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Preface to the First edition.

The Indian Evidence Act, unlike all other enactments consists of a number of abstract and abstract rules, which are by no means easy to understand. According to Lord Erskine the rules of evidence 'are founded in the charities of religion—in the philosophy of nature—in the truth of history—and in the experience of common life.' To understand the truth of the observation some knowledge is required; the origin and growth of the rules of evidence is absolutely necessary. So the historical treatment of a particular rule is not altogether out of place. I have tried my best in these pages to trace the origin and show the development of each and every particular rule of law, in order to enable the reader to have a firm grasp of the principle underlying it. "Our law observed Sirgent Plowden, "like all others, consists of two parts, namely of body and soul. The letter of the law is the body of the law, and the sense and reason of it is the soul, '*quia ratio legis est anima legis*' And the law may be resembled to a nut, which has a shell, and a kernel within, the letter of the law represents the shell, and the sense of it the kernel. So you will receive no benefit by the law if you rely upon the letter."†

It is well known that the Indian Evidence Act in the main is based on the English law of Evidence. According to Sir James Fitzjames Stephen, the great jurist and the framer of the Indian Evidence Act "every principle applicable to the circumstances of British India which is contained in 1598 royal octavo pages of *Taylor* on Evidence, is contained in the 117 sections of the Act. To understand such an enactment a thorough knowledge of the English law on the subject is *sine qua non*. Keeping that point in view, I have stated under each section the English law on the subject either in the *ipsa verba* of the great Judges who have

* 21 How St Jr 966

† *Ejston v Studd* Plowd Rep 465, *Wigmore* Vol I p VI

shaped and moulded the law of evidence in its present form or in the language of those text-writers whose statements of law the great Judges themselves felt bound to follow. But as the Indian Evidence Act is not a servile copy of the English law of Evidence, it differs in some places from the law to which it owes its origin. Whenever such divergence occurs, it is clearly indicated in the book, and the difference between English and Indian law has been stated in full.

Under each section I have given the principle underlying that section bearing in mind the following observation of *Joseph Chitty*: 'We all confess, but few adequately perceive, why it is so difficult to recollect a dry rule of practice, and we incorrectly impute to a defect of memory what in reality is attributable to our never having adequately known the subject. The simple truth is that *reason or principle is the appropriate food of the mind*, and it follows that no position is received with adequate appetite unless it be associated with the reason upon which it is founded *.' This also I offer as an apology for the large number of pages occupied in elucidating the principle underlying the section. It is very difficult to remember isolated decisions now-a-days when three dozen of reports (official and non-official) are vying with each other in reporting larger number of cases. But the necessity of remembering the majority of these cases will be obviated if once the trouble is taken of mastering the principles thoroughly, because 'the law does not consist in particular instances, though it is explained by particular instances and rules, but the law consists of principles, which govern specific and individual cases as they happen to arise†'. Moreover the thorough knowledge of the principle underlying the section will enable the reader to discard cases lying down the wrong law. In going through the book it will be seen that some cases decided even by the highest tribunal are not well founded in law.

* *Joseph Chitty Practice of the Law Second Edition Preface to Part II cited in Wigmore Vol I p VI*

† *Per Lord Mansfield in R v Benbridge 22 How St Tr 155 Wigmore Vol I p VI*

a particular section of the same by citing passages from Dr Greenleaf which have been drawn from by Justice Pitt Tylor himself. These rules are explained by Prof Wigmore more fully and comprehensively.

Moreover the limits of the commentary are by no means tied by the prejudices of certain Courts. Because in expounding the rational system of judicial evidence, reason is equally welcome—whether it comes from the great Judges of England or the great Jurists on the other side of the Atlantic. In this connection it would not be out of place to recall to mind the following passage of *Lord Cockburn C J* in *Scaramanga v Stamf*, 10 C P D 29, at p 30, where he said: 'Although the decisions of the American Courts are of course not binding on us yet the sound and enlightened views of the American lawyers in the administration and development of law—a law so far as altered by statutory enactment, derived from a common source with our own—entitle their decisions to the utmost respect and confidence in our part.' In *Macmillan Co Limited v K & J Cooper*, 28 C W N 61 (P C) at page 620, Lord Atkinson after quoting from a judgement of Story reported in the United States Report also said: "This decision is, of course not binding on this tribunal, but it is in the opinion of the Board sound and convincing and helpful." Similar observations were made in India by *Sir Lawrence Peel* in *Braddon v Abbot*, 11 Indr & Bells Reports, 347, 359, 360 and in *Malcolm v Smith* *ibid*, 283, 288 and cited by *Woodroffe J* in the Preface of his Evidence Act with approval. The only reasonable objection which can be legitimately urged against citing American decisions is thus forcibly put by *Lord Halsbury L C* in *In Re Missorie Steam Ship Co*, 42 Ch D 321 (330): 'We should treat with great respect the opinion of eminent American lawyers on points which arise before us, but the practice which seems to be increasing, of quoting American decisions as authorities, in the same way as if they were decisions, of our own Courts, is wrong. Among other things, it involves an inquiry, which often is not an easy one, whether the law of America on the subject in which

the point arises is the same as our own." So this objection loses much of its force where it is demonstrated that the English, American and Indian Laws on a particular subject are the same. This, in my humble opinion, is a fit scope of the work of a commentator. A busy judiciary may be unintentionally misled by a still more busy practitioner, but on a subject where a jurist like Prof. Wigmore, whose systematised knowledge in the domain of the Law of Evidence is second to none either in the old world or in the new, undertakes to show similarity and dissimilarity of the English and the American Laws, there is scarcely any reason for the apprehension expressed by His Lordship. Moreover, the advice given by His Lordship is not applicable in the case of commentators, whose duty it is in the first place to establish the similarity of law in both the systems and then to cite cases from the other system.

As the English law of evidence has its own peculiarities and as it is very difficult to have a complete grasp of the same without some knowledge of its origin and growth, I have given a history of the English law of Evidence in the introduction.

The book is replete with quotations from the judgments of the great Judges both of India and elsewhere. The quotations from English and American cases are given purposely in as much as the majority of the Indian lawyers have not got English or American Law Reports in their library. Even to the busy lawyers practising in the Presidency towns, these excerpts will be helpful to a certain extent as they will save them much time.

In the Appendix I have given the various reports which led to the passing of the Indian Evidence Act and the objects and reasons of subsequent amending Acts as well as Act II of 1855. I have also added in the Appendix the Indian Oaths Act and the Bankers' Books Evidence Act, fully annotated, as these two Acts may well be considered as forming part and parcel of the Indian Evidence Act.

I am conscious of the various shortcomings which will be found in the book. But my only apology is that these are unavoidable in the first edition of a book of this size.

I shall deem my trouble amply rewarded if the book be of any help to the members of the Bench and the Bar.

Konnagar
1st November 1930 }

N D BASU

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INTRODUCTION.

When we speak of the law of any subject, we are taken to mean those rules by which its consideration is to be governed. The laws of honour are the general rules of honourable conduct; the laws of thought are the fundamental principles of thought; the laws of war are the rules and usages recognised and accepted among civilized nations for regulating the conduct of the belligerents, the law of nature is the uniform occurrence of natural phenomena in the same way or order under the same conditions so far as human knowledge goes. The law of evidence, and by "evidence," is always to be understood 'legal evidence', consists of those rules statutory or otherwise which regulate the acceptance or rejection of that information to a legal tribunal

Meaning of "evidence" and "law of evidence".

which will justify a conclusion or judgment upon the matter in issue before it. Those rules have been adopted from the experience of ages, not only to regulate what evidence shall be admitted and what excluded, but the way in which it shall be presented or objected to—the mode and order, which its component parts shall assume—what shall be the extent of its recognition and cogency—what quantity and quality of proof, if any, shall be called for with respect to any particular matter submitted. Such are broadly the rules of evidence which taken together, are called the 'law of evidence'. A rule of evidence is defined by *Barker P J*, in *Lapham v Marshall*, 51 Hun (N Y) 561—3 N Y Supp 601, 603, to be the mode and manner of proving the competent facts and circumstances upon which a party relies to establish the fact in dispute in judicial procedure.

In *Sir James Stephen's* monumental *Digest of the Law of Evidence*, he named the great artery of law which defines rights, duties and liabilities, the substantive, and the next in importance by which that substantive law is applied to particular cases, the law of procedure.

Division of law into substantive and adjective.

Wherever the human race has existed, and under whatever conditions,—whether as some savage tribe in the heart of Africa, or as the most enlightened community of modern times,—the distinct personality of its members has always been prominent. Man is, above everything, an individual. However much he may combine for protective, social or commercial purposes it is the distinct personality of the individual which is seen in all the relations which are established. In this fact that man is an individual complete in himself and not a component part of some larger personality, lies the idea which distinguishes between "mine" and "yours"—the idea of ownership. This idea, implanted in man as a part of his nature is at the basis of all law—upon it the whole system rests. Rules which have from the inception of the human race governed human action are developments of this idea. These rules made up a large part of the law of the primitive peoples. They were rules which expressed general

Beginnings of the Substantive Law

that means exist by which B can enforce his rights in respect to his person and property. So too a piece of property—a horse for example—claimed by both A and B, might go to the stranger, though not the one rightfully entitled to it were it not for such means. In fact the rules defining the rights and obligations of men however complete and perfect they might be, would be of little use to mankind unless there existed the means of compelling men to conform their actions to them or of inflicting punishment upon them for failure to do so. So it happens that, with the growth of the substantive law, another kind of law has been established which relates not to the rights and obligations of men directly, but to the means of enforcing them. This is the law which defines the nature and powers of judicial tribunals and then prescribes the methods of procedure therein. This is known as the adjective law.

The rules both of substantive and adjective law have attained such vast proportions that for convenience in explaining and discussing them they are generally grouped into classes according to the nature of the subject-matter to which they relate. Each class is then spoken of by itself, as the law of the particular subject to which it relates, as the law of torts the law of contracts, the law of evidence and the like. What each subject includes is dependent largely upon the conception of the particular writer handling it for there is no well defined dividing line between many of the subjects.

The adjective law includes all the laws which have built up the judicial system whether they have had their origin in the constitution the legislature or the Courts. It embraces too the laws which have fixed the practice in the Courts—the methods of carrying on the work by Judge and jury, the laws prescribing the manner in which litigants might seek relief and carry on their cases are also included, and finally certain rules have grown up as a part of this law which relate not to the machinery of the system but having regard to the imperfections of the machinery are concerned with sorting out and selecting the materials which are supplied to it. These last mentioned rules make up the law of evidence.

The law of evidence says Sir James Fitzjames Stephens is that part of the law of procedure which with a view to ascertain individual rights and liabilities in particular cases decides, (1) what facts may and what may not be proved in such cases, (2) what sort of evidence must be given of a fact which may be proved, (3) by whom and in what manner the evidence must be produced by which any fact is to be proved.

Thus before the law of evidence can be understood or applied to any particular case it is necessary to know so much of the substantive law as determines what under given states of facts would be the rights of the parties and so much of the law of procedure as is sufficient to determine what questions it is open to them to raise in the particular proceeding.

THE INDIAN EVIDENCE ACT.

The general principle of the law of evidence consists of provisions upon the following subjects —

- (1) The relevance of facts.
- (2) The proof of facts.
- (3) The production of proof of relevant facts.

The foregoing observations show that this account of the matter is exhaustive. For if we assume that a fact is known to be relevant, and that its existence is duly proved, the Court is in a position to go on to say how it affects the existence, nature, or extent of the right or liability, the ascertainment of which is the ultimate object of the enquiry, and this is all that the Court has to do.

The matter must, however, be carried further. The three general heads may be distributed more particularly as follows —

I. The Relevance of Facts. Facts may be related to rights and liabilities in one of two ways, —

(1) They may by themselves, or in connection with other facts, constitute such a state of things that the existence of the disputed right or liability would be a legal inference from them. From the fact that A is the eldest son of B there arises of necessity the inference that A is by the law of England the heir at law of B, and that he has such rights as that status involves. From the fact that A caused the death of B under certain circumstances, and with a certain intention or knowledge there arises of necessity the inference that A murdered B, and is liable to the punishment provided by law for murder.

Facts thus related to a proceeding may be called facts in issue, unless their existence is undisputed.

(2) Facts which are not themselves in issue in the sense above explained may affect the probability of the existence of facts in issue, and be used as the foundation of inferences respecting them. Such facts are described in the Evidence Act as relevant facts.

All the facts with which it can in any event be necessary for Courts of Justice to concern themselves, are included in these two classes.

The first great question, therefore, which the law of evidence should decide is, what facts are relevant. The answer to this question is to be learnt from the general theory of judicial evidence in chapter II of the Evidence Act.

What facts are in issue in particular cases is a question to be determined by the substantive law, or in some instances by that branch of the law of procedure which regulates the forms of pleading, Civil or Criminal.

II Proof of Relevant Facts. Whether any alleged fact is a fact in issue or a relevant fact, the Court can draw no inference from its existence till it believes it to exist; and it is obvious that the belief of the Court in the existence of a given fact ought to proceed upon grounds altogether independent of the relation of the fact to the object and nature of the proceeding in which its existence is to be determined. The question is whether A wrote a letter. The letter may have contained the terms of a contract. It may have been a libel. It may have

constituted the motive for the commission of a crime by B. It may supply proof of an *alibi* in favour of A. It may be an admission or a confession of crime, but whatever may be the relation of the fact to the proceeding, the Court cannot act upon it unless it believes that A did write the letter, and that belief must obviously be produced, in each of the cases mentioned, by the same or similar means. If the Court requires the production of the original when the writing of the letter is a crime, there can be no reason why it should be satisfied with a copy when the writing of the letter is a motive for a crime. In short, the way in which a fact should be proved depends on the nature of the fact, and not on the relation of the fact to the proceeding.

"Some facts are too notorious to require any proof at all and of these the Court will take judicial notice; but if a fact does require proof the instrument by which the Court must be convinced of it is evidence, by which I mean the actual words uttered, or documents or other things actually produced in Court, and not the facts which the Court considers to be proved by those words and documents. Evidence in this sense of the word must be either (1) oral or (2) documentary. A third class might be formed of things produced in Court, not being documents, such as the instruments with which a crime was committed or the property to which damage had been done, but this division would introduce needless intricacy into the matter. The reason for distinguishing between oral and documentary evidence is that in many cases the existence of the latter excludes the employment of the former, but the condition of material things, other than documents, is usually proved by oral evidence, so that there is no occasion to distinguish between oral and material evidence.

"III. *The production of Proof*. This includes the subject of the burden of proof, the rules upon which answer the question by whom is proof to be given. The subject of witnesses, the rules upon which answer the question, who is to give evidence and under what conditions? The subject of the examination of witnesses, the rules upon which answer the question, how are the witnesses to be examined, and how is their evidence to be tested? Lastly, the effect upon the subsequent proceedings, of mistakes in the reception and rejection of evidence, may be included under this head."

The word *relevancy* is more fully defined in sections 11 of the Evidence Act. These sections enumerate specifically the different instances of the connection between cause and effect which occur most frequently in judicial proceedings.

They are designedly worded very widely, and in such a way as to overlap each other. Thus a motive for a fact in issue (s 8) is part of its cause (s 7). Subsequent conduct influenced by it (s 8) is part of its effect (s 7). Facts relevant under section 11 would in most cases be relevant under other sections. The object of drawing up the Act in this manner was that the general ground on

'Thus in general terms the law of evidence consists of provisions upon the following subjects —

- (1) The relevancy of facts
- (2) The proof of facts
- (3) The production of proof of relevant facts

'The foregoing observations show that this account of the matter is exhaustive. For if we assume that a fact is known to be relevant, and that its existence is duly proved, the Court is in a position to go on to say how it affects the existence, nature, or extent of the right or liability, the ascertainment of which is the ultimate object of the enquiry and this is all that the Court has to do.

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that the belief of the Court in the existence of a given fact ought to proceed upon grounds altogether independent of the relation of the fact to the object and nature of the proceeding in which its existence is to be determined. The question is whether A wrote a letter. The letter may have contained the terms of a contract. It may have been a libel. It may have

constituted the motive for the commission of a crime by B. It may supply proof of an alibi in favour of A. It may be an admission or a confession of crime, but whatever may be the relation of the fact to the proceeding, the Court cannot act upon it unless it believes that A did write the letter, and that belief must obviously be produced in each of the cases mentioned, by the same or similar means. If the Court requires the production of the original when the writing of the letter is a crime, there can be no reason why it should be satisfied with a copy when the writing of the letter is a motive for a crime. In short, the way in which a fact should be proved depends on the nature of the fact and not on the relation of the fact to the proceeding.

"Some facts are too notorious to require any proof at all and of these the Court will take judicial notice; but if a fact does require proof the instrument by which the Court must be convinced of it is evidence, by which I mean the actual words uttered, or documents, or other things actually produced in Court, and not the facts which the Court considers to be proved by those words and documents. Evidence in this sense of the word must be either (1) oral or (2) documentary. A third class might be formed of things produced in Court, not being documents, such as the instruments with which a crime was committed or the property to which damage had been done, but this division would introduce needless intricacy into the matter. The reason for distinguishing between oral and documentary evidence is that in many cases the existence of the latter excludes the employment of the former, but the condition of material things, other than documents, is usually proved by oral evidence so that there is no occasion to distinguish between oral and material evidence.

1 Judicial notice, 2
Oral evidence 3 Do-
cumentary evidence

produced in Court, and not the facts which the Court considers to be proved by those words and documents. Evidence in this sense of the word must be either (1) oral or (2) documentary. A third class might be formed of things produced in Court, not being documents, such as the instruments with which a crime was committed or the property to which damage had been done, but this division would introduce needless intricacy into the matter. The reason for distinguishing between oral and documentary evidence is that in many cases the existence of the latter excludes the employment of the former, but the condition of material things, other than documents, is usually proved by oral evidence so that there is no occasion to distinguish between oral and material evidence.

'III The production of Proof' This includes the subject of the burden of proof, the rules upon which answer the question, by whom is proof to be given. The subject of witnesses, the rules upon which answer the question, who is to give evidence and under what conditions? The subject of the examination of witnesses, the rules upon which answer the question, how are the witnesses to be examined, and how is their evidence to be tested? Lastly, the effect upon the subsequent proceedings, of mistakes in the reception and rejection of evidence, may be included under this head."

The word relevancy is 'more fully defined in sections 6-11 of the Evidence Act. These sections enumerate specifically the different instances of the connection between cause and effect which occur most frequently in judicial proceedings.

Obscurity of the definition

They are designedly worded very widely and in such a way as to overlap each other. Thus a motive for a fact in issue (s 8) is part of its cause (s 7). Subsequent conduct influenced by it (s 8) is part of its effect (s 7). Facts relevant under section 11 would, in most cases be relevant under other sections. The object of drawing up the Act in this manner was that the general ground on

which facts are relevant might be stated in as many and as popular forms as possible, so that if a fact is relevant, its relevancy may be easily ascertained. These sections are by far the most important, as they are the most original part of the Evidence Act, as they affirm positively what facts may be proved, whereas the English law assumes this to be known, and merely declares negatively that certain facts shall not be proved.*

The definition given in sections 6-11 is that of logical relevancy. Logical relevancy plays a certain part, in the law of evidence in that no evidence is admissible unless it is logically relevant. It does not follow that all evidence which is

logically relevant is admissible and in fact much that is logically relevant is excluded. Certain rules are laid down founded on various considerations, by which many matters which are logically relevant are declared inadmissible.

The modern system of Evidence says *Prof Wigmore*, 'rests upon two axioms. These underlie its whole structure. Implicitly but nevertheless actually and

positively, recognised in the practice of Courts and in the utterances of the Judges they were first distinctly formulated by the great master and expounder of the history of our law of Evidence. The first is this. None

but facts having rational probative value are admissible. This principle is indeed axiomatic, for any system of Evidence purporting to be rational. It assumes no particular doctrine as to the kind of ratiocination implied,—whether practical or scientific, coarse and ready or refined and systematic. It prescribes merely that whatever is presented as evidence shall be presented on the hypothesis, that it is calculated according to the prevailing standard of reasoning, to effect rational persuasion. The second axiom on which our law of Evidence rests is this. All facts having rational probative value are admissible, unless some specific rule forbids.'

'The great bulk of the Law of Evidence' says Sir James Fitzjames Stephens consists of negative rules declaring what, as the expression runs, is not evidence. The doctrine that all facts in issue and relevant to the issue, and no others, may be proved is the unexpressed principle, which forms the centre of and gives unity to all these express negative rules. The law has been worked out by degrees by many generations of Judges who perceived more or less distinctly the principle on which it ought to be founded. The rules established by them no doubt treat as relevant some facts which cannot perhaps be said to be so. More frequently they treat as relevant facts which really relevant, but exceptions excepted, all their rules are reducible to the principle that facts in issue or relevant to the issue, and no others, may be proved.'

'Four classes of facts, which in common life would usually be regarded as falling in with this definition of relevancy are excluded from it by the Law of Evidence except in certain cases

'1 Facts familiar to but not specifically connected with each other (*R's inter alios acta*)

"2 The fact that a person not called as a witness has asserted the existence of any fact (*Hearsay*)

"3 The fact that any person is of opinion that a fact exists (*Opinion*)

"4 The fact that a person's character is such as to render the conduct imputed to him probable or improbable (*Character*)

"To each of those four exclusive rules there are, however important exceptions which are defined by the Law of Evidence"

"The rejection on one or another practical ground of what is really probative is the characteristic thing in the English common law of Evidence, stamping it out as the child of the jury system. In the shape it has taken, it is not at all a necessary development of the rational method of

Characteristic of English common law of evidence

proof, so that, where people did not have the jury, or having once had it did not keep it (as on the continent of Europe, although they, no less than we, worked out a rational system), they developed under the head of Evidence no separate and systematized branch of law. The greatest and most remarkable offshoot of the jury was that body of excluding rules which chiefly constitute the English 'Law of Evidence'. This judicial oversight and control of the process of introducing evidence to the jury was what gave our system birth, and he who would understand it must keep this fact constantly in mind"

The growth and the characteristic of the English Law of Evidence is thus described by an author of great eminence—"At once, when a man raises his eyes from the common law system of evidence, and looks at foreign methods, he is struck with the fact that English system is radically peculiar. Here a

Peculiarity of English Law of evidence depends on jury system

great mass of evidential matter, logically important and probative, is shut out from the view of the judicial tribunals by an imperative rule, while the same matter is not thus excluded anywhere else. English speaking coun-

tries have what we call a 'Law of Evidence' but no other country has it, we alone have generated and evolved this large, elaborate, and difficult doctrine. We have done it, not by direct legislation, but, almost wholly, by the slow accumulated rulings of Judges made in the trying of causes, during the last two or three centuries,—rulings which at first were not preserved in print, but in the practice and tradition of the trial Courts, and only during the last half or two thirds of this period have they been revised, reasoned upon, and generalized by the Courts *in banc*. When one has come to perceive these striking facts he is not long in finding the reason for them. Indeed the very structure of the system thus produced points to the reason, when we observe its constant, anxious, and over-anxious endeavour to prevent the tribunal to which the evidence is principally addressed from being confused and misled and from dealing with questions which it has no right to deal with. It might seem strange and not worthwhile to keep alive so long a tribunal which has needed so much watching and so many safeguards, if one did not recall the immense persistence of legal institutions and usages, as well as the deep political significance of the

jury and its relation to what is most valued in the national history and traditions of the English race. It is this institution of the jury which accounts for the common law system of evidence,—an institution which English speaking people have had and used, in one or another department of their public affairs, ever since the Conquest. Other peoples have had it only in quite recent times, unless, indeed, they may belong to those who began with it centuries ago, and then allowed it to become obsolete and forgotten. England alone kept it, and, in a strange fashion, has developed it.

This institution the jury, which is thus the occasion of our law of Evidence, and which is also at the bottom of our system of pleading and procedure, and of very much in all branches of the substantive common law, has a peculiar interest for us.

"A system of evidence, like ours, thus worked out at the forge of daily experience in the trial of causes not created, or greatly changed, until lately, by legislation, not the fruit of any man's systematic reflection or forecast, is sure to exhibit at every step the marks of its origin. It is not concerned with the nice definitions or the exacter academic operations of the logical faculty. It is attending to practical ends. Its rules originate in the instinctive suggestions of good sense, legal experience, and a sound practical understanding; and they are seeking to determine, not what is or is not, in its nature, probative, but rather, passing by that enquiry, what, among really probative matters, shall, nevertheless, for this or that practical reason, be excluded, and not even heard by the jury. From the diversity and multitude of the casual rulings by the Judges,—rulings often hastily made, ill considered, and wrong,—from the endeavour to follow these as precedents and to generalize and theorize upon them from the forgetting by some Courts, in making this attempt, of the accidental and empirical nature of much in these determinations, and the remembering of this fact by others there has resulted plenty of confusion. The pressure under which a ruling must be made is often unfavourable to clear thinking and the law of evidence largely shaped at *mis prius*, took on a general aspect which was vague, confused and unintelligible. One thing in particular added greatly to the confusion, namely, the habit of assuming, whenever evidential matter was rejected or received, that the result was attributable to some principle of the law of evidence, while very often indeed, the reason lay wholly in the rules of pleading, procedure or substantive law which happened to control the case. In this way the law of evidence came to be monstrously overloaded, and was made to swallow up into itself much which belonged to other branches of law, or to the wide regions of logic and legal reasoning. Thus, not only were many of these other subjects clouded and thrown out of focus, but the law of evidence itself was intolerably perplexed."

A learned author has with infinite pains tabulated a complete survey of the historical development of the English rules of evidence.† He separates it into some marked divisions—
Gradual development of the law of evidence from the primitive times to the twelfth century, thence

*Lhayer's *Proc. Treat. on Evidence* p 4.

† Wigmore § 8

to the sixteenth, thence to the seventeenth thence to A. D. 1790, thence to 1830 thence to 1860, and thence to the present time. (1) From the section quoted we gather that up to the year 1300 we have no reliable data, although to the formalities of the earliest tribunals there can be traced the sources of our present rules for the summoning of witnesses, the effect of an oath, and the necessary production of original documents.

(2) The next three centuries marked the establishment of the trial by jury. In this period, no new specific rules seem to have sprung up. The practice for attesting witnesses, oaths, documentary originals is developed. The rule for the conclusion of a sealed writing is definitely established. But during these three centuries the general process of pleading and procedure is only gradually differentiated from that of proof,—chiefly because the jurors are as yet relied upon to furnish in themselves both knowledge and decision, for they are not commonly caused to be informed by witnesses, in the modern sense.

(3) Between 1500 and 1700 the foundation of the present English system was laid. In that period we find the regulation of the competency of witnesses, the rules of privilege and privileged communications, the rules for attorneys, the compulsory attendance of witnesses, the privilege against self incrimination, the "parol evidence" rule, and the enactment of the Statute of Frauds. The "parol evidence" enlarged its scope and came to include all writings and not merely sealed documents. The mark of the new period is seen at the Restoration. Justice, on all hands, then begins to mend. Crudities which Mathew Hale permitted, under the Commonwealth, Stoggs refused under James II. The privilege against self incrimination, the rule for two witnesses in treason, and the character rule—three landmarks of our law of Evidence—find their first full recognition in the last days of the Stuarts.

(4) The fourth period of ninety years saw the final establishment of cross examination by counsel, the rule for impeachment and corroboration of witnesses, the 'best evidence' doctrine and the publication of the first treatise on the Law of Evidence by Chief Baron Gilbert in 1726. About the same time the abridgments of Bacon and Comeyns gave many pages to the title of Evidence, but no other treatises appeared for a quarter of a century when the notes of Mr. J. Bithurst (later Lord Chancellor) were printed, under the significant title of the 'Theory of Evidence'. Blackstone's commentaries were published in 1763. In this period, besides the rules for impeachment and corroboration of witnesses (which were due chiefly to the development of cross examination), are to be reckoned also the origins of the rules for confessions, for leading questions, and for the order of testimony. The various principles affecting documents—such as the authorization of certified (or office) copies and the conditions dispensing from the production of originals—now also received their final shape.

(5) The next forty years (1790-1830) saw a tremendous increase of the rulings upon evidence there being more than in the preceding two centuries. In this development the dominant influence was plain, it was the increase of the printed reports of *Nisi Prius* rulings. This was at first the cause and afterwards the self multiplying effect, of the detailed development of the rules. As soon as *Nisi Prius* reports, multiplied and became available to all, the circuits must be,

reconciled, the rulings once made and recorded must be followed and the precedents, must be open to the entire profession to be invoked. There was, so to speak, a sudden precipitation of all that had hitherto been suspended in solution. This effect began immediately to be resisted and emphasized by the appearance of new treatises, summing up the recent acquisitions of precedent and practice. In nearly the same year, Peake, for England (1801), and Mac Nelly for Ireland printed small volumes whose contents, as compared with those of Gilbert and Boller seem to represent almost a different system so novel were their topics. In 1806 Evans' Notes to Pothier on Obligations was made the vehicle of the first reasoned analysis of the rules. In this respect it was epoch making. In 1813 and then in 1814 came Phillips and Starkie, in the bold combining of Evans' philosophies with Peake's strict reflection of the details of practice. There was now indeed a system of Evidence, consciously and fully realized. Across the water a similar stage had been reached. By a natural interval Peake's treatise was balanced in 1810, by Swift's Connecticut book while Phillips and Starkie were replaced by Greenleaf's treatise of 1817.

(6) The thirty years ending with 1860 will be ever associated with the names of Bentham, Brougham and Denman. The Theory of Judicial Evidence in spite of or perhaps by reason of, its philippic tone, created a mighty influence for good—an influence fortified by such doughty legal champions as Brougham and Denman. Their efforts culminated in England in the Common Law Procedure Acts of 1852 and 1854, while in the United States, Livingston and Field were the sponsors of similar results.

(7) In the period following 1860 there has been no serious emendation of the law of evidence in England later than the Judicature Act of 1873 and the Rules of Court of 1883, and the law of evidence attained rest. It is still over-patched and disfigured with multiplicitous fragmentary statutes, especially for documentary evidence. But it seems to be harmonious with the present demand of justice and above all to be so certain and settled in its acceptance that no further detailed development is called for.*

The Indian Evidence Act is ever associated with the name of Sir James

Sir James Fitzjames Stephens, the framer of the Evidence Act. Fitzjames Stephens Q. C., the great jurist and Judge who sponsored the amended Evidence Bill on which the present Act is based. At the final stage of the Bill he was vehemently criticised by competent critics but time shows how very judicious he was in enacting its provisions.

Before the passing of the Indian Evidence Act there was no complete code of evidence enforceable in every part of British India. The town of Calcutta had been from its foundation (1690) an English Colony, governed by English law. The early charters empowered the Governor in Council of each settlement to exercise civil and criminal jurisdiction therein, according to the laws of

No complete Code before the passing of the Evidence Act

England, and charters of 1726 and 1753 provided at least on paper for more regular tribunals at each of the principal settlements in shape of Mayor's Court for Civil, and Court's 'of Oyer and Terminer' and

Quarter Sessions for criminal proceedings. These Courts were supposed to decide cases according to English law and adopting English procedure.

Since the establishment of the Supreme Courts of Calcutta, Madras and Bombay, the English rules of evidence have systematically been followed in the Presidency towns and several of the reforms made in England by Parliament were from time to time applied to these by the Governor General in Council. Thus incompetency on the ground of crime and interest was abolished by Act IX of 1840 and Act VII of 1841. And Act XV of 1852 enabled parties to give evidence except in criminal proceedings and proceedings for adultery or breach of promise.

But in the Muffusal there was an absolute absence of any systematic law of evidence. The English laws of evidence were not in force in the Muffusal. The Muhammadan laws of evidence as laid down in the Hedaya, as modified by

Regulations passed from 1793 to 1831 as well as to a certain extent by English practice and English text books, were generally followed in the Muffusal Courts.

The Regulations of Bengal, Bombay and Madras laid down very few rules as regards evidence. Under section 15 of the Bengal Regulations III of 1793, a bond was required to be proved at least by two witnesses. But such documentary evidence was received without any proof unless objected to, such as copies of judicial proceedings, appearing to be authenticated by the signature of the proper officer, and copies of English correspondence from the Collectors or other Government officers similarly authenticated. Even

Different Regulations dealing with rules of Evidence

copies of copies were so received. Rules as to witness, corresponding those contained in the present Codes of Criminal and Civil Procedure, were made by the following Regulations in Bengal, Beng Reg IV of 1793, ss 6, 14, Beng Reg IX of 1796 ss 2, 3 and 4, Beng Reg IV of 1807, s 7, Beng Reg VIII of 1803, s 25, Beng Reg L of 1803, ss 2, 3 and 4, Beng Reg III of 1812, s 2, Beng Reg XXIII of 1814 ss 33 and 73, Beng Reg XXIV of 1814, s 11. In Madras also rules relating to this subject were contained in several regulations, namely, Mad Reg III of 1802, s 7, Mad Reg IV of 1802, s 18, Mad Reg V of 1802, s 16, Mad Reg VII of 1802, s 18, Mad Reg VII of 1809, s 22, Mad Reg XII of 1809, s 8, Mad Reg IV of 1816 ss 15, 16, Mad Reg VI of 1816 ss 28, 34, Mad Reg VII of 1816, ss 4, 5, Mad Reg X of 1816 ss 15, 16, Mad Reg XIV of 1816 s 9, Mad Reg IV of 1821, s 10, and Mad Reg VIII of 1832, s 3. Moreover Mad Reg VI of 1816, s 35 and Mad Reg VII of 1816 s 15 have excluded documents not duly stamped. Evidence declared by the Muhammadan law-officer to be inadmissible is dealt with by Mad Regs I of 1825 s 8 and VI of 1829, s 11. In Bombay some rules as to witnesses in civil proceedings were made by Bom Reg IV of 1827 and rules as to witnesses in criminal proceedings were prescribed by Regs XII and XIII of the same year. All persons who had arrived at years of discretion and were of sane mind were made competent witnesses by Bombay Reg IV of 1827, s 33 and XIII of 1827 s 35. And

the section last mentioned contain provisions (wanting in the present law) as to
irregular

with the law of Evidence
was Act A of 1853. That Act was made applicable
to all the Courts in British India. By that Act all the
Acts passed by the Governor General in Council could

be proved by the mere production of the Gazette purporting to contain it.
This Act was followed in quick succession by other fragmentary enactments,
laying down rules of evidence. Incompetency as a witness was abolished by
Act XIX of 1837 which was also declared to be in force in all the Courts of
British India. Hindus and Muhammadans were permitted to make solemn
affirmations instead of oath or declaration in the Mofussil Courts by Act V of
1840. That Act had no binding effect on any of the three Supreme Courts of
Calcutta, Bombay and Madras. Act IX of 1840 declared that if a witness in any
of the Supreme Courts were objected to on the ground that the verdict or judg-
ment would be inadmissible in evidence for or against him, he might be ex-
amined, and the verdict or judgment should not be so inadmissible. The object
of this enactment, which was taken from 3 & 4 Will IV Chap 42 was to render
less frequent the rejection of witnesses on the ground of interest. Incompetency
of a witness on the ground of interest or crime was abolished within the juris-
diction of the Supreme Courts by Act VII of 1844. But the Act did not make
the party on whose behalf an action was brought or defended a competent wit-
ness. By Act XV of 1853 parties to a cause were made competent witnesses,
except in criminal proceedings and proceedings for adultery or breach of promise
of marriage. By this Act the parties were compelled to allow inspection of
documents and Acts of State and judicial proceedings could be proved by the
production of certified copies alone. It made the register of British ship and
the production of the record of a conviction or acquittal. It dispensed with
also in the Supreme Courts. Act XIX of 1853 extended some of these reforms
to the Civil Courts of the East India Company in the Bengal Presidency. By
this Act, parties to suits as well as husbands and wives of the parties were made
competent witnesses. Although there was no express prohibition, henceforth,
a husband or a wife is enabled to give evidence for or against each other. In-
competency of a witness on the ground of relationship or interest was also abo-
lished and a party could be compelled to give evidence and produce documents.
But a witness was exempted from producing documents relating to a party's
title deeds, state documents, and irrelevant documents. Communication between
a witness and his professional adviser was also privileged. The Court could
compel a witness to produce any other documents. Section 26 of the Act
rendered absconding witnesses liable for damage.

In 1855 Sir Lawrence Peel introduced a Bill for the further improvement
of the law of evidence which was carried by Sir James
History of the pass- Colville and found place in the Statute Book as Act II of
ing of the Indian Evi- 1855. This Act though totally devoid of arrangement
dence Act

was skilfully worded, and contained many valuable provisions, which applied to all Courts in British India (*Vide Appendix C infra*) Act X of 1855, which was in force in the Civil Courts of the East India Company in the Presidencies of Fort St George and Bombay, enacted by s 10 a provision like section 26 of Act XIX of 1853. In 1859, the first Civil Procedure Code was passed by Act VIII of 1859 and in 1861 the first Criminal Procedure Code found place in the Statute book. Act XV of 1869 provides facilities for obtaining the evidence and appearance in Court of prisoners and for service of process upon them. So it is clear that down to 1872, there was no fixed rules of evidence, except those contained in Act XIX of 1853 and Act II of 1855 which could be applied in the Muffassil Courts. The Commissioners appointed in England to prepare a body of substantive laws for India (ignoring the fact that their commission did not comprise adjective law), accordingly framed a draft code, which in October 1868 was introduced by Mr Henry Summer Maine and referred to a Select Committee, as a Bill to define and amend the law of evidence. This Bill was published and circulated to local authorities in the usual manner. But it was pronounced to be unsuited to India by some competent persons. It was far from complete, it was ill arranged, it was not elementary enough for the officers for whose use it was designed, and it assumed an acquaintance with the law of England which could scarcely be expected from them. A new Bill was therefore prepared by Sir James Fitzjames Stephens, the worthy successor of Sir Henry, which was printed, circulated and very freely criticised. Sir James accordingly recast it, and it was ultimately passed as Act I of 1872*. It is on the main based on the English law of Evidence.

This enactment purports to consolidate, define and amend the whole law of Evidence with certain exceptions mentioned in sections 1 and II. But rules contained in the Indian Evidence Act are also thus criticised by *Sir Henry Summer Maine*. "It must always be recollected that the affirmative or positive method of arrangement followed in the Indian Evidence Act does not represent the historical growth of the English law of Evidence. So far as it consisted

express rules it was in its origin a pure system of exclusion and the great bulk of its present rules were developed as exceptions to rules of the widest application, which prevented large classes of testimony from being submitted to the jury. The chief of these were founded on general propositions of which the approximation to truth was but remote. Thus the assumptions were made that the statements of litigants as to the matter in dispute were not to be believed, that witnesses interested in the subject matter of the suit were not credible, and that no trustworthy inference can be drawn from assertions which a man makes merely on the information of other men. A complete account of it cannot in fact be given unless the mode of its development be kept in view.

Another important reason too, for remembering that our law of Evidence is historically a system of exclusion, is that we cannot in any other way account for its occasional miscarriages. The conditions under which it was originally

developed must still be referred to, in explanation of the difficulty of applying it in certain cases, or of the ill success which attends the attempt to apply it. The mechanism of judicial administration which once extended over a great part of Europe, and in which the functions of the Judge were distributed between persons or bodies representing distinct sources of authority—the King, and the country, or the lord and his tenants—in England gradually assumed the shape under which we are all familiar with it in criminal trials and at *Nisi Prius*. A body of men, whose award on questions of fact is in the last resort conclusive, are instructed and guided to a decision by a dignitary, sitting in their presence, who is assumed to have an eminent acquaintance with the principles of human conduct whether embodied or not in technical rules, and who is the sole judge of points of law, and of the admissibility of evidence. The system of technical rules, which the procedure carries with it, fails then in the first place, whenever the arbiter of facts—the person who has to draw inferences from or about them—has especial qualifications for deciding on them, supplied to them by experience, study, or the peculiarities of his own character, which are of more value to him than could be any general direction from book or person. For this reason, a police man guiding himself by the strict rules of evidence would be chargeable with incapacity, and a General would, be guilty of a military crime.

Again the blending of the duties of the judge of law and of the judge of fact deprives the system of much though not necessarily of all, of its utility. An Equity Judge, an Admiralty Judge, a Common Law Judge trying an election petition, an historian, may employ the English rule of Evidence, particularly when stated affirmatively, to steady and sober his judgment. But he cannot give general directions to his own mind without running much risk of entangling or enfeebling it, and under the existing conditions of thought he can not really prevent from influencing his decision any evidence which has been actually submitted to him, provided that he believes it. Englishmen are extremely prone to do injustice to foreign systems of judicial administration, from forgetting the inherent difficulty of applying the English law of Evidence when the same authority decides both on law and on fact as is mostly the case in other countries.

"When India came under the British rule, there were many branches of law in which the political officers of the British Government could find few positive rules of any sort, or, if any could be discovered, they were the special observances of limited classes or castes. Thus there was no law of Evidence, in the proper sense of the words, hardly any law of contract, scarcely any of Civil Wrong. . . . Whole provinces of law became exclusively, or nearly exclusively, English. The law of Evidence became wholly English; so did the law of Contract substantially; so did the law of Tort. It is quite possible to hold a respectful opinion of many parts of English law, and yet to affirm strongly that its introduction by Courts of Justice into India has amounted to a grievous wrong. . . . No branch of law had become more thoroughly English at the time when it was first comprehensively dealt with by the Indian Legislature than the law of Evidence, and the practical evils which hence arose were even greater than those which ordinarily result from the adoption of an exotic of system of legal rules, collected

with difficulty from isolated decisions reported in a foreign language. The theory of judicial evidence is constantly mis stated or misconceived even in this country. The English law on the subject is too often described as being that which it is its chief distinction not to be—that is, an Organon, or a sort of contrivance for the discovery of truth which English lawyers have patented. In India, several special causes have contributed to disguise its true character. There is much probability that our English law of Evidence would never have come into existence if we had not continued much longer than other western societies the separation of the province of the Judge from the province of the jury, and, in fact the English rules of Evidence are never very scrupulously attended to by tribunals which like the Court of Chancery, adjudicate both on law and on fact through the same organs and same procedure. Now, an Indian functionary, when he acts as a civil Judge and for the most part when he acts as a criminal Judge, decides both on law and on fact. He it is who applies the rules of Evidence to himself, and not to a body distinct from himself, and he has often to perform the delicate achievement of preventing his decision from being affected by sources of information which in reality have been opened to him.

The effects of their peculiar experience on many distinguished Indian functionaries may be seen to be of two kinds. In some minds there is a complete scepticism as to the value of the rules of Evidence, and though the man who for the time being is a Judge may attempt to apply them, he is intimately persuaded that he has gone into bondage to a foolish technical system under compulsion from the Court of Appeal above him. With others the consequences are of a different sort, but practically much more serious. They accept from the lawyers the doctrine that the law of Evidence is of the extremest importance, and unconsciously allow this belief to influence them not only in their judicial, but in their executive and administrative duties. It is often said in India that the servile reliance upon the English law of Evidence, which now a days characterizes many of the servants of Government, is producing a paralysis of administration, and though the assertion may be exaggerated it is far from impossible that it may have a basis of truth.*

'The jury trial system of rules of Evidence' says *Prof Wigmore* is not the only safe system of investigation in matters of liberty and property, for other nations have had a long experience of successful justice without it. Nor is it correct to assume that the general wisdom of experience which is represented in

the system at large is represented in all the detailed rules rigidly enforced, quite the contrary. What is commonly forgotten is that most of the rules—nineteen

Prof Wigmore's criticism
 twentieths, let us say—are merely rules of caution: & they are based upon a possibility of error, so that the failure to observe the rule is perfectly consistent with a high probability of truth. The rule for example requiring the original of a document to be produced is merely a rule against possibilities, for thousands of banks and business houses daily deal with millions of wealth on the faith of copies not originals, to assert that truth was certainly misused because a copy

*Village Communities in the East and West,

was used, is an absurdity. So, too, with the hearsay rule, it aims to guard against possibilities, and is sound enough, as a rule, but all history of the past and all public news of the present, is learned by hearsay, for less than a million of our population really knew by personal observation, that our soldiers fought in a war with Germany, and the entire financial and economic operations of the country are built on a complex structure of hearsay which is as solid as a steel and concrete building.

A second thing to remember is that the jury trial rules are intended for a constantly changing tribunals offit composed of inexperienced jury men dealing with hundred types of cases. When the tribunal is composed of *experienced professional men* habitually inquiring day after day into the *same limited class of facts*, an expert weighing of evidence can generally be counted upon. The cautions represented by the exclusionary jury rules can and will be applied by such a tribunal in weighing the evidence without the actual exclusion of it. Sir Henry Sumner Maine's comment on this feature represents a general truth. And in a community where the major part of such offices are filled by men already trained in the law, it is certain that the general wisdom of the cautions embodied in the jury rules of evidence will be employed by them.

Prof Greenleaf at the end of his famous book on Evidence says "The student will not fail to observe the symmetry and beauty of this branch of the law . . . and will rise from the study of its principles convinced with Lord Erskine, that they are founded in the charities of religion, in the philosophy of nature, in the truths of history and in the experience of common life, Commenting on this statement, says Prof James Bradley Thayer "I think that

Nature of the English rules of evidence it would be juster and more exact to say that our law of evidence is a piece of illogical, but by no means irrational patch work, not at all to be admired, not easily to be found intelligible, except as a product of the jury system, as the outcome of the quantity of rulings by sagacious lawyers, while settling practical questions in presiding over Courts where ordinary, untrained citizens are acting as judges of fact. Largely irrational in any other aspect in this point of view it is full of good sense, — a good sense indeed that occasionally nods, that submits too often to a mistaken application of its precedents that is often shortsighted and ill instructed, and that needs to be taken in hand by the jurist and illuminated, simplified, and invigorated by a reference to general principles.

"I have said that our law of evidence is ripe for the hand of the jurist. I do not mean for the hand of the codifier, it is not . . . but for a treatment which beginning with a full historical examination of the

Duty of a legislature in framing the law of Evidence "subject and continuing with a criticism of the cases shall end with a re-statement of the existing law and with suggestions for the course of its future development. Such an undertaking worthily executed, if it should commend itself to the bench, could need only a slight co-operation from the legislature to give to the law of evidence a consistency, simplicity, and capacity for growth which would make it a far worthier instrument of justice than it is."

ADDENDA

§ 4—Presumptions are of two kinds, presumptions of law and presumptions of fact. Presumptions of law are true presumptions. A I R 1932 Mad 343=35 M L W. 495=1932 M W N 264

§ 4—Where one fact is declared by law to be conclusive proof of another the court cannot allow evidence to be given in rebuttal. A I R 1932 All 35=1931 A L J 360

§ 8—Evidence of witness that complainant informed them about theft long after the incident is not admissible—A I R 1934 Cal 17=57 C L J 447

§ 8—A letter written by the deceased some months before his death to the Commissioner of Police requesting police protection against apprehended assaults by the second accused is admissible in evidence under s 8 of the Evidence Act in continuing statements which accompany and explain the conduct of the deceased. 34 Bom L R 1087

§ 8—Statements of persons writing alleged forged deed and one presenting same for registration are admissible under s 8 as accompanying and explaining their conduct. 1933 M W N 96

§ 8—Where direct evidence as to commission of offence is not available, evidence as to motive need not be considered. A I R 1933 Oudh 265

§ 8—Where a particular act and act so blended together as to be inseparable. 143 Ind Cas 17=34 Cr I J

§ 8—Though the statement made by the accused to the police may be inadmissible under s 162 Cr Pro Code evidence of their conduct is certainly admissible under s 8. A I R 1932 Mad 391. Fact of production of stolen property by an accused is admissible as conduct under s 8. A I R 1932 Bom 285=56 B 172

§ 9—Section 88 of the Evidence Act is no bar to telegram being considered along with the rest of the evidence and be admissible under s 9 for the purposes covered by that section even when the original of telegram is not proved to be in the hand writing of the sender. A I R 1933 Pat 96=142 Ind Cas 809=13 P L T 802

§ 10—Where the accused have been charged under the Arms Act for possessing arms and for conspiracy to commit a dacoity the fact that one of the accused was seen showing a revolver to companion with whom it is alleged he was conspiring to commit a dacoity would be relevant as evidence of preparation under s 11. A I R 1932 Cal 474

§ 10—Statement during trial is not as conspirator in furtherance of common intention of conspiracy. A I R 1933 Oudh 86=34 Cr L J 124=141 Ind Cas 192. The question whether a post card written by the accused after his arrest to another accused person is admissible in evidence depends on whether the provisions of section 10 have been complied with. A I R 1932 Cal 557=33 Cr I J 450=137 Ind Cas 317, A I R 1933 A 690

§ 11—Recitals in deed are not inadmissible for proving how lands are dealt with by landlord. A I R 1934 Pat 81

§ 11—Display of arms by one conspirators to his co-conspirators is relevant under s 11 of the Evidence Act. A I R 1932 Cal 474=59 C 1361=55 C L J 439

§ 11—Highly probable meaning of. A I R 1933 A 670

§ 13—Judgment not interpreted can only be used as evidence of transaction but can be admitted as proof of title of the person in whose favour it was passed. 36 C W N 866, see also 56 C L J 369-A I R 1933 Cal 222=143 Ind Cas 179

§ 13—Recitals in sale deed though not evidence of grant, can be used to show nature of title A I R 1933 Pat 656

§ 13—Recitals in a *kobala* that a land is rent free, cannot be admitted in evidence in a suit between landlord and tenant in as much as the landlord is not a party in the *kobala* 59 C 454=A I R 1932 Cal 427

§ 13—Custom recognized in previous judgments are admissible in evidence, but they are not conclusive A I R 1933 Lah 553, see also A I R 1933 Oudh 246

§ 13—Right in section 13 means incorporeal right and cannot possibly refer to any question of ownership of property in contradistinction to incorporeal rights A I R 1933 Pat 285

§ 13—Previous judicial decisions making mention of status of pre-emptor are admissible in evidence under ss 13 and 42—140 Ind Cas 566=A I R 1933 Lah 57=33 P L R 1054

§ 13—Section 13 (a) refers to admissibility of transaction by which a right is asserted A I R 1932 Cal 398=54 C L J 353=137 Ind. Cas 658, see also A I R 1932 Bom 291=34 Bom L R 236

§ 13—Partition deed between two persons could not be admissible to show permanency or otherwise of tenancy A I R 1932 Cal 398

§ 14—In a prosecution under s 415 of the I P Code evidence would be relevant on the question whether the accused was in embarrassed circumstances at the date when he entered into his contract A I R 1932 Bom 273=34 Bom L R 313

§ 15—Where conduct alleged and proved against accused is susceptible of more than one interpretation evidence of similar acts is admissible to show that conduct was systematic and not capable of favourable interpretation 142 Ind. Cas 274=A I R 1933 Cal 136=132 Ind Cas 274.

§ 16—Posting of letter cannot be held to prove delivery as postal servants are not always diligent A I R 1933 Rang 76

§ 17—In case of admission the entire statement must be considered together in order to treat it as admission Particular passages which may be favourable cannot be selected and other ignored A I R 1933 Lah 179=141 Ind Cas 204=34 P L R 149=141 Ib 218

§ 18—A party's admission should be accepted as true until contrary is proved A I R 1932 All 199=1932 A L J 77, A I R 1932 Cal 538=58 C 541

§ 18—A person called by a party as his witness cannot however be regarded as his agent within the meaning of s 18—A I R 1932 D 117=34 Bom L R 35

§ 18—Proceeding refers to proceeding in which matter stated by party is an issue or is relevant A I R 1933 Rang 292

§ 18—Admission shifts burden of proof to party making admission A I R 1933 Lah 725=34 P L R 482

§ 18—Where S and R attested a will which recited that L was wedded wife of G Held that S and R had practically admitted lawful marriage between L and G 142 Ind Cas 13=34 P L R 365=A I R 1933 Lah 347

§ 18—Where admission is based on erroneous state of affairs it is not binding 142 Ind Cas 720=33 P L R 819=A I R 1932 Lah 651

§ 18—Gratuitous admission can always be withdrawn A I R 1933 Oudh 20=140 Ind Cas 580=90 W N 923

§ 20—For purposes of reference to a third party under s 20, it is not necessary that the reference should be a question of fact within the knowledge of the referee A I R 1933 A 861

§ 20—Where both parties agree to abide by the statement of the referee the statement of the referee would then be the admission of both the parties binding upon them. A I R 1933 A 861

S 21—Admissions are relevant under the Evidence Act, unless they are inadmissible by some circumstances which the Act declares to be of an invalidating nature. A I R 1932 Mad 509-62 M L J 680-35 M L W 607

S 21—An admission must be taken as a whole. 138 Ind Cas 217-33 Cr L J 570-33 P L R 287, A I R 1933 Rang 204

S 21—Where an accused points out the window by which they entered and committed dacoity it can be proved against an admission. A I R 1932 Lah 488-34 P L R 405-142 Ind Cas 699

S 21—Admission against interest of party making it must be regarded as true until it is clearly proved to be untrue. A I R 1933 Lah 885-34 P L R 788-144 Ind Cas 497

S. 21—Evidence of person not party to a suit is admissible against such person and against those who claim under or from him in subsequent suit in which he is a party. A I R 1933 Oudh 246-10 O W N 268

S 24—Confession made on superior officer's holding out inducement to subordinate, cannot be used. A I R 1933 Cal 644-60 C 719, see also A I R 1933 All 31-1932 A L J 1125, A I R 1933 All 31-1932 A L J 1125

S 24—Statement made by inducement of pardon but not under pressure is admissible under s 339 (2) Cr Pro Code. A I R 1933 Lah 910

S. 24—Confession made under mere hope of pardon cannot be rejected when proved to be voluntary. A I R 1933 Lah 368-143 Ind Cas 499

S 24—The judge is to decide whether a confession is caused by inducement, threat, or promise. If according to him it is inadmissible, it must be

re-jury. A I R 1933 Cal 187-142 Ind
A I R 1932 Sind 64, 26 S L R 91=
A P 1932 Sind 64

S 24—Inducement, threat or promise by person who has no power to enquire does not make a confession to such person inadmissible. 142 Ind Cas 474-14 P L T 82-12 Pat 241-A I R 1933 Pat 149 (S B)

S 24—*Tahsildar* is not a person in authority. 142 Ind Cas 474-14 P. L T 82-A I R 1933 Pat 149 (S B)

S 24—Where a confession is duly recorded under s 164 the presumption is that it was freely made. A I R 1932 Sind 201-26 S L R 302-141 Ind Cas 392

S 24—Extra judicial confession of guilt made by a person, before he is taken into police custody has high probative value but it must be proved strictly when it is not in writing. A I R. 1932 Sind 201-141 Ind Cas 392-26 S L R 302

S 24—A retracted confession is not necessarily worthless. A I R 1932 Mad 391, see also 55 M 717-138 Ind Cas 240-33 Cr L J 586-35 L W 607-A I R 1932 Mad 500-62 M L J 680. A I R 1932 Oudh 115-139 Ind Cas 736-9 O W N 96, 139 Ind Cas 756-9 O W N 321, 10 Mys L J 304, A I R 1932 Oudh 321-137 Ind Cas 665-9 O W N 327

S 24—A retracted confession must be corroborated by reliable evidence, before it is acted upon. 140 Ind Cas 194-33 P L R 691-A I R 1932 Lah 557, A I R 1932 All 228-54 A 350-1932 A L J 162-33 Cr L J 201, 56 B 542-140 Ind Cas 740-34 Bom L R 1240-A I R 1932 Bom 553

S 24—Value of retracted confession depends upon circumstances of its making. 7 Luck 511-A I R 1932 Oudh 317-139 Ind Cas 751

S 24—Value of extra judicial confession made to another convict in jail is very little. A I R 1932 Oudh 324-9 O W N 170-137 Ind Cas 170

S 24—The manager of a company is a person in authority—A I R 1932 Sind 64-26 S I R 191-138 Ind Cas 618. So also a Zemindar connected with investigation. A I R 1932 Sind 55-138 Ind Cas 614-33 Cr L J 641

S 24—The question whether the word used were intended to convey to the accused an inducement etc must depend on the surrounding circumstances in which the words were used. The burden is on the prosecution to prove that the confession was not improperly induced. A I R 1933 Sind 406

S 24—No doubt the provisions of s 164 are imperative and mandatory but the court can admit the statement by calling oral evidence to prove that the statement had in fact been duly made unless the error has injured the accused as to his defence on the merits. A I R 1934 All 81—1933 A L J 1551 (F B)

S 24—Confession by accused by Magistrate not improperly induced can be proved though made under hope of pardon and even though not recorded as required by s 164 of the Cr Pro Code. A I R 1913 Lah 987

S 25—Political *Mohurr Oglis* is a police officer—A I R 1933 Pesh 38

S 25—Excise officer invested with police powers is not a police officer. 140 Ind Cas 283=13 Pat I T 627—A I R 1932 Pat 293 (S B) 1932 M W N 453 vide article in A I R 1932 pages 47—55 (Journal)

S 25—Statement of accused made at police station is inadmissible. A I R 1933 Lah 167=34 P L R 159=1933 Cr C 312

S 25—The term police officer should be read in a more popular and comprehensive sense. It includes police officers of Indian States. 140 Ind Cas 283=13 Pat I T 627—A I R 1932 Pat 29 (S B)

S 25—Writing taken down by police officers during investigation for comparison is not confession. 56 B 304=38 Ind Cas 708=34 Bom L R 598. A I R 1932 Bom 406

S 25—Confession to a crowd of people is not inadmissible merely because a police man was one of the crowd. A I R 1934 All 132

S 25—Confession to chaukidar is admissible. A I R 1934 All 132

S 25—Statement containing admission should be considered as a whole. A I R 1933 Rang 326

S 25—Report by accused at police station that he had killed deceased is inadmissible. A I R 1933 Lah 899

S 25—Confession made to police not used as such may be used to show that accused gave different versions to court and police. A I R 1938 Cal 308. 56 C L J 73=143 Ind Cas 220=34 Cr I J 530

S 25—Statement of accused is not admissible if it is a confession. Free will does not excluded under

S 26—Where the Magistrate has not made a record of confession under s 164 Cr Pro Code but only made a written memorandum he can prove the confession by his oral evidence and may refer the memorandum to refresh his memory. A I R 1933 Lah 76 see also A I R 1933 Lah 956. A I R 1933 Lah 513

S 26—The expression police custody does not necessarily means formal arrest. It also includes some form of police surveillance and restriction on the movements of the persons concerned by the police. A I R 1932 Lah 609

S 26—Section 164 of the Criminal Procedure Code does not apply to oral confessions. Such confession is admissible under s 26 of the Evidence Act. A I R 1933 Oudh 42

S 26—Conviction cannot be based on reported confession when the reporter cannot depose the exact confession. A I R 1934 All 8

S 26—Confession made to a fellow prisoner in judicial look up is not inadmissible as to the custody is magisterial. A I R 1934 Lah 75

S 26—Oral confession made to a Magistrate can be proved. 142 Ind Cas 619=41 R 1932 Lah 488

S 26—Oral confession made to a Magistrate soon after arrest when the police could scarcely have any opportunity to bring pressure upon the accused is admissible. A I R 1933 Lah 998

S 26—Confession to chaukidar after arrest is irrelevant. A I R 1934 Oudh 194

S 20—Confession of accused to Magistrate not deputed by police is admissible A I R 1932 Lah 261

S 28—Custody of a Police officer does not mean that the accused should be under actual arrest. The test is whether he is or is not at liberty to move from a particular place where he was when he made confession A I R 1932 Sind 149=26 S L R 1, see also A I R 1932 Sind 201=26 S L R 302=141 Ind Cas 392. In order to bar proof of confession two things must be proved, namely limitation should be imposed upon the liberty of confessor and it must be imposed upon by police A I R 1932 Sind 201=26 S L R 312

S 26—A village chaukidar is a police officer A I R 1933 Oudh 192=10 O W N 348=1933 Cr C 379

S 26—Where police officer takes magistrate with him while the former is conducting investigation the evidence by such magistrate as to what happened is not admissible A I R 1933 All 394

S 26—Magistrate of an Indian States is a magistrate under s 26—A I R 1933 All 285=1933 Cr C 481

S 26—Before retracted confession is acted upon it is necessary to make sure that corroborative evidence supports confession—57 C L J 13

S 26—Where accused is deceived into belief that the Magistrate before whom he is making confession is police officer the confession is not irrelevant 26 S L R 302=A I R 1932 Sind 201=141 Ind Cas 392=1932 Cr C 810. Test of police custody A I R 1932 Sind 149=26 S L R 1

S 26—Oral confessions made to the Magistrate can be proved under s 26 A I R 1932 Lah 488

S 26—A confession made to Honorary Magistrate is admissible 33 P L R 217=138 Ind Cas 497=A I R 1932 Lah 261=33 Cr L J 632

S 27—Where accused under detention as suspect makes statement leading to discovery of murdered body the statement is admissible A I R 1933 Lah 516. Such statement is admissible even though made in presence of police 143 Ind Cas 46=34 Cr L J 481=1932 M W N 801=A I R 1933 Mad 233=64 M L J 88

S 27—Statements made by accused to *daroga* showing place in jungle where occurrence took place are not admissible in evidence being in the nature of confession made to Police Officer while in custody. Section 27 does not apply and does not render statements admissible A I R 1933 Cal 146

S 27—Person accusing himself of offence and submitting to police custody under s 46 (1) Cr Iro Code is in police custody when he makes statement to police within s 27—142 Ind Cas 474=14 P L J 82=12 Pat 241=A I R 1933 Pat 149 S B)

S 27—Statement that *hatchet* produced was one by which murder was committed should not be allowed in evidence A I R 1933 Oudh 404

S 27—Section 27 is a special provision whereas s 162 Cr Iro Code is general and does not in any way affect the operation of the former when the conditions mentioned therein are fulfilled A I R 1932 Mad 391=1933 M W N 305 (F B)

S 27—S 27 is not a mere proviso to s 26. It cuts down the operation of ss 24 and 25 as well 59 C 1040=138 Ind Cas 116=36 C W N 373=A I R 1932 Cal 297 see also A I R 1932 Bom 286=31 Bom L R 303=66 II 172 137 Ind Cas 174

S 27—Where statements are made by several persons to the same effect leading to the discovery of some fact only the statement made by the first individual and only so much of it as related distinctly to the fact discovered can be admitted 36 C W N 373=59 C 1040=138 Ind Cas 116=A I R 1932 Cal 297 1932 M W N 113

S 27—The General rule that statements made by accused persons to the police in the course of an investigation cannot be proved does not affect

special exception to that rule remaining in force by force of s 27—55 M 903 = A I R 1932 Mad 391—62 M L J 742 F B)

S 27—Where the accused makes a statement that he and another accused hid the ornaments belonging to the murdered person in a particular place that statement can be admitted under s 27 1932 M W N 801

S 27—Where police officer interviewed person charged with offence of being in possession of cocaine and walked with him to place pointed out by him where cocaine was discovered the admission was held inadmissible A I R 1933 Cal 148=1933 Cr C 215

S 27—Only statement leading directly on the recovery of property are admissible A I R 1934 Nag 71

S 27—Statements not directly bearing upon discovery are not admissible A I R 1933 Nag 252

S 28—Confession on inducement is inadmissible A I R 1933 All 31=1932 A L J 1125 34 Cr I J 487

S 29—A confession if proved to have been made voluntarily is not inadmissible merely because the accused was not warned by the Magistrate that he was not bound to make such confession The provisions of s 164 Cr Pro Code are in this respect in conflict with those of s 29 of the Evidence Act but on a question of the admissibility of a particular piece of evidence it is the Evidence Act that prevails 55M 711=137 Ind Cas 863=62 M L J 559=A I R 1932 Mad 431 see also A I R 1933 Sind 166=1933 Cr C 530

S 29—S 164 deals with persons accused and not with witnesses as also does s 29 139 Ind Cas 725=33 Cr L J 814=36 M L W 798=56M 63=64 M L J 153=A I R 1932 Mad 748

S 30—Confession of co accused implicating himself and accused tried jointly with him may be considered if proved 142 Ind Cas 87=A I R 1933 Rang 57=142 Ind Cas 87=11 Rang 4

S 30—Approvers having ample opportunity to consult each other before becoming approvers should not be considered as corroborating each other A I R 1933 Lah 946

S 30—The confession of a co accused stands even on a lower footing than that of the evidence of an accomplice as it is not a statement on oath and cannot therefore be accepted without material corroboration connecting the accused with the case A I R 1933 Lah 956

S 30—The statement of a co accused can be considered when judging the case against any person Such evidence however has very little value and though it may come as a link in the chain it cannot form the basis of a conviction A I R 1914 Pes 11

S 30—Voluntary retracted confession is admissible against co accused A I R 1934 Rang 30

Ss 30 114(b) and 133—Evidence of accomplice may be corroborated by confessions of co accused as against other accused where truth of confession is guaranteed A I R 1932 Oudh 355

S 30—Where the evidence of the approver is eliminated as against one of the accused whose name has been falsely substituted by the approver the whole fabric must fall to the ground and it should not be accepted even against the other accused though to some extent it is corroborated by independent testimony A I R 1933 Lah 871

S 30—No conviction can be based on uncorroborated testimony of approver even if he has no enmity against accused A I R 1933 Lah 838=34 P L R 660 see also A I R 1933 Nag 249 16 N I J 129

S 30—A retracted confession is admissible against a co accused but it is practically of no value unless there be independent corroboration 136 Ind Cas 27=33 I I R 602=A I R 1932 Lah 294 A I R 1932 Oudh 321=137 Ind Cas 665=33 Cr I J 502 36 C W N 874=140 Ind Cas 379=A I R 1933 Cal 6

S 30—A confession cannot be accepted in part 33 P L R 511—A I R 1932 Lah 438

S 30—Section 30 is applicable only to statements made before and proved at the trial and not to statements made by some of the co accused in the course of the trial under s 342 of the Cr Pro Code 9 O W N 1135—141 Ind Cas 19=34 Cr I J 124

S 30—Statement of accused made at police station is inadmissible and cannot be used as evidence as against co accused 34 I L R 259—A I R 1933 Lah 167=1933 Cr C 312

S 32—Before admission of statements under s 32 evidence must be given that the makers of the statements are dead or are not available A I R 1933 Rang 212

S 32(1)—Corroboration of dying declaration is not necessary as a rule of law But declaration not made in expectation of immediate death and not made in presence of accused requires corroboration as a rule of procedure A I R 1933 Bom 479

S 32(1)—Simply because declaration is false in some part it should not be disregarded as a whole A I R 1933 Bom 479 Dying declaration is relevant under this section even though maker does not expect to die A I R 1933 Bom 479

S 32(1)—The statement of a person mortally wounded is admissible under this section 140 Ind Cas 892=1933 Cr C 93—A I R 1933 Oudh 53

S 32(1)—Transactions resulting in death does not mean any fact or series of facts which have no direct and organic relation to death Statements made by deceased long before actual incident of murder are inadmissible under s 32(1) 143 Ind Cas 17=34 Cr L J 505—A I R 1933 Nag 136

S 32(1)—Evidence of prosecution witnesses as to oral dying declaration of deceased should be discarded, where the deceased received several mortal injuries and there is no definite medical evidence that he would have been able to speak A I R 1933 Oudh 333=10 O W N 557

S 32(1)—Corroboration of dying declaration is not necessary as a rule of law But declaration not made in expectation of immediate death and not made in presence of accused requires corroboration as a rule of procedure A I R 1933 Bom 479

S 32(2)—Report submitted by a process person who is dead regarding service of notice is admissible under s 32(2) and s 3,—A I R 1933 Pat 658

S 32(2)—The Zemindari papers can be used as independent evidence provided they are brought within s 32(2) of the Evidence Act by showing that the persons who prepared them are dead or cannot be found etc but the weight to be attached to them must depend on circumstances 11 Pat 701—A I R 1933 Pat 6

S 32(2)—The entries in a diary of a police officer who is subsequently murdered is admissible in evidence 140 Ind Cas 578=1932 A L J 301—A I R 1932 All 442

S 32(4)—Evidence as to family custom based on information derived from deceased is admissible if it is expression of independent opinion based on hearsay A I R 1933 Oudh 246=10 O W N 268

S 32(5)—Where the statements regarding fact of adoption of the party in the present suit were made in previous suits in which the question of adoption was directly in issue such statements should not be admitted in evidence in the present suit under subsection 3, section 32 as they were not made before the question of dispute was raised A I R 1932 Mad 198

S 32(1)
ledge and
A I R

S 32(5) — The statement of a witness on a question of relationship can be admissible either under s 32(5) or s 50 A I R 1934 All 117

S 32(5) — The statement of a deceased Mahomedan that the mother of his children was married to him is evidence of marriage for proving legitimacy A I R 1933 All 329 = 1933 A L J 483

astrologer on information by person
ate of birth of particular person and
is admissible under s 32(5) though not
n relates to existence of relationship
within s 3 (5) 30 C W N 230 = 30 C L J 253 = 142 Ind Cas 36 = A I R, 1933 Cal 51

S 32(5) — Section 32(5) does not apply because statements were made after question in dispute was raised 35 Bom L R 118 = A I R 1933 Bom 126

S 33 — The expression representative in interest is not for all purposes synonymous with the expression persons claiming under in s 11 of the C P Code A I R 1932 Mad 198 = 62 M L J 116 = 1932 M W N 31 = 55 M 40 = 139 Ind Cas 684

S 33 — Where a witness is dead but the accused had opportunity to cross examination his evidence is admissible in *de novo* trial 139 Ind Cas 203 = A I R 1932 Mad 559 = 1932 M W N 857

S 33 — A deposition on which there was no opportunity at all to cross-examine, is not admissible under s 33 A I R 1934 Mad 100 = 39 M L W 34

S 33 — The first proviso to section 33 of the Evidence Act deliberately inverts the requirements of the English law and means that where the two proceedings are not between the same parties in order that the proviso may be complied with the party to the first proceeding must have been a representative in interest of the party to the second proceeding and not *vice versa* 38 C W N 1 P C

S 33 — Evidence of witness before Coroner in enquiry into death is not admissible under s 33 where the witness dies prior to the enquiry before Magistrate A I R 1933 Bom 479, see also A I R 1933 Bom 126

S 34 — The mere filing of accounts and exhibiting them does not prove the various items in the accounts without some more evidence. The accounts may corroborate the oral evidence and there must be the evidence of some person who knows the transaction personally and he swears to them A I R 1933 Mad 756

S 34 — A entry in an account book is an admission by the maker thereof in his own favour and it is accepted as evidence only if it strictly complies with the requirements of being kept regularly in the ordinary course of business. The account books in which balances are not struck for six days running is not therefore a document which would inspire confidence in a Court of justice 33 P L R 745 = A I R 1932 Lah 417, see also A I R 1932 Sind 186

S 34 — Entries in old account books over 30 years by themselves are not sufficient to charge a person with a liability though there is presumption that they were written by person by whom they are purported to have been written 142 Ind Cas 869 = A I R 1932 All 500 = 1933 A L J 423

S 34 — Where a suit is based on entries on an account book the entries themselves should be proved 34 P L R 46 = A I R 1933 Lah 344, see also A I R 1933 Lah 212

S 34 — Where persons preparing Zemindari papers are dead or could not be found, the Zemindari papers can be used as independent evidence 141 Ind Cas 157 = 11 Pat 701 = A I R 1933 Pat 6

S 34 — Account books of respectable firms should not be stigmatised as fabricated without coming to finding that books produced are fabricated and without giving reasons. 142 Ind. Cas. 463 = 14 P L T 61 = A I R 1933 at 145

S 35—Entry in order sheet that notice has been served is presumed to be correct though it is conclusive evidence of *fictum* of service 1933 Pat 658

S 35—Reports of Tasildar and Extra Assistant Commissioner in inquiry into *naufi* of property are relevant A I R 1934 Lah 39

S 35—Entries on the books and forms maintained under rules of Education Department are relevant as evidence of conduct of parties proving and disproving a fact of adoption A I R 1934 Nag 1

S 35—School certificate as to the age of a boy, duly prepared according to authority are admitted in evidence A I R 1934 Nag 44=16 N L J 232, see also 28 N I R 127=140 Ind Cas 66=A I R 1932 Nag 117

S 35—Entries in public documents of relevant facts are admissible irrespective of the fact whether public officer recording them knows them or not A I R 1933 Sind 317 But entry in the death register as to age is not conclusive proof of age *Idid*

S 35—*Hitchda* of Chikidar containing date of birth is admissible though written by Dafidar at request of Chikidar A I R 1933 Pat 473 in Record of Rights being irrelevant are

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survey map has presumptive value against a landlord of a neighbouring estate The Gringetic survey map cannot have the same value as evidence of title as the Revenue Survey map A I R 1933 Pat 671.

S 36—Rennel's map though correct with reference to the course of rivers cannot be preferred in a matter regarding the direction of villages to the investigations of a commissioner appointed for the purpose 56 C L J 369=143 Ind Cas 179=A I R 1933 Cal 222

S 35—Where there is discrepancy between Birth Register and Guardianship certificate regarding date of birth the age should be determined by reference to birth register 142 Ind Cas 794=1932 A L J 1012=54 A 1019=A I R 1933 All 100

S 35—Where deposition is recorded in ordinary way that record is proper evidence of statement and not abstract from judgment Oral admission acted on and recorded by Court in its judgment which constituted only official record of it, such record is admissible in evidence—142 Ind Cas 548=A I R 1933 Mad 184

S 35—Wajibularz entry in respect of custom if duly attested by settlement officials and signed by zamindars of village to which it relates must be admitted under s 85 A I R 1933 Oudh 246=10 O W N 268

S 35—Entries in marriage Register kept under the Christian Marriage Act are admissible in evidence 141 Ind Cas 284=26 S L R 423=A I R 1933 Sind 27

S 41—Order in lunacy is binding on parties thereto or those claiming under them A I R 1933 Mad 624, 1935 M W N 514

S 41—A judgment in a suit for restitution of conjugal right is not a judgment in *rem* and a third party is not bound by it A I R 1933 Rang 250

S 41—Statement in judgment not *inter partes* is not admissible A I R 1932 Lah 50

S 41—A Judgment not *inter partes* or in *rem* is admissible only to show its date and legal consequences A I R 1932 Cal 292=59 C 136=137 Ind Cas 163

S 41—It is doubtful whether judgment refusing probate of will is judgment in *rem* 141 Ind Cas 287=56 Mad 346=A I R 1933 Mad 14

S 42—Judgment declaring person to be owner of certain properties as auction purchaser though not *inter partes* is admissible as assertion of title 143 Ind Cas 179=56 I L J 369=A I R 1930 Cal 22

S 42—Previous judicial decisions making mention of status of preceptor are admissible in evidence under s 13 and 42=A I R 1933 Lah 57=140 Ind Cas 566=33 P L R 1054

S 42—Judgment determining similar questions are relevant though not conclusive A I R 1937 Bom 398=34 Bom L R 802

S 42—Previous judgments cannot be used as evidence to decide points which are at issue in different case except in cases under ss 40 and 42 A I R 1932 Pat 690

S 43—Decrees not *inter partes* are not evidence save under ss 13 and 43 They are mere evidence of transaction A I R 1933 Cal 21=140 Ind Cas 365=36 C W N 806 see also 37 M L W 623=A I R 1933 Mad 429, 58 C 1187=58 I A 125 56 C L J 369 1932 M W N 362

S 44—the plea that a decree passed by a Native State Court was made without jurisdiction is open to the objector under s 44 and can be raised at any stage of the proceeding unless there is a bar or *res judicata* or any rule of equitable estoppel against him A I R 1931 All 689

S 45—Opinion as regards the date of the stamp whether admissible 11 Pat 782=A I R 1932 Pat 352

S 45—A Magistrate should not refuse to record the evidence of hand writing expert where the question of identity of handwriting is in issue as the evidence of an expert in the matter of handwriting has been made admissible and relevant 139 Ind Cas 508=A I R 1932 Lah 481=33 P L R 811

S 45—Opinion of expert that document is type written on same machine as another is not admissible A I R 1933 All 690 A I R 1933 All 498

S 45—Where one expert is contradicted by another their evidence has little value A I R 1933 Lah 805

S 45—Opinion of expert as to signature in language which expert cannot read or write is not of much value except by way of corroboration of other evidence A I R 1933 Pat 559

S 45—Expert evidence is not conclusive and a man cannot be convicted for forgery merely on the evidence of a handwriting expert A I R 1937 Lah 450=33 P I R 697=108 Ind Cs 368

S 45—Letter No 276 Home Judicial of the Punjab Government does not have the effect that the expert should never be called It merely says that expert should not be called unnecessarily A I R 1932 Lah 202=33 P L R 76=137 Ind Cas 774

S 45—Where no opportunity was given to parties to examine expert his bare report is not admissible 141 Ind Cas 707=A I R 1933 Pat 159

S 45—Deposition of experts as to results of their opinion is not expert evidence A I R 1933 P C 26=64 M L J 193=141 Ind Cas 815=1933 A L J 393

S 45—Where Court finds signature true on comparison under s 73 expert evidence can be dispensed with A I R 1932 Bom 588=34 Bom L R 1371=141 Ind Cas 747

S 45—Expert witness is generally prejudiced in favour of the side calling him A I R 1933 Lah 561

S 48—If
uncontradicted
A I R 1937

according to usage
usage is sufficient
=13 Lah 800

S 49—T
depends on character of deposing witnesses and on the consideration as to whether they are expressing their own opinion A I R 1933 Sind 213

S 50—Evidence of witnesses that certain man and woman were regarded as man and wife by members of community does not come under s 50 Such evidence is not opinion expressed by conduct with special means of knowledge as to existence of such relationship 1932 A I J 208=A I R 1933 All 130

S 50—For conviction under sections 497 and 498 marriage must be strictly proved A I R 1934 Sind 10

S 51—A chemical Examiner must give in his report his opinion and the ground on which his opinion is based. Mere opinion is not sufficient. A I R 1932 Nag 158=34 Cr L J 154=141 Ind Cas 448

S 54—A police officer is competent to give evidence about reputation of a person residing in his circle or about whom he has occasions to make observations or inquires. A I R 1933 All 674

S 54—Evidence of previous convictions is admissible not as evidence of character but to prove habit and association. A I R 1933 Oudh 355

S 54—Under s 54 if evidence is otherwise relevant it is not rendered inadmissible merely because it shows bad character or the commission of offences other than the offence with which the accused is charged. 59 C 1361=139 Ind Cas 873=55 C L J 439=A I R, 1932 Cal 474

S 55—General and not particular evidence of character of complainant is admissible and relevant for awarding damages. A I R 1932 Nag 158=141 Ind Cas 448=34 Cr L J 154

S 57—The Court should take judicial notice of public holidays. 14 Lah 240=A I R 1933 Lah 538

S 57—The Court can take judicial notice of the fact that 'the present political movement' is in fact a movement prejudicial to public safety or peace. 36 C W N 1158

S 58—Where the execution of an insufficiently stamped hand note is admitted by the defendant in his written statement, the plaintiff is entitled to maintain the suit. 63 M L J 303=A I R 1932 Mad 693=1932 M W N 793

S 60—Test as to value of evidence admissible under ss 32, 49 and 60 depends on the character of deposing witnesses of deceased person and on the consideration as to whether they were expressing their own opinion. A I R 1933 Sind 213. Section 162 of Cr Pro Code is an application of the rule against hearsay evidence contained in s 60. A I R 1933 Pat 589

S 65—Copies of letters of conspirators to co-conspirators which were intercepted and reported, are admissible though addressees are not called to produce originals. A I R 1933 All 498

S 65—Party not producing document in his possession should not be allowed to prove contents by secondary evidence. A I R 1933 Lah 378=37 M L W 672=69 M L J 676

S 65—Where document was tendered in evidence and exhibited but not found on record the party can produce copy or secondary evidence of contents. A I R 1933 Lah 782

S 65—Secondary evidence should not be allowed unless circumstances are sufficient justification under Evidence Act for reception of secondary in lieu of primary evidence. A I R 1933 Pat 468, A I R 1933 All 690=1933 A L J 799, A I R 1933 Lah 945

S 65—Where secondary evidence has been admitted by trial court without objection the appellate court cannot reject such evidence. A I R 1933 Lah 601=144 Ind Cas 45

S 65—An income tax return is not a public document or a public record of a private document within s 74 and so section 65 does not apply. A I R 1933 Bom 291=56 B 324=34 Bom L R 236

S 65—Where the record of a document has been burnt in the Govt Record room a certified copy of such document is admissible. 11 Pat 569=138 Ind Cas 419=A I R 1932 Pat 157

S 68—If any of the defendants to a suit denies that any of the alleged executants executed the deed the plaintiff must produce one of the attesting witnesses to prove the document. A I R 1937 All 320=1937 A L J 207=140 Ind Cas 115

S 68—Where execution is not specifically denied document is admissible without proof of execution by summoning attesting witness. A I R 1933 Lah 378, A I R 1933 Mad 432=37 M L W 677=1933 M W N 141.

§ 68 — Although by virtue of the proviso, the attesting witness need not be called still the party is not relieved from necessity of proving mortgage in form prescribed under T P Acts 59 141 Ind Crs 700—A I R 1933 Rang 6=11 Rang 26

§ 68 — Person identifying executant before registration authorities, signing as such and identifying witness, whether is an attesting witness A I R 1934 Rang 1

§ 68 — Scribe witnessing execution and appending his signature is attesting witness A I R 1933 Sind 257

§ 68 — Where mortgage is sued upon as simply money bond, proof of attestation is unnecessary A I R 1933 Sind 257

§ 68 — Person attesting document is not estopped from taking contrary position unless he knew contents of document when signing it, A I R. 1933 Lah 703

§ 68 — Proviso to s 68 is retrospective in operation A I. R. 1933 Mad 432=37 M L W 677=1931 M W N 141, 1933 Mad 612

§ 69 — Where the plaintiff has taken early steps to secure the attendance of the attesting witness and is not responsible for the last summons being ineffective an adjournment should be granted for examining the attesting witness and if the witness has died during the pendency of the appeal whether under the amendment of s 68 or under s 19 it is open to the plaintiff to prove the document by other means A I R 1933 Mad 612

§ 74 — Letter forwarding proceedings of public meeting is not public document 55 C L J 58=14, Ind Crs 367=A I R 1933 Cal 812

§ 74 — An income tax return is not a public document or a public record of a private document within the meaning of s 74—56 B 324=107 Ind Cas 381=34 Bom I R 237—A I R 1982 Bom 791

§ 74 — Certified copies of confessions by accused persons would be admissible to prove the act of the Magistrate recording the confession A I R 1934 All 81=1933 A I J 501

§ 77 — Proof of entry in public document should be proved either by producing the document or by certified copy Proof of ownership of a car can be made by producing register It is irregular for court to accept proof of ownership by mere statement of person without person being called 36 C W. N 1147—A I R 1933 Cal 70=141 Ind Cas 246

§ 77.—Deposition of witnesses must be proved properly unless they are certified copies A I R 1933 Rang 212

§ 80 — Deposition can be proved only under s 80 of the Evidence Act, when these are taken according to law 142 Ind Crs 653=34 Cr L J 430—A I R 1933 Cal 190

§ 80.—Where there are no irregularities regarding the recording of the confession and the statement was taken in accordance with law, then under s 80 there would be a further presumption that the circumstances under which it was stated to have been taken were true A I R 1934 All 81=1933 A L J 551, see also 10 Mys I J 385

§ 83.—Entries in survey map and *khasat* carry presumption of correctness A I R 1933 Pat 555

§ 83—Kinnel's map indicates correctly course of rivers, but not direction of villages A I R 1933 Cal 222=143 Ind Cas 179=56 C L J. 339

§ 88 — Where original of a telegram is not proved to be in the handwriting of the sender, it is not admissible in evidence unless it is proved to be a copy of the original. But section 88 is no bar to admission of evidence and can be admissible s 9—A I R 1933 Pat 96=142 Ind. Cas 507=131 L J 832

§ 89 — Where a party produces an unstamped copy of an instrument by way of secondary evidence the court may in the absence of contrary evidence presume that the original was stamped 1932 M W N. 432

§ 90 —The presumption arising under s 90 as to the due execution and attestation of a document 30 years old is equally applicable to the copies as to the original when the copy is proved to be a true copy of the original A I R 1934 Nag 67, see also A I R 1933 Mad 860

§ 90 —Repeated assertion of title in ancient documents being mere recitals are no evidence of what is there recited though actual possession in conformity therewith would constitute *prima facie* title 56 C L J 369

§ 90 —The presumption under this section extends to genuineness and not to holding that document was executed by person possessed of requisite authority A I R 193 Oudh 227=9 O W N 379=138 Ind Cas 513, but see A I R 1933 All 99=1932 A L J 1010

§ 90 —In the case of execution of a deed by a *parda nashin* lady, proof that document was explained and understood by her must be given, it being a matter to which presumption under s 90 does not attach A I R 1933 Oudh 170=10 O W N 747

§ 90 —In the case of a will the presumption as to execution under s 90 arises but presumption does not cover question of disposing mind A I R 1923 Lah 58

§ 90 —Where a document is admitted by trial court under s 90 the appellate court should be slow to interfere with such discretion unless its exercise is perverse 142 Ind Cas 13=34 P L R 365=A I R 1933 Lah 347 see also A I R 1933 All 443

§ 90 —Courts should be very careful about raising presumption under s 90 in favour of old deeds of *Sankalpana* produced after many years after first settlement in suit where under proprietary rights are set up on their basis 133 Ind Cas 513=8 Luck 18=A I R 1932 Oudh 227=9 O W N 379

§ 91 —Sections 91 and 92 only applies where the document on the face of it contains or appears to contain all the terms of the contract 56 B 180=137 Ind Cas 478=34 Bom L R 26=A I R 1932 Bom 151

§ 91 —Where the debt and the execution of the promissory note are contemporaneous the debt can be proved only by the note 139 Ind Cas 361=A I R 1932 Mad 637=36 I W 432 1932 M W N 1260=140 Ind Cas 193 I R 1932 All 610=140 Ind Cas 117 140 Ind Cas 193=1932 M W N 120=A I R 1933 Mad 71 A I R 1933 Mad 117=140 Ind Cas 833=64 M L J 79 A I R 1933 All 109=141 Ind Cas 177 but see 29 N L R 131=A I R 1933 Nag 57, A I R 1933 Pat 584 141 Ind Cas 163=13 P L 7 506=A I R 1932 Pat 325 9 O W N 585=A I R 1932 Oudh 235 (F B)=139 Ind Cas 298

§ 91 —An unregistered sale deed cannot be received as evidence of any transaction affecting the property A I R 1933 Lah 276=33 P L R 227=37 Ind Cas 41

§ 91 Oral evidence to prove intention of executor is not admissible especially where *wakif* though alive several years after never sought its rectification 1933 A L J 21=A I R 1933 All 186

§ 91 —Unregistered document relating to partition is admissible to prove mere separation in status but not to prove that particular item has ceased to be joint 141 Ind Cas 487=34 P L R 194=A I R 1933 Lah 574 see also 143 Ind Cas 634=A I R 1933 Lah 194 A I R 1933 Rang 249

§ 91 —Where document creating lease is not admissible for want of registration oral evidence as to terms is not admissible A I R 1933 Cal 612, see also A I R 1933 Bom 381 But where the partition deed is not registered possession can be proved by oral evidence A I R 1933 Nag 270, A I R 1933 Rang 249

§ 92 —Written contract cannot be varied by local custom. A I R 1933 Cal 772

§ 92 —One of the executants of a promissory note cannot be allowed to let in evidence to the effect that he signed the promissory note only as

S 92—Where the contract between the parties has been embodied in a mortgage deed, letters between the parties within several months before the completion of the mortgage are inadmissible in evidence to contradict, vary or add to the terms. They only constitute evidence of negotiation between the parties. A I R 1933 Lah 1024

S 82—Oral agreement to pay decree by instalments in court can be proved if certified within 90 days A. I R 1933 Lab 806

S 92 —Oral contract, giving preferential right to pre empt leased property
if it was brought to sale can be proved 138 Ind Cas 774 = 1933 A L J
381 = 63 M L J 403 = 56 M L W 450 = 34 Bom L R 1609 = A I R 1932
P C 231 (P C)

oral evidence to prove recession
133 Lih 278

S 92—This section has no application where letter containing some terms of the proposed lease and a lease embodying all terms is agreed to be executed later A I R 1933 Lah 61-142 Ind Cas 754-33 P L R 323-14 Lah 137

S 92 — Oral agreement to vary terms of documents can be set up when writing is not required by law 142 Ind Cas 41 = 34 P L R 266 = A 1 R 1933 Lah 453

§ 92—The absence of mention of an agreement to pay interest in a balance struck in the creditor's book does not debar him from proving an agreement to pay interest independently and by oral evidence. A I R 1932 Lah 652

S. 92.—A distinct oral agreement between co mortgagors made subsequent to the execution of the mortgage deed should, in order to be admissible under the Act, be reduced to writing. A I R 1933 Mad 218=1932 M W N 168

92.—Where an oral agreement is made by two partners to dissolve the partnership earlier than originally agreed to in their registered agreement, the agreement and any payment made in accordance therewith is not admissible. 136 Ind Cas 874—A I R 1932 Nag 42=14 N.

S. 93.—A bequest in favour of a son of L or G is void for uncertainty as extraneous evidence is not admissible to show which particular son of L or G was intended to be benefited by the testator A I R 1933 Pat 647

S 94.—Where mortgage deed is clear and unambiguous and actually applies to existing facts parol evidence is inadmissible A I R 1934 All 100

S. 95.—Where language of document is meaningless with reference to existing facts extrinsic evidence is admissible to prove its true meaning 141 Ind Cas 298—A I R 1933 Oudh 80—9 O W N 1024

S. 101.—Those who allege fraud must prove it A I R 1933 Pat 306, A I R 1932 All 825

S 101.—Where circular is issued by a public servant containing certain statement a person who challenges that statement must prove it A I R 1934 Mad 27

S. 103.—Persons claiming to succeed on ground of relationship should prove such relationship and absence of nearer heirs A I R 1934 All 117

S 105.—Where death results from the injuries caused by the accused, the burden of proving the circumstances which entitled him to kill the deceased so as to bring his case under any of the exceptions in the Penal Code is on him A I R 1933 Lah 1055

S 108.—The rule of presumption of Mahomedan law as regards missing person has been abrogated by the Evidence Act A I R 1934 Oudh 41

S 112.—The parties to marriage were in touch with each other, were residing for a short period in reasonable proximity the wife being in the house of a relation of the husband There was nothing to suggest that she was unfaithful or that the parties were on terms of personal hostility Held that the child could have been begotten during the period and his legitimacy was undeniable—A I R 1934 P C 49 The word access means no more than opportunity of intercourse *Ibid* The burden of showing that parties to marriage had no access to each other at any time when child could have been begotten is on the person challenging legitimacy of the child *Ibid*

S 114 ill (a)—It is not possible to lay down any maximum period which will apply to all cases of possession of stolen property 1932 M W N 862

S 114 ill (a)—Where revolver stolen in October found with accused in May and the accused is unable to account for its possession a presumption would arise under s 114 ill (a) because revolvers are not easily obtainable in market overt 1933 A L J 523—A I R 1933 All 461—14 L R A Cr 63

S 114 ill (a)—Court may draw presumption if accused is not able to account for his possession but the onus of proving ingredients of offence under s 411 P Code is on the prosecution and does not shift to the accused A I R 1933 All 893

S 114 ill (a)—Possession and production of part of stolen property six days after commission of the offence give rise to the inference that the accused dishonestly received stolen property knowing it to be stolen and not that he was actually concerned in burglary 1933 M W N 325—193 M Cr C 143 But possession must be definitely established in order to justify presumption of guilt 141 Ind Cas 537—34 Cr L J 163—A I R 1932 Sind 180

S 114 (b)—No conviction can be based on the uncorroborated testimony of an approver even if he has no enmity against the accused A I R, 1933 Lah 838, A I R 1933 Pat 500, A I R 1934 Lah 21, 1934 Lah 23—34 P L R 866 A I R 1931 Cal 114, A I R 1934 1es 11, A I R 1931 Oudh 90, A I R 193 Oudh 265—1933 Cr C 49 But corroboration need not be by direct evidence nor should corroboration be sufficient by itself to prove guilt A I R 1933 P 500 To justify conviction on approver's evidence it is sufficient if corroboration is merely circumstantial evidence of accused's connection with crime 140 Ind Cas 19—14 Lah 11—84 P L R 285—A I R 1932 Lah 623 Approver's evidence must be corroborated by

reliable and independent evidence 34 P L R 2 Corroboration by another accomplice is not material corroboration 147 Ind Cas 809=13 P I 1 802 = A I R 1933 Pat 96 Evidence of accomplice must be regarded with suspicion A I R 1933 Rang 116 It is not necessary that the evidence corroborating the story of an approver or an accomplice should be evidence which directly connects the accused with the offence, but there must be some evidence which tends to show that the story of the approver or accomplice is true in so far as it relates to the accused A I R 1933 Bom 487 Approvers on different occasions should make their statement must always be regarded as true unless the accomplices are not necessarily accomplices in which accomplices

make their statement must always be regarded as true unless the accomplices are not necessarily accomplices in which accomplices can be laid down 142 Ind Cas 809=13 P L T 802=A I R 1933 Pat 96 Evidence of approver can be corroborated by confession of co accused jointly tried implicating both himself and accused But the court must scrutinise such corroboration with care 342 Ind Cas 87=34 Cr L J 286=11 Rang 4=A I R 1933 Rang 57, see also A I R 1933 Oudh 355 Confession of co accused and testimony of accomplice without other evidence is not sufficient to justify conviction of other accused A I R 1933 Oudh 355 Retracted confession has no value against other accused unless fully corroborated A I R 1933 Rang 520, see also A I R 1933 Rang 73=143 Ind Cas 142=34 Cr L J 558

S 114 III (e)—Secretary to Government signing petition is presumed to be acting within authority until contrary is shown 37 C W N 276=A I R 1933 Cal 118 Evidence accepted by a Court is presumed to be regular and the burden is upon the party who asserts the contrary to prove it otherwise 10 Mys L J 151

S 114 III (f)—Where lawyer sends letter purporting to be instructed by client the presumption is that the letter is written under instruction A I R 1933 Rang 147 Where registered letter is returned by Post office is refused the presumption as to due delivery or service depends upon particular circumstances of each case A I R 1933 Rang 76

S 114 III (g)—Where the accused does not attempt to get certain witnesses examined it may fairly be presumed that the evidence of such witness will not be helpful to the accused A I R 1933 Sind 412 Where a party suppresses a document or evidence the opposite party is entitled to make presumption in his favour A I R 1933 Mad 451=37 M L W 672=64 M L J 676, A I R 1933 All 474 But to draw an inference under this section the Court must be satisfied that the evidence is in existence 142 Ind Cas 225=37 M L W 521=64 M L J 413=37 C W N 657=A I R 1933 P C 87=7 C L J 222 But in a criminal case the prosecution is under no obligation to call all relevant evidence and presumption in illius (g) need not be raised simply because prosecution does not call certain witness A I R 1933 Cal 620 The only witness whom the prosecution need call are those who know the facts and are able and willing to give truthful evidence which is relevant to the charge 58 C 1335=135 Ind Cas 443=A I R 1932 Cal 118

S 114 III (i)—The strength of the presumption which might be raised when the document creating obligation is produced by the obligor varies in different circumstances A I R 1933 Nag 379

S 114 III (k)—Where mortgagor produces the mortgaged deed with stamp cancelled presumption is that the mortgage has been paid up in full A I R 1933 Rang 61

S 115—There can be no estoppel unless other party has changed position on fact of representation A I R 1933 Mad 471, see also 56 Bom 501=A I R 1932 Bom 386=10 Ind Cas 171

S 115—There can be no estoppel when true state of affairs is known 143 Ind 542=14 P L L 189=A I R 1933 Pat 210

S. 115.—Attestation after hearing contents estops attester A I R 1934 Pat 93

S. 115.—Estoppel is nothing more than rule of evidence The law of India and England is the same as regards estoppel A I R 1933 Pat 708

S 115 —An admission on a point of law is not an admission of a thing so as to make the admission a matter of estoppel within section 115 A I R 1932 Pat 267 = 140 Ind Crs 687

S 115 —It is estoppel alone which can prevent the true owner from disputing the acts of his *benami* dar 58 C 1371 = 135 Ind Crs 433 = A I R 1932 Cal 167

S 115—There can be no estoppel when a person acts in a different capacity 36 C W. N 972

S 115—An infant is not estopped from setting up the plea of his infancy where he has fraudulently represented that he is of age and thereby induced another to enter into a contract with him A I R 1932 All 710 = 139 Ind Cas 718

application when person acts in
ll 641

shed that a tenant who has been
teny his landlord a title however

defective it may be so long as he has not openly restored possession by surrender to his landlord 33 P L R 799 = 139 Ind Cas 46, I R Lah 623 55 M 601 = 134 Ind Cas 31 = A I R 1932 Mad 292 = 62 M L J 313

S 115 —A witness is competent if she understands questions put
36 C W N 1152 = A I R

class of witness for when of a tender age they often mistake dreams for reality, repeat glibly as their own knowledge what they have heard from others and are greatly influenced by fear of punishment, by hope of reward and desire of notoriety When considering the evidence of child witness these observations should not be lost
depend upon its particular facts and circumstances
Ind Crs 479

should not be rejected simply because
129 = A I R 1933 Oudh 340 Evi

dence of respectable and reliable witness should not be disregarded merely because he is related to party calling him A I R 1933 Rang 162

S 118—Accused though competent to testify is incompetent witness because oath cannot be administered to him 141 Ind Cas 89 = 10 Rang 512 = A I R 1932 Rang 190 (F B)

S 122 —Prohibition against admission of communication between husband and wife extends to all communication of whatever character This prohibition can in no circumstances be waived or relaxed 33 Bom L R 174 = A I R 1933 Bom 153

SS 123, 124 —Under the above sections subject matter of police diaries is privileged 142 Ind Cas 854 = 34 Cr L J 464 = A I R 1933 Lah 498

S 126 Prov. 2.—Definite charge of fraud and some evidence to support it is necessary to compel pleader to answer question which he is privileged not to answer A I R 1933 Rang 61

S 126 —Doctor called to give evidence is not protected and he is not entitled to withhold evidence 1933 A L J 14 = A I R 1933 All 57

S. 132 —A witness is not protected unless he has objected to answering questions A I R 1933 Oudh 370

S 133 —Corroborative evidence must be taken in case of evidence of accomplice A I R 1933 Lah 294, A I R 1933 Nag 249, A I R 1933 Pat 500 But corroborating evidence need not directly connect accused

with offence A I R 1933 Bom 482 So also corroboration need not be by direct evidence nor should corroboration be sufficient by itself to prove guilt A I R 1933 Pat 500, A I R 1933 Lah 294

§ 133 —The evidence of one accomplice cannot be corroborative of the evidence of another accomplice A I R 1933 Nag 372, A I R 1933 Oudh 355

§ 133 —Evidence of accomplice may be corroborated by confession of co accused as against other accused where the truth of the confession is guaranteed A I R 1933 Oudh 355

§ 133 —Retracted confession of co accused and motive and suspicion are not enough for conviction for murder 34 P L R 477=142 Ind Cas 620=34 Cr L J 372

§ 137 —Unfinished testimony if substantially complete should be submitted to the jury and should not be rejected A I R 1933 Lah 561

§ 145 —Statement made to headman of a village can be used only under ss 145 and 157 A I R 1933 Rang 119

§ 145 —The statements under s 164 Cr Pro Code cannot be put to the jury in their entirety under s 145 or under any other provision of law if there is no evidence susceptible of corroboration recorded under s 288, Cr Pro Code A I R 1934 Cal 174 The provisions contained in s 145 relates to previous statements in writing but does not militate in any way against such previous statements being used by way of corroboration of statements put in under s 288 Cr Pro Code which are substantive evidence in the case before the court of Session especially when the accused are not prejudiced *Ibid* The object of s 162 Cr Pro Code is plainly to exclude altogether the hearsay evidence of police officer except for the purpose of contradicting a witness in the manner provided by s 145 and if the exception thus made is to be applied it must be applied in the manner provided in the section A I R 1933 Pat 589 A document which is used to contradict a witness must be put to the witness Simply because the witness does not go to the witness box the court is not entitled to break the law and admit such document A I R 1934 Pat 55

§ 146 —The Judge should control cross examination A I R 1933 Lah 667

§ 154 —The circumstances in which a witness may be cross examined by the party calling him are not laid down in s 154 of the Evidence Act which leaves the matter entirely to the discretion of the Court and there is no legal objection to such permission being freely granted A I R 1933 Pat 488 A I R 1933 Nag 384 Discretion exercised under s 154 will not be reversed by Appellate Court A I R 1933 Rang 57=142 Ind Cas 87=34 Cr L J 286

§ 154 —This section does not lay down that a witness must be declared
A I R 1933 Na., 384
declared hostile his evidence cannot
31 at 517 Value of his testimony
Ibid Either side can rely upon
evidence as a whole *Ibid*
of modifying s 155 Evidence Act

A I R 1933 Cal 307
§ 157 —Recital of boundary in document between strangers to suit relating to adjoining land is not admissible under s 157 if executant is called and deposes as to boundary or under s 37 if he is dead A I R 1933 Lat 636

§ 158 —List of stolen things given to supplement first information report is admissible and can be referred to under s 158 and proved under s 158 A I R 1933 Lah 987

§ 159 —Documents can be referred to for refreshing memory A I R 1933 Pat 305 A I R 1933 Lah 716

S 164 —In prosecution for offence under s 408 Penal Code accused not producing document after notice can use it to cross examine complainant 236 C W N 1126=A I R 1933 Cal 65=60 C 341

S 165 —Question whether particular evidence is admissible or not should be decided before it is actually given A I R 1932 Sind 201=26 S L R 302=141 Ind Cas 392

S 167 —Retrial by appellate court can be ordered if evidence is not sufficient to pronounce judgment 35 Bom L R 174=A I R 1933 Bom 153=1933 Cr C 465, see also A I R 1933 Cal 136=142 Ind Cas 274=34 Cr L J 294

S 167 —Evidence is not a ground to evidence upon which see also 141 Ind Cas

392=26 S L R 302=A I R 1932 Sind 201



ADDENDA

Latest Amendments and Case-laws reported upto January 1936

N B—The references within the parenthesis are to the page nos of the book

Amendment—In section 1, after the words "Army Act" the words and figures, "the Naval Discipline Act or that Act as modified by the Indian Navy (Discipline) Act, 1934" shall be inserted—*vide*, the Amending Act, 1934 (XXXV of 1934)

Case laws

Preamble (p 11) Where terms of section are clear, English law should not be applied *Emperor v Ramanuja*, A I R 1935 Mad 528=1934 M W N 1479

S 3 (p 38) The definition of fact in s 3 does not restrict fact to something which can be exhibited as a material object *Emperor v Ramanuja*, A I R 1935 Mad 528=1934 M W N 1479

Ss 3, 5, 65 (p 43) A document which is not relevant to the issue, even if admitted without objection by the opposite party must be discarded by the appellate Court *Baduel Islam v Ali Begum*, A I R 1935 Lah 251

S. 6. (p 119) Evidence of witnesses that complainant informed about theft long after incident is not admissible *Brjibala Dhar v Nityimoyee Biswas*, A I R 1934 Cal 17=57 C L J 447=150 Ind Cas 209

S. 8 (p 140) Statement of accused after arrest in course of investigation giving false name is inadmissible under s 162 Cr Pro Code and cannot be admitted under s 8 *Krishna Iyer In re*, A I R 1935 Mad 479=1935 M W N 82

S 8 (p 40) Statements accompanying or immediately preceding production of articles are evidence of conduct under s 8 of the Evidence Act as much as the Act of production itself In adducing evidence as to the production of articles, evidence as to absence or existence of contemporary statements should also be adduced *Emperor v Rafiqueuddin* 39 C W N 368

Ss 8, 27 (p 140) Where joint acts of several persons are sought to be proved, in order to ask the Court to draw an inference from such conduct, evidence should be led with some degree of particularity so that it may be possible for the Court to draw the necessary inference from the conduct of each of the persons concerned in the act The principle applies not only to evidence relevant under s 27 but also to that under s 8 of the Act *Rafique uddin v Emperor*, A I R (1935) Cal 184 (F B)

Ss 9, 11 13 42, 43 (p 161) Judgment in previous suit is admissible in evidence under ss 9 11 13, 42 and 43 *Mirbahuddin v Vidyasagar*, A I R 1935 Lah 64=36 P L R 106

S 10 (p 180) Where a person is charged under s 420 and 120 B for committing fraud on the Insurance Company by inducing the said company to accept the proposal for insurance on the life of one M by securing a false statement of the doctor that M was suffering from a fatal disease though

s 10 of the Act seeing that other grounds for believing that there was a conspiracy *Kunjali Ghose v Emperor* A I R 1935 N 1015

S 10 (p 180) Document written by deceased describing conversation with third person who referred to accused as conspirator is admissible under s 10 *Emperor v Surja Kumar Sen*, 35 Cr L J 334=147 Ind Cas 32=A I R 1934 Cal 221 (S B)

S 10 (p 186) For meaning of anything said—*Vide* A I R 1933 All 690=1933 A L J 799

S 11 (p 195) In determining the question as to whether recital as regards boundaries in document between strangers are admissible s 11 has no application *Soney Lal v Darbdeo Varain*, A I R. 1935 Pat 167=16 P L T 199 (F B)

S 11 (p 200) Where statement of deceased is not admissible under s 32 s 11 cannot make it evidence *Latafat v Omkar* A I R 1935 Oudh 41=152 Ind Cas 1042=1934 O L R 922=11 O W N 1589

Ss 11, 32. (p 200) Statement not falling under s 32 is inadmissible even under s 11 *Naima Khatun v Basant Singh*, A I R 1934 All 406 (F B)=1934 P L J 318

S 11 (p 200) A *chitta* prepared by the landlord recording his land to be in possession of certain persons as tenants would be admissible in evidence against a third person if there is further account introduction or verification *Abdul Khaleque v Susil Chandra Chaudhuri* 39 C W N 330

S 13 (p 222) A judgment not *inter partes* mentioning that certain rights in respect of property have been claimed and recognized by the authorities concerned is admissible in a subsequent case *Matasaddi v Lainmi*, A I R 1935 Lah 179

Ss 13, 43 (p 229) Judgment not *inter partes* is admitted for limited purposes under s 43, read with ss 11 and 13 *Hemchandra v Purna Chandra* A I R 1934 Cal 788=59 C L J 320=A I R 1934 Cal 653

S 13. (p 240) Where the Collector had given his decision in the course of a prior proceeding on an incidental issue also but such issue arises in a subsequent suit his decision cannot make it *res judicata* in the subsequent suit. But that decision is a piece of evidence under s 13 Evidence Act, to which some weight must be given in the determination of the status of the two estates in relation to each other *Sonaboti v Kutymananda*, A I R 1935 Pat 306=14 Pat 70

S 13 (p 242) Decision in custom case is not judgment *in rem*. It may only be instance of custom under s 13 *Janat Bibi v Ghulam Hussain* A I R 1934 Lah 861=36 P L R 256

S 13 (p 243) A recital of boundaries in a deed executed by strangers is not admissible under this section. But it may be used as a corroborative evidence under s 157 if the executant is called as a witness *Rimnandan v Laley Tilakdhari* A I R 1934 Pat 636=145 Ind Cas 944

Ss 13, 11 (p 250) Recitals in deed are not admissible for proving how lands are dealt with by landlord *Thakur Kurmi v Lalji*, 150 Ind Cas A I R =1934 Pat 81

S 13 (p 200) Where the defendant purchased by a *kobola* in which the lands in suit were described as *niskar*, Held that the *kobola* was not admissible in evidence for the purpose of proving *niskar* *Kanta Mohan v Basudeb Ghose*, 39 C W N 311, but see 12 Pat 285=A I R 1913 Pat 285

Ss 13 35, 32(5) (p 250) Where certified copies of decree and of two pedigrees with it are produced the Court may presume that the two pedigrees were filed in suit. Both pedigrees should be admitted as pedigrees filed by the respective parties to the suit and not as evidence of relationship

under s 32(5). The statements in the decree that the predigrees are filed in evidence under s. 35 as an entry in a public record, or under s 13, as evidence of the course of proceedings in a suit *Collector of Gorakhpur v Ram Sundar*, 56 A 468-40 L. W. 217-38 C W. N. 1101 15 P L T 531-60 C L J. 67-36 Bom L R 267-1934 M W. N. 751-11 O. W. N. 889-1934 A. L J. 779-67 M. L J 274 (P. C)

S 14 (p 277) To prove habit and association, evidence of previous conviction is admissible *Benc Madho v. Emperor*, A. I R. 1933 Oudh 355 -10 O W. N. 688-146 Ind Cas 1064.

S 14 (p 282). Views held by the accused show his conduct and as such relevant under this section. *Manabendra v. Emperor*, A. I. R 1933 All. 495-1933 Cr C 833.

S 16, illus (b) and s 114, illus (f). (p. 300) A registered letter which is proved to have been correctly addressed and posted and which did not come back, must be presumed to have reached the addressee, although the latter's signature on the acknowledgment receipt may not be proved. *Rajani Sutradhara v. Baskuntha Chandra*, 39 C W. N 1041.

S 17. (p 313) Where in a document executed by a woman there was an admission and the fact that she made the statement was relevant in a suit in which the document was proved *Held* that the admission should also be held to be proved even though the woman was not examined A I R 1935 Lah. 628

S 18. (p 320) Admission is 'the best evidence of the party making it. *Nansal v Nutbehari*, 38 C. W N 861

SS 18, 21. (p. 322) In case of admission by a party, admission must be relied as whole and not by pieces *Durshan Singh v. Baldeo Singh*, A I R 1934 Oudh 370

S 18. (p 325) Under s 18 a statement made by a servant is admissible in evidence against his master both as regards his position, if it is in dispute, as to whether he is a servant and as regards his liability as such Occupying the position of a servant does not involve as one essential ingredient acting in the course of his employment The driver of a lorry is a servant of the owner of the lorry *M E Moses v Shaikh Bakridhor*, 39 C W. N 736

N 18 (p 333) Statement of opinion by counsel is not admission by party and so not binding on him *Kanti Prasad v Chait Narain*, A I R. 1934 All. 531

S. 18 (p 335) There is no rule of evidence under which the statement of one person can be regarded as the admission of another person merely on the allegation that the two are in collusion *Motiram v Sripal*, A I R 1934 All 684-151 Ind Cas 261

S. 18 (p 385) Admission by one partner binds another *Thomas Bear v Rula Ram*, A I R 1934 Lah 625-148 Ind Cas 763

S 18. (p 385) Ordinarily an admission is admissible against the party making it or his privies To this principle there are exceptions, namely, of admissions made by joint contractors and joint owners But admissions made by such persons must be limited within legitimate bounds, which are two in number, namely, that the admission must relate to the subject matter of the suit and that it must be made by the declarant in his character of a person jointly interested with the party against whom evidence is tendered *Kanta Mohan v Makhan Satra*, 39 C. W. N 277, see also *Thomas v Rula*, A I R. 1934 Lah 625

S 18 (p 353) Where a person offers to accept a smaller sum as a matter of compromise that offer is not an admission as to the proper amount due to him *Chandrika Prasad v Bombay Biroda Ry* A I R 1935 P C 59 = 1935 O W N 178 (P C)

S 21 (p 360) Confession is provable against accused unless prohibited by law *Sidheswar Nath v Emperor* A I R 1934 All 351 = 1934 A L J 178 = 152 Ind Cas 174

S 21 (p 361) The onus to prove the alleged joint ownership of the plot was initially on the plaintiff, but the proof of an admission shifts the onus because what a party himself admits to be true may reasonably be presumed to be so *Abady v Mumtasuddin* A I R 1934 Lah 662 = 35 P L R 578 = A L R 1934 Lah 853

S 21 (p 361) Admission made in prior suit can be used in subsequent suit, even when the admitting party in the prior suit is not a party in the subsequent suit. *Amarnath v Ralla Rim*, 35 P L R 463 = A I R 1934 Lah 527 = 149 Ind Cas 217

S 21 (p 361) An admission is no doubt a very good piece of evidence and under ordinary circumstances it would be taken as binding upon a party unless the party who makes the admission can explain it away. *g*, the document was executed by a *pardaiashin* lady *Bholanath v Mritunjay* 59 C L J 532 = A I R 1934 Cal 85; see also *Sidheswar v Emperor* A I R 1934 All 351 = 1934 A L J 178 = 152 Ind Cas 144

S 21 (p 361) Statement in admission must be taken as a whole *Sundara Rajah v Gopala Thevan*, 150 Ind Cas 132 = 39 L W 34 = A I R 1934 Mad 100, see also *Fakhr Khan v Ismail Khan* 14 Lah 218 = 34 P L R 149 = A I R 1933 Lah 179 *Darson Singh v Baldeo Singh*, 11 O W N 579 = A I R 1934 Oudh 370

S 21 (p 368) Admission not allowed to be explained cannot be used against maker *Latafat v Onkar* A I R 1935 Oudh 41 = 152 Ind Cas 1042 = 134 O L R 922 = 11 O W N 1589

SS 21, 13 (p 369) Document containing admission by third party can be allowed in evidence not as admission but as proof of transaction mentioned *Jasoda v Punst* A I R 1934 Pat 48 = 146 Ind Cas 937

S 21 (p 363) A statement in a judgment that a witness admitted certain things is not admissible to prove the admission unless it is proved that primary evidence is not available *Meda varuppa v Meda varuppa* A I R 1935 Mad 268 = 40 M L W 810

S 24 (p 393) When a confession is used against a person the whole confession must be introduced *Mahomed v Emperor* A I R 1934 Lah 620 = 35 P L R 659 see also *Pathani v Emperor* A I R 1934 Lah 673 = 152 Ind Cas 1077

S 24 (p 393) Where part of confession is found to be false the entire confession need not be rejected *Emperor v Shankar* A I R 1934 Oudh 222 = 11 O W N 66 = 35 Cr L J 894

S 24 (p 395) Clear consistent and convincing extra judicial confession should be believed *Ramappa v Government of Mysore* 12 Mys L J 73

S 24 (p 409) Plea of guilty under s 271 (2) Cr Pro Code is not confession as dealt with in s 24 *Srikant Das v Emperor* A I R 1934 Pat 256 = 35 Cr L J 1217

S 24 (p 409) For rejecting confession lesser degree of probability is required because the word used is appear and not proved *Ajeb Shana v. Emperor*, 61 C 399 = 38 C W N 659 = 35 Cr L J 1479 = A I R 1934 Cal 636 = 152 Ind Cas 44

S 24 (p 40) Where the main foundation for the conviction is the confession alleged to have been made by the accused, there are three things which the prosecution must establish (a) that a confession was made, (b) that evidence of it can be given, (c) that it is true *Bhojo v Emperor*, A I R 1934 Sind 172-1934 Cr C 1274-152 Ind Cas 1032

S 24 (p 409) A voluntary confession if uncorroborated by circumstances is admissible in evidence *Bhurvar v Emperor*, 9 O. W. N. 1191

S 24 (p 417) Mere belief of accused that person to whom confession is made is person in authority is not sufficient. Such person must have authority to interfere *Mukhis* are not persons in authority *Bhojo v Emperor*, A I R 1934 Sind 172-1934 Cr C 1274-152 Ind Cas 1032

S 24 (p 417) Honorary Magistrate who is also *Zasildar* is a person in authority *Hesmat v Emperor*, A I R Lah 417-1934 Cr C 643-15 Lah 417-1934 Cr C 643

S 24 (p 427) Unqualified expression "you had better tell the truth" amounts to inducement *Hesmat v Emperor*, A I R 1934 Lah 417-1934 Cr C 643-152 Lah Ind Cas 998-15 Lah 856-37 P L R. 25

S 24 (p 436) It is rule of practice and not of law that retracted confession requires corroboration *Bhojo v Emperor*, A I R 1934 Sind 172-152 Ind Cas 1032, see also *Chinnaga v Government of Mysore* 11 Mys L 407, *Imamuddin v Emperor* 150 Ind Cas 862-35 Cr L J 1154-11 O W N 950-A I R 1934 Oudh 388, *Jahangir v Emperor*, 35 Cr L J 180-150 Ind Cas 106, *Bhaskar v Emperor* 35 Cr L J 1113-150 Ind Cas 810-11 O W N 851-A I R 1934 Oudh 405, *Aishan Bibi v Emperor* 15 Lah 310-152 Ind Cas 206-A I R 1934 Lah 150-1934 Cr C 830, *Mariem v Emperor*, 35 Cr L J 1453-A I R 1934 Lah 89-1934 Cr C 172, *Nahman v Emperor*, 151 Ind Cas 716-35 Cr L J 1190-36 P L R. 2 A I R 1934 Lah 715, *Sheoratan v Emperor*, 35 Cr L J 1290-151 Ind Cas 298-11 O W N. 1012-A I R 1934 Oudh 418

S 25 (p 441) Statements which are not of incriminating nature is not confession *Mustafa v Emperor*, 35 P L R 359, see also *Rudrapa v Government of Mysore* 11 Mys L J 438, *Misri v Emperor*, A I R 1934 Sind 100-35 Cr L J 1332

S 25 (p 442) A *chaukidar* is not a police man A I R 1934 All 132-35 Cr L J 448-1934 A L J 143

S 25 (p 442) Village headman is not police officer *Ramcharan v Emperor*, A I R 1935 All 549-1935 A L J 478-36 Cr L J 636

S 25. (p 443) Excise officer is police officer within meaning of s 25 *Amin Shariff v Emperor*, A I R 1934 Cal 580-61 C 607-150 Ind Cas 561-35 Cr L J 1071-59 C L J 555-38 C W N 930-1934 Cr C 841 (F.B.), see also *Keratala v Emperor* A I R 1934 Cal 616-61 C 967-150 Ind Cas 980-38 C W N 1035, *Ram Karim v Emperor*, A I R 1935 Nag 13

S 25. (p 443) Sub divisional Magistrate is not police officer *Srikant Das v Emperor* 150 Ind Cas 991-35 Cr L J 1217-A I R 1934 Pat 256

S 25 (p 444) An admission of the accused to the Excise Sub-inspector is inadmissible under s 25 *Rajmal v Emperor*, A I R 1934 Nag 136-1934 Cr C 568-150 Ind Cas 1144-35 Cr L J 1233

S 25 (p 445) First information by accused to police officer admitting guilt is inadmissible being confession *Harnam v Emperor* A I R. 1935 Bom 26-36 Bom L R 1117

Ss 25, 26, (p 445) Evidence of police officer and complainant as to pointing out of various places by accused is evidence of his confession and as such not admissible under ss 25, 26 *Turib v Emperor* A I R 1935 Oudh 1-11 O W N 1385-152 Ind Cas 473-1934 O L R 875

S 25 (p 446) Where confession was made to private individual in presence of *chaukidar*, but where *chaukidar* does not take part in bringing about confession, confession is admissible *Emperor v Shankar*, 149 Ind Cas 69-35 Cr L J 894-11 O W N 636-A I R 1934 Oudh 222

S 26 (p 448) A *chaukidar* is a police officer *Jangli v Emperor*, 118 Ind Cas 475-35 Cr L J 664-11 O W N 119-A I R 1934 Oudh 19

S 26 (p 446) Confession to a fellow prisoner in lock up in the presence of guard of the lock up is not inadmissible A I R 1934 Lah 75-1934 Cr C 142 35 Cr L J 1432-1, Ind Cas 894 see also *Barnabas v Emperor* 152 Ind Cas 275-15 Pat L T 111-A I R 1934 Pat 586

S 26 (p 448) Confession to Magistrate himself while in police custody satisfies requirements of s 26 *Sidh swar Nath v Emperor*, A I R, 1934 All 351-1934 A L J 178 152 Ind Cas 174

S 26 (p 448) Bare possibility of inducement having been offered is not sufficient for holding confession is irrelevant *Hashmat v Emperor*, 15 Lah 856-37 P L R 25-A I R 1934 Lah 417

S 26 (p 448) Magistrate in Native State is included in s 26 *Mahomed Bur v Emperor* A I R 1934 Sind 103-1934 Cr C 82-151 Ind Cas 311-35 Cr L J 1328

S 26 (p 448) Statement containing denial by accused of dishonest intention is not confession *Ramsakha v Emperor* A I R 1934 Pat 651-1 P L T 586

S 26 (p 448) Mere presence of Magistrate will not make confession voluntary *Krishna Iyer Iyer* A I R 1935 Mad 479-1935 M W N 82

S 26 (p 446) Formalities of law should be strictly followed in recording confession *Ram Saksha v Emperor* A I R 1934 Pat 651-15 P L 1 586

S 29 (p 449) Statements made by the accused to a Magistrate when produced by the police for purpose of remand are admissible *Nga Po Dwe v Emperor*, A I R 1935 Rang 78-1934 Cr C 471-148 Ind Cas 1002-35 Cr L J 823.

S 27 (p 454) Section 27 is a proviso to both the sections 25 and 26 which immediately precede it *Emperor v Ramanuj*, A I R 1935 Mad 528-1934 M W N 1479

S 27 (p 456) The word fact as used in s 27 only includes physical fact *Emperor v Ramanuj*, A I R 1935 Mad 528-1934 M W N 1479

S 27 (p 461) Section 162 does not apply to the statement of an accused person. Such a statement would however be inadmissible under s 27, if it is of a nature of a confession and no material fact is discovered in consequence of the information received *Mohammad v Emperor*, A I R 1934 Lah 695-35 P L R 738

S 27 (p 461) Where a person is in police custody, such of his statements as lead to the discovery of articles are admissible *Aishan v Emperor* A I R 1934 Lah 150

S 27 (p 458) If a fact has been previously discovered by the police s 27 would not apply *Chiragdas v Emperor* A I R 1934 Lah 786-36 P I R 40, see also *Hir Narain v Emperor* A I R 1934 Lah 313-35 I L R 203-1934 Cr C 545-36 Cr L J 189

S 27 (p 468) Section 27 does not operate to make admissible in evidence a confession which would be otherwise irrelevant under s 24. Section 27 would make admissible only that part of the confession in consequence of which a fact deposed was discovered. *Hashmat v Emperor*, 15 Lah 856

S 27 (p 458) Statement of accused that leads to discovery of anything by police is only admissible. *Ghandalal v Emperor*, A I R 1934 Sind 159 = 26 S L R 41 = 1934 Cr C 126

S 27 (p 468) Only statements bearing directly on the recovery of property are admissible. Where therefore A stated that he handed on the property to B and B stated that he handed on to C and C to D and D to E, and recovery was made from E, the statements of A, B, C, D, have direct bearing on the recovery of the property, although they may have had an indirect bearing in giving the police a fresh starting point for investigation and they cannot be admitted. *Maganlal v Emperor*, A I R 1934 Nag 71 = 30 N L R 269 = 35 Cr L J 1097 = 150 Ind Cas 623 = 1934 Cr C 276

S 27 (p 468) Court should direct statement and admit only such portion as directly led to discovery. *Emperor v Salve*, A I R 1934 Bom 233 = 36 Bom L R 384

S 27 (p 468) It is not necessary that the information given by a person in the police custody shall be a confession before it can be proved under the provision of this section. Any information which relates distinctly to the fact deposed to as discovered in consequence of the information received may be passed. *Emperor v Ramannji*, A I R 1934 M W N 1479 = A I R 1935 Mad 528

S 29 (p 474) The provisions of s 164 Cr Pro Code do not affect the provisions of s 29, Evidence Act, and therefore a confession cannot be excluded from evidence as irrelevant merely because all the provisions of s 164 were not carefully complied with. *Khistali v Emperor*, A I R 1934 Oudh 404 = 10 O W N 931 = 146 Ind Cas 903

S 30 (p 481) Before any statement made by one of the accused person tried jointly with the others can be taken into consideration against such others it must fulfil two conditions (a) it must be a confession of guilt affecting himself equally with the others, and (b) it must be proved against those persons who are jointly tried with him. This section introduces a departure from the ordinary rule relating to the admissibility of evidence and must be strictly construed. *Narvab v Emperor*, A I R 1935 Lah 35

S 30 (p 482) A confession by each of the co accused throwing entire burden on the other is inadmissible as against the latter. *Narvab v Emperor* A I R 1935 Lah 35

S 30. (p 483) No doubt under s 30 Evidence Act the confession of an accused person may be taken into consideration as against other co accused but this is not tantamount to saying that such confession is to take the place of proof. *Kasimuddin v Emperor* 39 C W N 27 = A I R 1934 Cal 833 = 1934 Cr C 1368

S 30. (p 483) This section applies to proceedings under Cr Procedure Code s 110. *Richpal v Emperor* 152 Ind Cas 881 = 1934 A L J 1170 = 1934 Cr C 1246 = A I R 1934 All 927

S 30. (p 483) It is unsafe to rely upon confessions extracted under circumstances not free from doubt. *Bhagwan Din v. Emperor*, A I R 1934 Oudh 151

S 30. (p. 485) Offence in s 30 includes its abetment and attempt. *Richpal v Emperor*, 152 Ind Cas 881 = 1934 A L J 1170 = A I R 1934 All 927.

S 30 (p 488) If the statement of a person who is being tried jointly with the accused is a statement deprecating his own guilt, and seeks to clear himself at the expense of the accused, the statement cannot be taken into consideration under s 30 Evidence Act, or any other provision of the law as against the accused *Jogendra Nath v Emperor*, A I R 1934 Cal 724 = 152 Ind Cas 924 = A L R 1934 Cal 411

S 30 (p 488) The word 'proved' means proved before the prosecution case comes to an end either proved in the course of the prosecution case or proved in some proceedings previous to the trial *Nawab v Emperor*, A I R 1935 Lah 35

S 31 (p 496) Retracted confession and co accused - *vide Jahangir Lal v Emperor* 150 Ind Cas 1056 = 35 Cr L J 180, A I R 1934 Pat 586 = 15 P L T 711 = A I R 1914 Pat 586, *Kuladip v Emperor*, A I R 1934 Lah 718, *Sheoratan v Emperor*, A I R Oudh 418 = 35 Cr L J 1290, 11 O W N 1012 = 35 Cr L J 1290, A I R 1934 Pesh 1 = 35 Cr L J 719

S 32 (p 518) The expression 'written statement by person who is dead' means statement actually written or dictated by deceased *Nga Mya v Emperor*, A I R 96 Rang 42

S 32 (1) (p 540) Statements made by a person who is dead must be proved whether they are written statements or verbal statements. If they are verbal statements, the persons who heard the deceased make the verbal statements must be examined on oath as witness *Nga Mya D v Emperor*, A I R 1936 Rang 42

S 32, (1) (p 540) Statement by person who is dead as to cause of death is admissible though he was not aware of his impending death when he made the statement *Inayat v Emperor*, A I R 1935 Lah 14, see also A I R 1934 Lah 805 = 36 P L R 24

S 32 (1) (p 540) It is not safe to base conviction on dying declaration alone A I R 1934 Oudh 405 = 11 O W N 851 = 35 Cr L J 1113

S 32 (1) (p 540) In a trial for robbery statement of a person before death regarding the circumstances of robbery is relevant under s 32 (1), even though death was caused remotely by the wounds received at robbery *Nga Ba Min v Emperor*, A I R 1935 Rang 418

S 32 (1) (p 540) A magistrate should be very careful in recording dying declaration. He should see that the declarant does not get any hint or help from outside *Nem Singh v Emperor* A I R 1934 All 908 = 152 Ind Cas 41 = 1934 Cr C 1167

S 32 (2) S 34 (p 552) To prove books of accounts writer of the account book if alive should be called *Gajendra v Shankar*, 11 O W N 1323 = 152 Ind Cas 4 B

S 32 (2) and s 34 (p 552) Books of account, if no balance have been struck in them may be inadmissible under s 34 but they are however admissible under s 32 (2) as entries or memoranda made by persons who are dead, in books kept in the ordinary course of business *Babuji v Ratanlal* A I R 1934 Nag 106 = 30 N L R 192

S 32 (2) (p 552) Statements of boundaries of title between third parties are not admissible under s 32 (2) as this cannot be deemed to be statements made by persons in ordinary course of business *Soney Lal v Darbeto Niran*, A I R 1935 Pat 167 = 15 P L I 199 (F B)

S 32 (3) p 553 A statement in a sale deed by the executant that he was liable for a particular amount is admissible under s 32 (3) as a statement made against the pecuniary or proprietary interest *Babhnaji v Ratanlal*, A I R 1934 Nag 106 = 30 N L R 192 = 140 Ind Cas 1033

S 32. (3) (p 553). A statement in order to be admissible under s 32 (3) must be a statement of a relevant fact and must be against the proprietary interests of the person making it *Soney Lall v Darbdeo Narain*, A I R 1935 Pat 167 = 16 P L T 199 (F B)

S 32 (3) (p 561) Statement which makes a person liable to criminal prosecution is admissible *Gerold v Olga*, 150 Ind Cas 445 = A I R 1934 All 618 (F. B); but see *Kunjulal v Emperor*, 38 C W N 1015

S 32 (3) (p 571) Statements of boundaries in documents of title between third parties are not admissible under s 32 (3). Such a statement cannot be said to be necessarily and *prima facie* against the proprietary interest of person making it. It will be admissible only if it is shown that (1) at the time it was made it was contrary to interest of maker and (2) at the time it is sought to be used it is a statement of relevant fact *Soney Lall v. Darbdeo*, A I R 1935 Pat 167 = 16 P L R 199 (F. B)

S. 32 (3) and (7) (p 573) Where there is recital in deed that land in deed is bounded by property over which another person exercises proprietary rights, recital is no evidence against third party *Hari Ahir v Sanglat Chada*, A I R 1934 Pat 617 = 152 Ind Cas 829

S 32 (p 597) Entries in books of priests are admissible but should be accepted with care. *Acharaj Ram v Ganesh Das*, A I R 934 Pesh 78

S 32 (p 597) Statement as to age of adopted son by adoptive mother is admissible under s 32 (b) *Naina v Basant* A I R 1934 All 406 (F. B) = 1934 A L J 318

Ss 32 (5) and 50 (p 600) Statement of witness as to relationship between two persons can be admissible only under s 32 (5) or s 50 *Chunna Kumar v. Mukhat Beharilal*, A I R 1934 All 117.

S 32 (5) (p 600) Party producing a witness for proving pedigree, should elicit from his requirement under s 32 (5). *Chunna Kumar v Makhat Behari Lal*, A I R 934 All. 117

S 32 (5) (p 600). Where the relationship is created by adoption is of such importance and specifically included in the act, evidence of incidents bearing more or less directly on the fact or otherwise of an adoption and its validity would be allowed subject of course to careful scrutiny as to value *Handis v Manmatha Nath*, A I R 1936 Cal 1

S 32 (5) (p 600) Where pedigree was filed for purpose of preparation of *Khewat*, and document was more than 30 years old and signatories are all dead, pedigree is admissible *Mahadeo v Suraj Bal*, 148 Ind Cas 1041 = A I R 1934 Oudh 210

S 32 (5) (p. 600). Pedigree table relied on in previous suit is not admissible under s 32 *Jagmahar Singh v Sidhu Ram*, A I R 1934 Lah 283 = 36 P L R 503 = 15 Lah 688 = 149 Ind Cas 943

S 32 (b) (p 601) Hearsay evidence is to be restricted to proof of pedigree and not to proof of birth, death, etc *Naina v Basant*, A I R 1934 All 406 (F B) = 1934 A L J 318

S 33 (p 616) Section 33 makes evidence given by a witness in "a judicial proceeding" admissible in evidence in a subsequent judicial proceeding, where the question in controversy in both proceedings is identical and where the witness is dead or cannot be found or is incapable of giving evidence *Sri Krishna v. Ahmadi Bibi*, A I R 1935 All 187 = 1935 P L J 235

S 33 (p 616) Where in a case under ss 366 and 458, Penal Code, the horoscope of the accused was produced to show that the girl was below 18 years of age as the person, preparing the horoscope was examined in the committing Court and he admitted that the horoscope was prepared by him but he did not

appear in the Sessions Court though summoned, and it was alleged that he did not get the summons. *Held* that it was not open to the prosecution to invoke s 33, Evidence Act, and the Sessions Judge was right in refusing to admit evidence given in the lower Court *Superintendent v Forhad*, A. I. R 1934 Cal 766

S 33 (p 616) An inquiry before the Coroner, although it may be a judicial proceeding, is not a proceeding between the prosecutor and the accused. The proceedings before the Coroner are merely an inquiry into the circumstances leading to the death of the person whose death is under inquiry, and it is impossible to say that the Crown is a party to those proceedings, even if it can be said that the accused is a party on the ground that he was during those proceedings a suspect. Hence the evidence given by a witness before a Coroner is not admissible under s 33 if such witness dies prior to inquiry before Magistrate *Emperor v Mahomed Yusuf*, A I R 1933 Bom 479

S 33 (p 622) The statement made by a person before a committing Magistrate can be transferred to the record of the Sessions Judge only if the person is examined as a witness before the Sessions Judge. If such a person is not examined before the Sessions Judge as a witness his statement can not be transferred under s 288, Cr 1ro Code. The proper section applicable is section 33 Evidence Act, but in such a case it is necessary for the Sessions Judge to hold that the witness was incapable of giving evidence within the meaning of that section *Emperor v Nath Singh* A I R 1934 Lah 212 = 35 P L R 75 = 35 Cr L J 349 = 149 Ind Cas 234

S 33 (p 623) A witness who had been brought from Calcutta and examined on two occasions once before framing of the charge and again after framing of the charge was cross examined and re examined in great detail so that there could be no doubt that all that could be got out of this witness had been got out of him. The complainant was not a man of means to bring such witness from Calcutta, for the *de novo* trial must have been a very heavy drain on his purse. Moreover there would be delay in securing attendance of such a witness. *Held* that the difficulty and expense involved in calling this witness were sufficient to make such evidence admissible under s 33 *Fernandes v Emperor*, A I R 1935 Rang 484

S 33 (p 626) The person who is called by Proviso (1) 'a representative in interest' of another is a person who was a party to the first proceedings. Whatever may have been the intention of those who framed the section, the first proviso exactly inverts the requirements of the English law, which requires that the parties to the second proceedings, should legally represent the parties to the first proceeding, or be their privies in estate. The first proviso requires that the party to the first proceeding should have represented in interest the party to the second proceeding in relation to the question in issue in the first proceeding to which 'the facts which the evidence states' were relevant. It covers not only cases of privity in estate and succession of title, but also cases where both the following conditions exist, viz, (1) the interest of the relevant party to the second proceeding in the subject matter of the first proceeding is consistent with and not antagonistic to the interest therein of the relevant party to the first proceeding and (2) the interest of both in the answer to be given to the particular question in issue in the first proceeding is identical. There may be other cases covered by the first proviso; but if both the above conditions are fulfilled, the relevant party to the first proceeding in fact represent in the first proceeding the relevant party to the second proceeding in regard to his interest in relation to the particular question in issue in the first proceeding, and may grammatically and truthfully be described as a representative in interest of the party to the second proceeding. What the first proviso aims at securing is that the evidence shall not be admitted unless the person who tested, or had the opportunity of testing, the

evidence by cross examination either is himself or represented the interests of, the party to the latter proceeding against whom the evidence is tendered is that he was (in the latter case), in effect, fighting that person's battle as well as his own. Where a party to the second proceedings were not himself a party to the first proceeding the admissibility of the evidence in favour of such a party must be tested by its admissibility if tendered against him. If not admissible against him it cannot be admissible in his favour. *Krishnaaya v Venkata*, A I R 1933 P C 202-60 I A 336-1933 P L J 1039-38 L W 409-1933 M W N 191-38 C W N 1-35 Bom I R 1076-58 C L J 335-65 M L J 479

S 33 (p 629) The accused has a right to cross examine a prosecution witness before the charge is framed against him and if he has failed to do so not only had he opportunity but he had the right of cross examining the witness and the action of the Court in treating the evidence of any such witness under s 33 is justified when it is found impossible to produce him for further cross examination under the provisions of s 256 Cr Pro Code. *Gurudin v Emperor*, A I R 1935 Nag

S 33 (p 629) Actual cross examination by adverse party is not necessary, it is enough if there was opportunity to cross examine. *Gouri Dutta v Dowling* A I R 1934 Pat 413-151 Ind Cas 683

S 34 (p 638) Entries in account books by the agent of a party are irrelevant against the party under this section. *Nanilal v Nutbehari Das*, 38 C W N 861

S 34 (p 638) A day book which has been entered after four months from the happening of an event and the rough notes of which are available is not a document which can be held to have been kept in the regular course of business. These remarks apply a fortiori to ledger which is prepared from such a day book. *Arjan Singh v Sirjan Singh* A I R 1935 Pesh 44 see also *Nanilal Das v Nutbehari Das*, 38 C W N 861. *Nanak Chand v Parameshri Das* 35 P L R 539

S 35 (p 65) Guardianship certificate does not fall under this section. *Naina v Basant* A I R 1934 All 406 (F B) 1934 A L J 318

S 35 (p 651) Entry as to age in school register based on statement by father since deceased is admissible under ss 35 and 32(5). *Latafat v Onkar Mal* A I R 1935 Oudh 41-152 Ind Cas 1042-11 O W N 1589, see also *Las Baba v Government of Mysore* 12 Mys L J 133-39 Mys H C R 406. *Liladhar v Mabibi* A I R 1934 Na. 44-16 N L J 232-149 Ind Cas 660

S 35 (p 651) Municipal register is admissible under section. *Ju Bhagwan v Guttoo*, 11 O W N 410-A I R 1934 Oudh 67

S 35 (p 6) The words an entry the opinions of public officer based on or made before them in the course of enquiry. Code. *Ghanay v Mehleb* A I R 1934 Lah 890

S 35 (p 651) The very wording of s 35 conveys the idea of a duty imposed upon the matter of the entry by law or his official position to record the information he possesses or has gathered in an official document of the nature described therein. It further imports that the entry will be of a permanent nature. *Ghulan v Surindar* A I R 1936 Lah 37

S 35 (p 651) Entries as to age in vaccination and school register vide *Superintendent v Torhad* A I R 1934 Cal 766

S 35 (653) The *Khirsra Girda* varis are public documents and admissible under s 35. *Mohammad Din v Fat'h Din* A I R 1934 Lah 698-35 P L R 725-153 Ind Cas 209-1934 Cr C 1010

S 35 (p 653) The documents consisting of mere opinions expressed in secretarial correspondence which passed between various officers of the Government who had held no personal enquiries in the matter are admissible in evidence *Ghulam Mohammad v Samundar Khan*, A I R 1936 Lah 37

S 35 (p 654) A certificate of birth of a person is evidence and conclusive evidence of his age unless disproved by the evidence of the witness of the party denying correctness of it *Nanha v Baijnath*, A I R 1935 Pat 474-16 P L T 629

S 35 (p 654) Public servant need not be compelled by legislative enactment to discharge duty of preparing or keeping document *Phakkar v Progn*, A I R 1935 Oudh 268=1935 O W N 321=154 Ind Cas 575=1935 O L R 176

S 35 (p 657) The entries in the *riwajnam* owe their weight to the principle originally laid down in English law which received statutory recognition in s 35 Evidence Act. The principle is that statements made by a public officer should be receivable in evidence because it is his duty to satisfy himself of the truth of the statements made. If the officer himself is not satisfied of the truth of the statements made such statements have less weight than they otherwise would *Sukh Devi v Faquir Singh*, A I R 1935 Lah 434

S 35 (p 658) *Butwara* record is not conclusive evidence. It is weak evidence of title *Charan v Ramani*, 60 C 302=38 C W N 268=A I R 1234 Cal 488

S 35 (p 658) As regards admission *vide Narasayya v Veerayya*, 40 L W 810

S 35 (p 660) The *Khara Girdadars* are public documents *Mahamed v Fateh*, 151 Ind Cas 786=35 P L R 405=A I R 1934 Lah 698.

S 35 (p 660) An entry in the first information report is admissible under s 35 of the Act *Babu v Government of Mysore*, 11 Mys L J 475=39 Mys H C R 75

S 35 (p 660) The *Ahasra paimush* is not a record of title but a mere record of survey and carries with it no presumption of correctness so far as the question of ownership is concerned *Kartar Singh v Mehr Nishan*, A I R 1934 Lah 885

S 35 (p 660) As regards value of entries in survey record *Kumar Kamakhya v Abhim Singh*, 13 Pat 589=39 C W N 41=150 Ind Cas 807=11 O W N 1025=1934 A L J 793=1934 M W N 810=15 Pat L T 555=40 L W 342=60 C L J 153=A I R 1934 P C 182=64 M L J 450 (P C)

S 35 (p 666) *Thak* maps are good evidence of the state of things at the date of the Permanent Settlement in the absence of evidence to the contrary *Kumar Raj v Barbani coal*, A I R 1935 Cal 361=62 C 316=60 C 477

S 40 (p 682) *Vide Hridayanath v Probodh chandra*, A I R 1933 Cal 923=37 C W N 1148=60 C 1171=57 C L J 549, *Ramparekha v Ram Jhari*, A I R 1933 Pat 690

S 41 (p 690) A judgment in heirship proceeding is not a judgment *in rem* in a matrimonial Court which would be binding under s 41 Evidence Act *Bayata v Parvilega*, 144 Ind Cas 442=35 Bom L R 118=A I R 1933 Bom 126

S 41 (p 693) A decree under s 42 Specific Relief Act but not in exercise of matrimonial jurisdiction is not a judgment *in rem* *Khambata v Khambata*, 6 Bom L R 1021

S 41 (p 694) A judgment in Insolvency proceeding is a judgment *in rem* *Bansiram v Firm Aninda Ram*, A I R 1935 Pat 213.

S 41 (p 695) An order in lunacy proceeding, *vide Subba Naicker v Solappa*, 56 M 904=1933 M W N 514=A I R 1933 Mad 624=65 M L J 279

S 42 (p 699) A judgment relating to *wikf* property is a judgment of a public nature *Misbiuddin v Vidjasagar*, 36 P L R 106

S 42 (p 700) Judgment in which existence of usage has been judicially recognised is admissible but is not conclusive proof *Ragunath v Ramperlab*, A I R 1935 Sind 38

S 43 (p 704) Previous judgment in main suit becomes relevant in objection proceedings in execution of decree *Vednath v Mahomed*, A I R, 1934 Rang 212=154 Ind Cas 123

SS 43, 11, 13 (p 704) Previous judgment not *inter partes* though does not operate as *res judicata* is admissible in evidence for limited purpose but not for discussing basis of its decision *Hemchandra v Purnachandra*, 59 C L J 320=A I R 1934 Cal. 788=A L R 1934 Cal 653

S 44 (p 705) S 44 has no application to proceedings under s 73 C P Code It is only decrees under ss 40, 41, and 42, Evidence Act, which are referred to in s 44, Evidence Act, and such decrees have no application in execution proceedings *Biswambhor v Aparna*, A I R 1935 Cal 290=39 C W N 490

S 44 (p 705) *Vide Keshavlal v Amarchand*, A I R 1933 Bom 398=35 Bom L R 630=57 B 456

S 44 (p 705). S 44 has no application to proceedings under s 73 C P Code It is only decrees under ss 40, 41, 42, Evidence Act, which are referred to in s 44, Evidence Act, and such decrees have no application in execution proceedings *Biswambar v Aparna*, A I R 1935 Cal 290=39 C W N 490

S 44 (p 742) Orders issued by Courts without authority is not binding on another Court *Keshavlal v Amarchand*, A I R 1933 Bom 398=35 Bom L R 630=57 B 456

S 45 (p 734) A Court is not to surrender his own opinion to that of experts who are called before it, but with such help as the experts can afford the Court must form his own opinion on the subject in hand *In the matter of an Advocate*, A I R 193, Rang 178

S 45 (p 735) Report of expert by itself is not evidence Expert should be produced in Court and his evidence should be tested by cross examination *Bhoore Singh v Karan Singh*, A I R 1935 All 142=193 A W R 76

S 45 (p 735) In case of expert opinion basis of expert's opinion should be put before court *Tili v Alfred*, 1934 A L J 1129=A I R 1934 All 27

S 45 (p 742) As regards value of evidence of interpreters of Hindu law, *Vide Sabitri v F A Savi*, 12 Pat 359=14 Pat L T Sub I=A I R 1933 Pat 306

S 45 (p. 743). Doctor's opinion as regards age is not entitled to more weight than that of any other person *Nasrullah v Emperor*, A I R 1934 Oudh 32=O W N 1274

S 45 (p 746) Judge should not take upon himself the duties of hand writing expert or form opinion about genuineness in privacy of his chamber. *Borkat Ali v Kirtar Singh* A I R 1935 Lah 555=16 Ind Cas 253. Objection in revision is not competent *Karim Din v Ata*, A I R 1934 Lah 230

S 45 (p 753) The evidence of handwriting expert has often found to be faulty but so far as finger prints are concerned it has never so far been found that two finger prints can be identical in all respects. Hence where the execution of an entry is proved by evidence of thumb impression experts, the burden of proving want of consideration is on the executant *Ganga Sahai v Molar*, A I R 1935 Lah 147

S 45 (p 753) Evidence of expert that one document has been typed on same machine as another is not admissible, Court must come to its own conclusion on such point *Bacha Babu v Emperor* A I R 1935 All 162, see also *Jhabwala v Emperor*, 1933 A L J 799=34 Cr L J 957=A I R 1933 All 590, *Manibendra v Emperor*, A I R 1933 All 498

S 45. (p 754) Where a marriage is attacked on the grounds of non-observance of ceremonies, the Court is not bound to accept the opinion of a religious expert however high his position may be placed in church *Till v. Alfred*, 56 A 428=1934 A L J 1123=A I R 1934 All 273

S 45 (p 756) The Imperial Geologist is a highly responsible officer and a duly qualified scientist who would never venture to give any definite opinion on a question unless he has the fullest scientific data in support of his conclusion. His opinion therefore is entitled to great weight. *Ghirrao v. Emperor*, A I R 1933 Oudh 265=84 Cr L J 1009=145 Ind Cas 470

S 47 (p 762) Where the only witness was examined to prove a particular letter to be in the handwriting of the accused stated "I have no writing of H with me. I have no correspondence with him. From a single letter I would not be able to identify the handwriting of any person. I was not particularly friendly with H." Held that the evidence was hardly sufficient under s 47 to prove that the letter was in the hand writing of H. *Hemraj Lodhi v. Rimcharan Lodhi* A I R 1931 Nag 204=1934 Cr C 898

S 47 (p 762) Where the fact to be proved is a signature and a witness merely says that the signature is of the person concerned there is no proper evidence of the facts required to be proved under section 47 *Surendra Krishna v. Mirza Mahamad*, 40 C W N 226 (P C)

S 4 (p 762) A finding of the lower Court to the effect that a person unable to read and write certain characters could prove the handwriting of another person in those characters because he had the occasion to see the latter write, cannot be questioned in second appeal because, though such a thing is rare, is not impossible *Rim Chandra v. Jaith Mall*, A I R 1934 All 990=4 A W R 676

S 47 (p 769) Statement by another in writing with regard to partnership cannot be proved different person. *In the Matter of B*, A I R 1935 All 1023=1935 A W R 12-9

S. 48 (p 773) A living witness may state his opinion on the existence of a family custom and may state as grounds thereof information derived from deceased person, but it must be the expression of independent opinion based on hearsay and not repetition of hearsay. The weight of the evidence would depend on the position and character of the witness, and of the persons on whose statements he has formed his opinion. However, evidence, oral or documentary as to statements of a deceased person as to the custom in a family is not admissible if it appears that such statement were made after a controversy as to the custom had arisen. *Amina Khatun v. Kahlurrahman* A I R 1933 Oudh 246=8 Luck 445=10 O W N 268.

S 48 (p 773) Value and sufficiency of expert evidence cannot be questioned on second appeal. *Jafar Beg v. Ujagar Lal* A I R 1935 All 501

§ 50 (p 778) Statement of witness as to relationship between two persons can be admissible only under s 32 (5) or s 50 *Chunna v. Mukat*, 151 Ind Cas. 338—A I R 1934 All 117

§ 51 (p 784) No doubt the Excise Sub Inspector is an expert in his
 ow but the Court should under
 s based *Ram Karian Singh*
 vi

§ 51. (p 784) It is not enough for the chemical examiner merely to state his opinion. He must state the grounds on which he arrives at that opinion. As the chemical examiner merely tenders a report and he does not appear and give evidence, it is extremely desirable that his report should be full and complete and take the place of evidence which he would give if he were called to Court as a witness. *Gajrinu v Emperor* A I R 1934 All 394=144 Ind Cas 357=34 Cr L J 754=1933 Cr C 654

§ 54. (p 802) Evidence of previous conviction cannot be admitted during trial. It cannot also be referred to by Judge while addressing jury. *Bhura Singh v Emperor*, A I R 1935 Sind 115

§ 58 (p 80) In spite of waiver of proof by an admission under s 58 Evidence Act, a note or other instrument insufficiently stamped cannot be acted upon or decree given upon it. *Alipati v. Tasiraddi*, A. I R 1933 Mad 17=64 L J 79=37 L W 157=1933 M W N 663

§ 58 (p 840) While s 58, can be invoked when the documentary evidence about the admitted facts is shut out by provisions made in purely revenue laws, it cannot be invoked to overrule the provisions of non revenue enactments, nor can it be used to bind the party who has made an admission of the genuineness of a document, when such admission is accompanied by a legal plea that the contract and the other facts mentioned in that document could not be relied upon by the opposite party owing to the provisions of the statutory laws relating to registration or attestation. *Bashehar Nath v. Aslan Feroz Sha*, A I R 1935 Pesh 12

§ 60 (p 868) Hearsay evidence is excluded. *Annamuthu v Emperor*, 1933 M W N 1424

§ 60 48 (p 869) Person who holds an opinion should be cited as a witness. *Amin v. Khalil*, A I R 1933 Oudh 246

§ 60 (p 869) The value of evidence depends upon the character of the person who deposes. *Mulchand v Demgir* A I R 1933 Sind, 213

§ 60 (p 869) The fact that a person is a habitual offender may in view
 neral reputation or otherwise
 the rule against receipt
 evidence Act *Raghubar v*

Emperor A I R 1934 All 735

§ 65. (p 887) Where secondary evidence of the contents of a deed are led without objection by the other party objection cannot be raised in second appeal. *Umeruddin v Ghulam Moham mad* A I R 193 Lah 628

§ 65, 66 (p 894) The only purpose of a notice under section 65 and 66 of the Evidence Act is to give the party an opportunity by producing the original to secure if he pleases the best evidence of the contents and under section 66 the Court has absolute power when it thinks fit to dispense with a notice under these sections. *Surendra Krishna v Alisa Moham mad* 40 C W N 225= A I R 1936 P C 15, see also *Jhabwala v Emperor* A I R 1933 All 690.

§ 65 (p 899) Where a Will has not been seen for a long period of time, a statement by a person in whose custody it is alleged to have been given, that

it is not with him and never was, is sufficient evidence of loss to satisfy s 65
Kunwar Basant v Kunwar Bij Raj, 39 C W N 1057

Ss 65, 80 (p 902) Where mortgage was admitted in *vajis u lars* more than 30 years old and signed by another for mortgage s 90 applies and mortgage can be proved by certified copy *Bhairon Prosad v Abalak*, 148 Ind Cas 1972 = A I R 1934 All 529

S 66 (p 915) The identity of the machine on which two have been type written would not by itself show that the writer of the two is one and the same person But such a conclusion may be drawn from additional evidence *eg* internal evidence afforded by the document, or external circumstances, or the continuity of the correspondence passing between the sender and the addressee *Jhawala v Emperor* 145 Ind Cas 481 = 34 Cr L J 967 = 1933 A L J 799 = A I R 1933 All 690

S 67 (p 914) Thumb marks are not exempt from provisions of s 67
Ramamananama v Busarayya, A I R 1935 Mad 558 = 40 M L W 277 = 1934 M W N 443 = 151 Ind Cas 990

S 67 (p 914) S 67 is not restricted to proof of handwriting of executant alone *Ponnuswami v Kalyan Sundara*, A I R 1935 Mad 365 = 57 M 662 = 66 M L J 712 = 149 Ind Cas 257 = 39 M L W 571 = 1934 M W N 38

S 67 (p 915) The meaning of the term "sign" is different from one as defined in s 3 of the General Clauses Act *Shasadi v Beni*, A I R 1934 All 390

S 68 (p 921) If signature of attesting witness is proved, everything on face of document is proved *Ponnuswami v Kalyan Sundaram* A I R 1935 Mad 365 = 57 M 662 = 66 M L J 712 = 149 Ind Cas 257 = 1934 M W N 384

S 68 (p 932) In a case where attestation according to law is specifically denied but the signing of the document required to be attested is not so denied it is necessary to call atleast one attesting witness to prove execution under s 70 of the Evidence Act *Ebrahim Mandal v Akshoy Konor*, 40 C W N 151, see also *Asizunusa v Siraj Husain*, 1934 A L J 817 = 152 Ind Cas 146 = A I R 1934 All 507

S 68 (p 932) Where execution of mortgage was not specifically denied, marginal witness need not be called *Jhillar v Rajnarain*, A I R 1935 All 781 = 156 Ind Cas 45, see also *Gobinda v Chanan Singh*, A I R 1933 Lah 378; *Dotas v Sheo Deo* 17 R D 70

S 68 (p 932) Proviso does not dispense with proof of mortgage *Karlar v Didar*, A I R 1934 Lah 282 = 149 Ind Cas 1109

S 69 (p 935) Where witness says that the executant signed his name in the mortgage deed in my presence and in the presence of the attesting witnesses and also identifies their signatures but did not say that the attesting witnesses signed in his presence, the requirements of section 69 have been fulfilled *Bhairon Singh v Ganga Narayan*, A I R 1935 All 527

S 73 (p 947) There is considerable doubt as to whether s 73 refers to an accused person at all *Kishore v Emperor*, A I R 1935 Cal 308 = 39 C W N 936

S 73 (p 947) A magistrate making an enquiry before commitment has no power under s 73 to ask another magistrate to direct an accused person to make a specimen signature for comparison with other writings *Kishore v Emperor*, A I R 1935 Cal 308 = 39 C W N 985

S 73 (p 949) Standard writing must be proved to be in alleged writer's handwriting Comparison is hazardous proof When made by stranger to subject

and without guidance from experts or arguments of Counsel *Lafat v Onkar*, A I R 1936 Oudh 41 = 152 Ind Cas 1042 = 1934 O L R 922 = 11 O W N 1589

S 74 (p 953) Education officers of a Government are public officers *Las Babu v Government of Mysore*, 12 Mys I J 133

S 74 (p 955) Certified copies of deposition are admissible *Karapay v Masandi* A I R 1933 Rang 212

S 74 (p 957) A certified copy of the pedigree given in the *Khwat* of village is admissible in evidence *Sheo Shankar v Mt Ram Dei* A I R 1935 Oudh 231 = 1935 O W N 162 = 1935 O L R 119

S 74 (p 957) Certified copies of confession are admissible *Mahamed v Emperor*, 1933 A L J 1551 (F B)

S 80 (p 968) Certified copies of confession are admissible to prove act of Magistrate recording it *Mohammat Ali v Emperor* A I R 1934 All 81 (F B) = 1933 A L J 1551 (F B)

S 80 (p 969) Dying declaration before Magistrate recorded by him is inadmissible in evidence without calling Magistrate as a witness *Sunuj Bali v Emperor* A I R 1934 All 340

S 88 (p 978) Entry in cadastral survey map has presumptive value against landlord of neighbouring estate *Radhi Kishun v Shyam Das* A I R 1933 Pat 671

S 87 (p 983) Maps prepared by Revenue authorities after due inquiry are presumed to be correct *Tarik Dis v Secy of State* A I R 1935 P C 125

S 90 (p 988) In the case of documents purporting or proved to be 30 years old and produced from proper custody s 90 allows the Court to presume that the signature and every other part of such documents which purport to be in the handwriting of any particular person is in that person's handwriting and in the case of a document executed or attested that it was duly executed and attested by the persons by whom it purports to be executed and attested, under the General Clauses Act (10 of 1897) the word sign includes mark with reference to a person who is unable to write his name S 90 makes no provision for any presumption in regard to seals nor can a seal be regarded as a signature under the definition contained in the General Clauses Act *Special Manager v Tribeni Prasad* A I R 1935 Oudh 289 = 1935 O W N 387 = 1935 O L R 217 = 154 Ind Cas 965, see also *Nilsa v Johorlal* 38 C W N 753

S 90 (p 988) When a sale has been made nearly 30 years before the suit is brought and all the parties to the transaction have died it is impossible to expect full and detailed evidence of all the circumstances that gave rise to the transaction and presumptions are permissible in the details which have obliterated by time *Bishnaji v Ratanlal* A I R 1934 Nag 106 = 30 N L R 192

S 90 (p 989) Under s 90 of the Evidence Act the period of 30 years is to be reckoned not from the date upon which the deed is filed in Court but from the date on which it having been tendered in evidence its genuineness or otherwise becomes the subject of proof *Surendra Krishna v Mirza Mahammad* 40 C W N 226

S 90 (p 989) Recitals in a deed of alienation thirty years old by a limited owner stating legal necessity can be relied on in the absence of any evidence either for or against such necessity *Krishna Ayyar v Mattu Lakshmi Ammal* A I R 1931 Mad 169 = 65 M L J 342 = 39 M L W 701 = 150 Ind Cas 1137

§ 90 (p 989) Period of 30 years is to be reckoned from date on which document is tendered in evidence and not date of filing it *Surendra v Mirsa Mohammed* A I R 1936 P C 15

§ 90 (p 991) Under s 90, what the Court may presume is that the signature and every other part of such document which purports to be in the handwriting is in that person's handwriting. In the case of imaginary persons like *Imams* there can be no question of signature and handwriting and an attempt to apply to such documents as *Imams letters* is never futile *Man soor li v Taiyabali* A I R 1935 Nag 15f

§ 90 (p 991) Where document was written by licensed stamp vendor 55 years ago and comes from proper custody, benefit of s 90 can be claimed A I R 1934 Lah 685-35 P L R 661-153 Ind Cas 23

§ 90 (p 993) Section 90 requires the production to the Court of the particular document in regard to which the Court may make the statutory presumption. Production of a copy is not sufficient to justify the presumption of execution of the original. If the document produced is a copy admitted under s. 65 as secondary evidence and it is produced from proper custody and is over thirty years old when the signature authenticating the copy may be presumed to be genuine *Basant Sin h v Brij Raj*, 39 C W N 1057

§ 90 (p 993) The presumption under s 90 in regard to documents thirty years old arises in the case of copies as well as of originals *Gir Har sarooft v Bhagrandin* A I R 1935 Oudh 96 11 O W N 1435-1934 O L R 890-152 Ind Cas 861

§ 90 (p 998) Presumption as to due and execution and attestation arises even to copies when copy is true copy of the original *Shri Gopi Nath v M u Chitra*, A I R 1934 Nag 67-30 N L R 155

§ 90 (p 994) The words 'duly executed and attested' signify execution and attestation as prescribed by law *Rajeshwar v Har Kishan*, A I R 1933 Oudh 170-10 O W N 147

§ 90 (p 996) Ordinarily an appellate Court would be slow to interfere with the discretion exercised by the lower Court in the matter of raising presumption under s 90 but the discretion allowed by the section is a judicial discretion in principle and after due regard to *Minager v Tribeni Prosad* A I R 1935 O L R 217-154 Ind Cas 963, see also *Gir Har Sarooft v Bhagrandin* A I R 1935 Oudh 96-11 O W N 1435-1934 O L R 890-152 Ind Cas 861 *Radha Kishun v Busdeo* A I R 1935 Oudh 482 156 Ind Cas 990-1935 O W N 842-1935 O L R 454

§ 91 (p 1002) Section 91 lays down that the terms of contract or of an agreement or of the disposition of property may not be established by oral evidence when they have been reduced to the form of a document but it does not say that no other evidence may be given of facts set forth in the recitals in a document *Bhargu v Gaya Prasad*, A I R Oudh 57

§ 91 (p 1002) Where the relationship of the parties was determined by the terms of the lease and these are embodied in the said document oral evidence to prove these terms was barred by s 91 *Mohammad v Saroda* A I R 1934 Lah 743-148 Ind Cas 558

§ 91 (p 1002) Production of oral evidence to prove terms of written contract is barred *Shan v Raghu* A I R 1934 Lah 606-153 Ind Cas 1076, but see *Aimna v Lakshmi*, A I R 1934 Lah 705

§ 91 (p 1002) Document not admissible to prove terms can not be used to show that it contains all terms of contract *Datto Shivram v Baba Saheb*, A I R 1934 Bom 149-36 Bom L R 859-58 B 419

S. 91 (p 1002) The term "in proof of such matter" must carry with it the term "in disproof of it" because if evidence were to be admitted on one side, it would have to be admitted on the other *Rambhar v Chatur Ghun Rai*, A I R 1935 All 58

S 91 (p 1002) Where a contract is signed by one person evidence to show that another is also a party to it or is bound by it is admissible *Mun swami v Thandu Naraya*, A I R 1935 Mad 5=1935 M W N 1084

SS 91, 92 (p 1002) Oral evidence to prove separate contemporaneous agreement that amount mentioned will not be paid is not admissible *Mohammad Taki v Jang Singh*, A I R 1935 All 529=1935 A L J 560 (F B)

SS 91, 92 (p 1002) The acknowledgment of receipt of the whole or part of the sale consideration in a deed of sale is not a term of the deed of sale and oral evidence may be given to show that the amount acknowledged or any part of it was not received *Taki v Jang Singh*, 1935 A L J 560=A I R 1935 All 529 (F B), see also *Hukum v Shambhu*, 1935 A L J 54=A I R 1935 All 346 But the amount of sale consideration is a term of deed of sale, when the terms of a deed of sale have been proved according to s 91 of the Act, no evidence of any oral agreement or statement shall be admitted as between the parties to the deed of sale or their representatives for the purpose of contradicting, varying, adding to, or subtracting from the amount of sale consideration *Moham Taki v Jang Singh*, A I R 1935 All 29 (F B)

S 91 (p 1002) Although a document is inadmissible for the purpose of proving a claim, it may be admissible for a collateral purpose, that is, a purpose foreign and not subordinate to the purpose, for which document was executed *Tribhuvan Ojha v Ramchandra*, A I R 1935 Pat 375 14 Pat 233=16 P L T 475

SS 91, 92 (p 1003) Where one party tenders oral evidence to prove that the amount acknowledged or any part of it was not received, this does not give the other party a right to produce evidence of any oral agreement or statement that the amount of sale consideration was less than what entered in the deed of sale *Mohammad Taki v Jang Singh* A I R 1935 All 529 (F B)=1935 A L J 560 (F B)

S 91 (p 1004) If there is a document evidencing the contract between the parties then that and that alone is the repository of the terms of the contract between the parties and all else reduced to silence *U Sin v U Tun* A I R 1935 Rang 473

S 91 (p 1006) Evidence of the contents of a document inadmissible for want of registration cannot be given *Nantullu v Safia*, A I R 1935 Bom 208 37 Bom L R 82, but see *Sidamma v Chenna barappa*, 12 Mys L J 236

S 91 (p 1006) Even where the loan is not antecedent to or independent of the bill but is contemporaneous with it, the lender when the note turns out to be invalid can fall upon the original contract express or implied arising from the loan The effect of s 91 is merely to provide that the contract embodied in the bill shall be proved by the bill itself, but that does not mean or imply that the bill has either destroyed or superseded the original right, for to hold that it does, would amount to holding that the rule of evidence overrides a well settled principle of substantive law, viz., that a negotiable instrument operates only as a conditional discharge The bill can be treated only as a contract but not having the effect of superseding the original right *Chinnai v Srinivasa*, A I R 1935 Mad 206=67 M L J 912, see also *Ganesh Prasad v Bechu Singh*, 147 Ind Cas 443=A I R 1934 All 271, *Ma Ung Chit v Koshan*, A I R 1934 Rang 389=12 Rang

500-512 (Ind Cas 1038 but see *Mirsa Murad v Shipley* A I R 1934 All 837-151 Ind Cas 123, *Gulari v Fasihunnissa*, 1934 A L J 1185, *Chockalingam v Palanappa* 67 M L J 595

S 91 (p 1006) Where deed is clear and unambiguous oral evidence is not admissible *Sujatnand v Gobind* A I R 1934 All 100, see also *Allah v Punjab Bank* A I R 1934 Lah 181 35 P L R 200

ES 91, 92 (p 1011) Mortgagor can prove by parol evidence that money sought to have been borrowed has not actually been borrowed *Mohammad Taki v Jang Singh* A I R 1935 All 529-1935 A L J 560 (F B)

S 92 (p 1011) Courts are empowered to go behind the apparent terms of a registered document and to hold that what purports to be a mortgage with possession can by the subsequent conduct and intention of the parties be shown to be in fact not a mortgage with possession but contract merely by hypothe- cating land by way of collateral security *Gopichand v Mahammad Umar* A I R 1935 Pesh 176

S 92 (p 1022) For admissibility of oral agreement to vary etc, terms of written contract law must be ascertained only from the section *Alakesh Chandra v Aranda Chandra* 61 C 341-A I R 1934 Cal 564

S 92 (p 1023) The Court in considering whether oral evidence can be given or not has to look to the Evidence Act and the equitable consideration which has influenced the English Courts in like cases have no application in this country *Khunaji v Damaji* 148 Ind Cas 267-35 Bom L R 1197-A I R 1934 Bom 39

S 92 (p 1024) It is doubtful whether evidence is admissible in the case of consent decree to explain the ambiguity *K P Ganapatty v K P Sibra- nianiya* A I R 1933 Mad 516 144 Ind Cas 95

S 92 (p 1024) A decree is an adjudication by a Court of the rights of the parties litigating before it it is not an act of the parties but an act of the Court and derives its binding force and validity from the authority of the Court and not from any agreement or contract between the parties. Hence a decree or its terms cannot be varied or modified except by the Court. It is a matter of procedure and not rules of evidence. The parties can not by their agreement alone vary or modify the terms of the decree whether the agreement be oral or written. Section 92 therefore has no application to the decrees *Adappa Papamma v Dasbha Venkaya* A I R 1935 Mad 860 1935 M W N 685-42 M L W 365

S 92 (p 1024) Where the judgment debtor pleads that the decree-holder has accepted a smaller sum that was due to him under the decree in full satisfaction of it s 92 Evidence Act does not bar him from proving such adjustment under order 21 rule 2 C P Code by oral evidence *Kamakshi v Thangamathu*, A I R 1935 Mad 424-1935 M W N 335

S 92 (p 1024) Oral evidence to prove an agreement to take less than what is due under a promissory note is not admissible *Ma Ou Bar v V L P R Chattjare* A I R 1935 Rang 188

S 92 (p 1024) Oral evidence as to real nature of consideration is admis- sible *Gangaram v Alah Nui* A I R 1935 Sind 48-28 S L R 265- 153 Ind Cas 635

S 92 (p 1024) Section 92 is no bar to consider question as to what extent consideration is absent under s 44 Negotiable Instruments Act *Biru Subramani v Venkatarama*, A I R 1935 Mad 253-67 M L J 650- 40 M L J 706

§ 92 (p 1028) Persons not party to a sale deed can let in oral evidence to establish that it was not executed with knowledge and consent of another as mentioned in sale deed *Maung Hsane v Maung Aung*, A I R 1935 Rang 122

§ 92 (p 1028) Agreement not to execute the decree against a particular judgment debtor does not vary its terms. The agreement pleaded is not one to which all the parties to the decree are parties but only some of them and s 92 does not apply *Adippi Papamma v Disbha Venkaya*, A I R 1935 Mad 860 = 1935 M W N 685 = 42 L W 365

§ 92 (p 1029) Section 92 excludes admission of any oral agreement or statement between the parties to the agreement *Basant v Abasali*, 150 Ind Cas 635 = 36 Bom L R 158 = A I R 1934 Bom 145

§ 92 (p 1031) Executant of promissory note cannot prove that as between promisee and him, he is only surety *Venkata v Karnadan*, A I R 1935 Mad 643 = 1935 M W N 525 = 42 M L W 24 156 Ind Cas 827, see also *Akhunji v Damaji*, A I R 1934 Bom 39 = 35 Bom L R 1197 = 148 Ind Cas 260

§ 92 (4) (p 1031) Contract to release between mortgagee and stranger need not be in writing and registered. It can be oral *Manuswami v Gobindaraju*, A I R 1935 Mad 113 = 40 M L W 942 = 153 Ind Cas 668

§ 92 (p 1033) Rate of interest and time and mode of repayment of principal are essential parts of mortgage deed. Verbal agreement making change in these terms must be excluded *Maung Bi v Nimmram*, A I R 1934 Rang 316 = 13 Rang 22 = 154 Rang 189

§ 92 (p 1034) Where mortgage is alleged to be modified by subsequent verbal arrangement, such subsequent verbal agreement cannot be proved *Kamta Singh v Chaturbhuj*, A I R 1935 P C 98 = 11 O W N 481 = 13 Pat 310 = 15 P L T 169 = 61 I A 185 = 18 C W N 575 36 Bom L R 541 = 1914 A L J 462 = 1934 O L R 371 (P C)

§ 92 (p 1035) Oral evidence is not admissible to prove intention of the executant of a document under s 92 *Ma Sun v Ma Thin Kyi*, A I R 1934 Rang 129 = 150 Ind Cas 966

§ 92 (p 1041) Where a *sanad* regarding a property is based upon a letter of the Legal Remembrancer, the intention of the *sanad* can be interpreted from the letter, where only an extract of the *sanad* is available and not the *sanad* *Basva v Abisali*, 150 Ind Cas 635 36 Bom L R 158 = A I R 1934 Bom 145

§ 92 (p 1041) Oral evidence is competent to show the real consideration at the basis of the promise made by the obligor to pay the amount mentioned in the deed *Gangaram v Maluk*, 28 S L R 266

§ 92 (p 1041) Oral statements intended to vary the terms of a warrant required by law to be in writing are not admissible *Enperor v Subramania* A I R 1935 Mad 648 = 1934 M W N 1170 = 68 M L J 421 = 41 M L W 679 153 Ind Cas 496

§ 92 (3) (p 1041) Though s 120 Negotiable Instruments Act precludes the maker of a promissory note from denying the validity of the note, where money is not advanced as a single loan unconditionally upon the promissory note but is advanced after the note had been executed and on certain conditions previously agreed upon the promisor is entitled to prove circumstances in repudiation of his liability *Bichin Singh v Dhira Art Bank* 143 Ind Cas 348 = 34 P L R 470 = A I R 1933 Lah 456

§ 92 (p 1041) Oral evidence can be given to show what the oral consi

deration was for the *Kabuliyat. Kumar Raj v Barbam Coal*, A I R 1935 Cal 368=62 C 346=60 C L J 477

§ 92 (p 1041) Where a renewed promissory note has been executed in consideration of a prior promissory note, the executant can show by oral evidence that a part of the debts of the prior promissory note was paid. Section 92 does not bar the admissibility of such evidence. *Bala Subramania v. Venkatarama*, 40 L W 706=1934 M W N 1382=67 M L J 650

§ 92 (p 1041) A mortgagee with deposit of title deeds was acting as an agent of his mortgagor in arranging a loan for the mortgagor. At the same time he was also acting as agent of the mortgagee. but as agent of the mortgagor he sent a letter to the mortgagor containing the scope of the security and the terms. Held that the document was not the bargain between the parties to the mortgage subsequently effected but only one sent by agent of the mortgagor, that it did not require registration and that extraneous evidence was admissible to prove the scope of the security. *Villa v Petty*, A I R 1934 Rang 51=148 Ind Cas 721

§ 92 (p 1041) Where a tenant of an occupancy holding executed a lease by means of a *patti* which was registered under s 41 H. Held the land lord was not precluded by s 92 Evidence Act, from giving evidence to show that the real transaction was not a lease but a sale, the landlord not being a party to the deed. *Troilokya v Jajneswar*, A I R 1934 Cal. 821=38 C W N 1004=152 Ind Cas 933

§ 92 (p 1041) The recital in a bond or in a pronote that consideration has passed amounts only to an admission, and it is open to the party whose admission it is to prove that his own admission is in fact incorrect but the burden of proof lies on him. *Gin, a Dewar v Tilok Dhar*, A I R 1934 All 496=148 Ind Cas 1124

§ 92 (p 1041) Evidence to prove that there was no consideration for a promissory note is not debarred by this section. *Ram Jash v Markanda*, 4 A W. R. 964=A I R 1934 All 1068

§ (p 1050) Where compound interest payable under deed, oral agreement that stipulation will not be enforced cannot be proved. *Mahesh Chudra v. Anada Chandra*, 61 C 344=A I R 1934 Cal 564

§ 92 (p 1050) Where after execution of mortgage of *sir* land equity of redemption was also sold evidence of a separate agreement to give up *ex* proprietary right cannot be given. *Partap v Buchan* 14 L R 425 (Rev) =17 R D 500

• § 92 (p 1050) Where promissory note fails for non cancellation of stamp, the plaintiff cannot fall back upon the original loan. *Afa Shree v Deva Hwar*, A. I R 1933 Rang 161=145 Ind Cas 378

§ 92 (p 1050) Where the document purports to be a promissory mortgage, evidence to show that the mortgage was in reality a simple mortgage according to the intention of the parties is inadmissible under s 92. *K S Mian Feroz Sha v Subhat Khan*, 60 I A 273=65 M L J 150 (P C)=14 L W. 466=A I R 1933 P C 178=37 C W N 993=35 Bom L R 877=1933 A L J 1191=143 Ind Cas 659 (P C)=1933 M W N 755

§ 92, proviso 1 (p 1051) There is a distinction between the case where the plea is taken that an agreement the terms of which had been embodied in a written instrument was not intended to be acted upon *ad initio* and the case when the plea is that the terms had been varied by a contemporaneous or oral evidence or indirect the parties are admissible to prove such intention. In

the latter, no such evidence is admissible *Satyendra Nath v Pramananda*, 39 C W N 888

S 92 Proviso (1) (p 1504) Executant of a bond can adduce evidence that no consideration passed *Gunga v Tilak* A I R 1934 All 496, see also *Ranjnas v Murkundi*, A I R 1934 All 1068

S 92 (p 106^A) Oral evidence that the real consideration for a promissory note was not payment of money as recited in the note but something different, namely, the construction of a sluice is admissible under s 92, proviso 3 *Nima gudda v Adusumille*, A I R 1935 Mad 310 = 41 M L W 298

S. 92 (p 1070) The consideration for a lease is the rent to be paid and the payment of the *atakasam* a kind of premium or renewal fee paid by the tenant to the landlord, is clearly in the nature of a condition precedent, evidence as to which is permitted by proviso 3 s 92, Evidence Act *Punjab Kallians v Valuar Tarward*, A I R 1935 Mid 190

S 92 (p 1070) Where the mortgagor intends to sell his property to the mortgagee there is nothing in law to prevent the parties from coming to a settlement, for the purpose of determining the amount of sale consideration, as to what is the amount of money which could be due to the mortgagee under the deed of mortgage accounts are taken on aforesaid basis *Hari Krishna v Nasir Hasan*, A I R 1934 Oubh 115 11 O W N 254 = 151 Ind Cas 581

S 92 (4) (p 1071) Where the claimant under the option of repurchase affirms the original transaction is a sale and merely seeks to enforce a mortgage by deed does not require registration no objection can arise under s 92, clause 4 Evidence Act as it does not seek to use it as to affect the provisions of the original deed *Chinakal v Chunnathambi*, 152 Ind Cas 634 = A I R 1934 Mad 102 = 60 M L J 635 = 40 L W 646 = 1934 M W N 1122

S 92, Prov (4) (p 1071) A document purporting to be a sale deed was presented for registration. The executant denied that he had executed a sale deed, and stated that he had merely agreed to execute a mortgage deed. After some discussion the parties agreed that the transaction should be entered as a mortgage and made statements to the Sub Registrar, who recorded the terms of the mortgage agreed to by the parties and registered the document as a mortgage deed. Held that proviso (4) to s 92 did not prevent the successor in interest of the executant from proving that the transaction entered into between the parties was really a mortgage and not a sale, as he was not producing any evidence to prove any subsequent oral agreement to rescind or modify a contract which had been registered *Ganga v Praga* A I R 1933 Lah 318 = 145 Ind Cas 697

S 92 (4) (p 1071) Mortgage created jointly is inadmissible, hence any agreement between a co mortgagor and mortgagee in derogation of original contract is variation and therefore is inadmissible in evidence *Ma Tin v Alagappa Chelliyar*, A I R. 1915 Rang 197

S 92 (4) (p 1071) Where executant orally agreed to pay in form of transfer of land instead of money agreement cannot be proved under s 92 (4) *Nachiappa Chelliyar v Thervanai*, A I R 1914 Rang 228 = 151 Ind Cas 398

S 92 (p 1083) This section does not preclude oral evidence to disprove that a note about presentation of petition is wrong *Jivan v Umir Din*, A I R 1934 Lah 452 = 148 Ind Cas 209 = 15 Lah 694 = 36 P L R 525

S 93 (p 1092) Where meaning of terms of agreement is capable of being made certain having regard to conduct of parties, s 93 is no bar to the produc-

tion of extrinsic evidence to show their meaning *Gadula Ram v Musala*
A I R 1935 Mad 276-1933 M W N 114-40 M L W 914

S. 93. (p 1092) Where the language of a document is plain and there is no ambiguity in it, it is not permissible to produce other evidence to show that there was different intention on the part of the transferor *Dhanpatti v Badri Singh* A I R 1935 All 729-156 Ind Cas 53

S 93 (p 1092) In case of patent ambiguity in consent decree, evidence should not be allowed to construe it *Jahuri Lal v Kanhai Lal*, A I R. 1933 Pat 123

S 94 (p 1098) Where deed is clear and unambiguous and applies to existing facts, oral evidence is not admissible *Sijaatmud v Gobind*, A I R 1934 All 100 147 Ind Cas 633, see also *Ram Rakh v Gauri Sankar*, 36 P. L R 611

S 95 (p 1103) Where there is doubt about construction of security bond it must be considered in light of order directing security to be given *Mohendra nath v Satish chandra* 61 C 890-150 Ind Cas 985-A I R 1934 Cal 569

S 96 (p 1107) Extrinsic evidence to explain acknowledgment may be given *Nipalu Ram v Radhuram*, A I R 1934 Lah 835

S 97 (p 1107) Where language applies partly to one set of facts and partly to another but whole not applying to either extrinsic evidence to show which of two applies is admissible *Banaphal v Noor Mohammad*, A I R 1935 All 662-1935 A L J 664-155 Ind Cas 634

S 97 (p 1107) Where in mortgage decree, boundaries and area of property given are totally wrong oral evidence is admissible to explain intention of decree *Allah Buksh v Punjab and Sindh Bank*, A I R 1934 Lah 181-35 P L R 20-147 Ind Cas 23

S 101 (p 1124) Wrong view of burden of proof can be interfered in second appeal *Pandurang v Tukaran* 152 Ind Cas 441-A I R 1934 Nag 253

S 101 (p 1125) The burden of proving allegations in the plaint is on the plaintiff *Anand v Deputy*, 143 Ind Cas 568-O W N 412-A I R 1933 Oudh 242

S 101 (p 1125) Where in a prosecution for false entries the defence raised was that the entries were made under the direction or authority of the member of the complainant's firm it is the duty of the prosecution to call some of the partners or at least one responsible person as a witness and to give positive denial of the allegation which the accused put forward *Indra Kumara v Emperor*, A I R 1934 Cal 500 59 C L J 83-152 Ind Cas 226-36 Cr L J 74

S 101 (p 1125) The general rule of evidence is that, if in order to make out a title, it is necessary to prove a negative the party who avers it, must prove the title *Hemchandra v Matsal*, A I R 1934 Cal 68-58 C L J 85-37 C W N 1174-60 C 1253-149 Ind Cas 177

S 101 (p 1125) Where circular has been issued by public servant containing certain statement person challenging that statement must prove it *Bijli v Mahomed* A I R 1934 Mad 21-39 M W N 466-146 Ind Cas 572

S 101 (p 1125) Where all available evidence has been brought on record question of onus is not important *Chunilal v Radha Devi* A I R 1934 Pesh 134-153 Ind Cas 71, see also *Matl Ram v Official Receiver*, A I R 1934 Lah 936, *Nipalchand v Narain Das*, A I R 1934 Lah 949, *Rimjital v Debi Sihar* A I R 1934 Lah 542-33 P L R 462-152 Ind Cas 240, *Maug Po v Reichthar*, 145 Ind Cas 413-A I R

1933 Rang 211; *Deendra v Nigendra*, 60 C 1158-37 C W N 1001
Bhanji v Gobind, 29 N L R 298-A I R 1934 Nag 379, *Pandurang*
 v *Tukaram* A I R 1934 Nag 253

S 102 (p 1125) Where a transferor brings a suit to show that transfer was not meant to be operative ■ such onus is on him to prove it *Amrit v Gurcharin*, A I R 1934 All 226-147 Ind Cas 59

S 103 (p 1126) Person claiming to succeed on ground of relationship should prove such relationship and absence of nearest heir *Chunna v Lala Markat* A I R 1934 All 117, see also *Mahabir v Rudha*, 10 O W N 424-A I R 1933 Oudh 231

S 104 (p 1131) Onus of proving error of lower Court in appeal is on the appellant *Abdul v Nasir*, A I R 1933 Oudh 142-10 O W N 201

S 114 (p 1132) The onus of proof that property has been purchased *benami* ■ in the person who alleges that *Ma Khatun v Ma Bt Bt*, A I R 1933 Rang 393

S 104 (p 1140) Burden of proving fraud is on the person who alleges fraud *Sabir v Savi*, 12 Pat 359-145 Ind Cas 1-14 Pat L T (sup) 1-A I R 1933 Pat 306 But when fraud has been established, it is on the opposite party to prove that the party alleging fraud had knowledge of those circumstances which constitute fraud *Ramuddin v Naimaddi*, 143 Ind Cas 284-56 C L J 570-A I R 1933 Cal 339

S 104 (p 1144) In a dispute s regards tenancy, initial onus is on tenant *Rikhdoo v Gangi Prosid* 146 Ind Cas 1002-A I R 1933 All 825

S 104 (p 1145) The defendant who claims that the suit is barred by limitation must prove that *Padhum v Tribeni*, A I R 1934 Pat 44

104 (p 1145) One questioning marriage, must prove that it was not performed with requisite ceremonies, etc 56 A 428-A I R 1934 All 278

S 104 (p 1146) In a suit for possession the person claiming possession must prove his title *Aruna chalam v Ko Tu*, 146 Ind Cas 445-A I R 1933 Rang 174

S 104 (p 1149) In a Will case, the onus is on the propounder that the Will was duly executed *Jotindra v Rajlakshi* A I R 1933 Cal 449-57 C L J 8

S 105 (p 1152) The accused must prove that his case comes within any exception *Ng Bashi v Emperor* 144 Ind Cas 420-14 Cr L J 783-A I R 1933 Rang 142, see also *Maung Sein Ba v Maung Kawe*, A I R 1934 Rang 90-12 Rang 55-150 Ind Cas 667

S 106 (p 1157) A fact which is within the special knowledge of a person must be proved by that person *Mahabir v Rohini*, 64 M L J 413 (P C)-A I R 1933 P C 27-15 Bom L R 500 17 C W N 657 (P C), see also *Dhanirajarat v Pirtha Sirathy* 38 L W 714-1933 M W N 1182-A I R 1933 Mad 825

S 108 (p 1170) There is no presumption as to the time of death *Ram Kali v Nirun Singh*, A I R 1934 Oudh 298-11 O W N 793-149 Ind Cas 632

S 108 (p 1170) There is no presumption as to the time of death but not of time of death
v Sheo Gobind A I R 1934 Oudh 298-11 O W N 793-149 Ind Cas 632

S 108 (p 1173) Where two brothers died in same catastrophe and who died first is not known no presumption exists as to the time, of death or the survivorship of either *Nikshi v Jatali*, A I R 1934 Oudh 101-11 O W N 267-9 Luck 461

S 109 (p 1176) Where there is not only a decree but that the plaintiff has collected rent due under it this is sufficient to bring about the relationship under s 109 and to throw the onus of proving that tenancy terminated is on the defendants *Medatapurpa v Medivarupa* A I R 1935 Mad 268=40 M L W. 810

S 109 (p 1076) Where the re the burden of proving that they had ship is clearly on the person wh A I R 1935 Lah 49

S 110 (p 1179) Section 110 applies even in cases where Government is a party and s 41 (1) of Berar Land Revenue Code is not meant to lay down a rule regarding the burden of proof at variance with the provisions of s 110 Evidence Act *Govind Rupchand v Secy of State* A I R 1935 Nag 163=155 Ind Cas 264.

S 110 (p 1179) Where certain property is found to be held by a person who occupies the office of Mohant of a *Math* there is no presumption that the property belongs to the *Math* *Ganesh Gir Giru v Fitehchand* A I R 1935 Nag 114

S 110 (p 1175) Where the defendants who are in possession of a well have from time to time asserted their claim to the property as owners the mere user of the well by the public is not sufficient to rebut the presumption of ownership or to raise a further presumption that the defendants are trustees of the said property *Hemraj v Alladin* A I R 1935 Sind 133

S 110 (p 1179) Long possession creates presumption of ownership *Champal v Toti Ram*, A I R 1934 Lah. 324=150 Ind Cas 17=16 P L R 64

S 111 (p 1183) Where a gift is executed to a person standing in a fiduciary relationship to the donor the donee is bound to establish good faith of the transaction For this the donee may prove that the donor had independent advice or that the fiduciary relation had ceased for so long that the donor was under no control or influence whatever by showing existence of other circumstances sufficient to prove good faith *Binoy Krishna v Panchanon*, A I R 1935 Cal 671

S 111 (p 1183) The words active confidence in s 111 indicate that the relationship between the parties must be such that the one is bound to protect the interest of other, in order that the law may be really protective the word should receive a wider interpretation *Benoy Krishna v Panchanon* A I R 1935 Cal 671, see also *Lekh Raj v Mt Mehtab* A I R 1933 Lah 861

S 111 (p 1183) Where the fact of undue influence was not seriously disputed burden lay upon him who denies to show that no undue influence was used and the transaction was made in good faith *Aisunnissa v Siraj Husan*, A I R 1934 All 507=1934 A L J 817

S 111 (p 1187) Section 111 applies to case of a Will and burden of proving good faith of the transaction lies on propounder *Nandalal v Dasa rathi* A I R 1936 Cal 15=61 C L J 304

S 112 (p 1193) The presumption of law that a child born of a married woman in wedlock was begotten by the husband and born in his wedlock band nor a wife is permitted child to give evidence of no have been conceived—as enur prevails equally in India as in England The above principle is not limited to legitimacy proceedings but applies in consequence of adultery and it is in the Evidence Act The fact of no other than that of the husband *Joseph Ant* 1047

S 112 (p 1193) Where a person is admittedly born after his mother's marriage to a certain person the onus of establishing non access and physical incapacity to procreate on the part of the husband lies heavily on those who allege such person to be an illegitimate son *Bhagwan Baksh v Mahesh Baksh*, A I R 1935 (P C) 199=1935 O W N 1261 (P C)

E 112 (p 1193) Even though connection between a man and a woman is adulterous at its inception by the existence of a marriage between the woman and another man, when the latter divorces the woman and the two continue to live together and are treated as husband and wife and a child is born during such period, presumption of legitimacy can be raised *Gurdial Singh v Bhagat Singh*, A I R 1934 Lah 517=35 P L R 532=153 Ind Cas 241

S 112 (p 1193) In a divorce suit filed by the husband on the ground of adultery the miscarriage took place long after filing of petition, and the evidence of non access was offered by the husband *Held* that the evidence of the husband of non access was admissible against his wife *Gerald v Olga*, A I R 1934 All 618.

S 112 (p 1193) Section 112 merely requires proof to the satisfaction of the Court that there was no access to each other, not that there was no intercourse. That there was no access is a pure finding of fact *Varyan*, A I R 1934 Nag 124=150 Ind Cas 306

E 112 (p 1193) Presumption that child in lawful wedlock is legitimate child of its mother's husband is rebuttable. But if access or intercourse by husband is proved, presumption becomes irrebuttable *Sivakami v Koolyandi*, A I R 1934 Mad 318=66 M L J 283=149 Ind Cas 953, see also *Samuel v Annammal*, A I R 1934 Mad 310=66 M L J 279=149 Ind Cas 100

S 112 (p 1194) Access means sexual intercourse *Samuel v. Annammal*, A I R 1934 Mad 310=66 M L J 279=149 Ind. Cas 100. The word "access" means "effective access" and physical incapacity to procreate, if established amounts to non access within the meaning of s 112 *Bhagwan Baksh v Mahesh Baksh* A I R 1935 P C 199=1935 O W N 1261 (P C), see also *Umaruddin v Ghulam*, A I R 1935 Lah 628

S 112 (p 1194) The evidence of Indian witness on question of age is notoriously often very vague and unreliable and it is unsafe to base a finding of physical incapacity on the part of a husband on such evidence *Bhagwan v Mahesh*, A I R, 1935 P C 19=1935 O W N 1261. In dealing with the question of non access under s 112 in a case of child marriage among the Hindus much depends upon the question whether the case presented on either side is reconcilable with the established customs and usages of Hindus as regards child marriage *Ibid*

S 112 (p 1195) To brand a child born in lawful wedlock with illegitimacy on the ground of physical incapacity of the husband to procreate it is necessary in the first place to prove the precise age of the husband at the date of conception and in the second place to negative the possibility of premature virility at that age owing to precocious development *Bhagwan Baksh v Mahesh Baksh*, A I R 1935 P C 149=1935 O W N 1261 (P C)

S 112 (p 1195) Ordinarily onus of proving illegitimacy lies on person who so asserts. But where opposite party has failed to prove that mother of alleged illegitimate son was lawfully married to his father, onus is not on former *Ram Nath v Desraj Singh*, A I R 1935 Oudh 80=1934 O L R 983=1935 O W N 25=153 Ind Cas 349

S 112 (p 1196) Where a child establishes the possession of filiation, which is the acknowledgment of the parents and habit and repute everything

such as legitimacy must be presumed in his favour *Akshen Singh v Sidhi and others* A I R 1933 Lah 520

S 114 (p 1202) The effect of the provision of s 114 is to make it perfectly clear that Courts of justice are to use their own common sense and experience in judging of the effect of particular facts and that they are to be subject to no technical rules whatever on the subject *Sirul Chaudia v Emperor* A I R 1934 Cal 719 (S B) = 35 Cr L J 1335 = 151 Ind Cas 473

S 114 (p 1202) If an article stained with human blood is recovered from the possession of an accused or from a place pointed out by an accused then the case against him becomes very serious. He has to explain that point away. But if the prosecution fails to establish that there were stains of human blood on any of the articles so recovered then a Court would be wholly unjustified in drawing an inference that blood stains were of human blood. *Imamuddin v Emperor* A I R 1931 Oudh 385 = 11 O W N 95 = 35 Cr L J 1154 = 150 Ind Cas 862 see also *Bhagwati v Emperor*, A I R 1934 Oudh 373 = 11 O W N 969 = 35 Cr L J 1159

S 114 (p 1202) Court is often obliged to rely more upon circumstances than on direct evidence. *Mallavarupa v Boggavarupa* A I R 1935 Mad 769 = 1935 M W N 528 = 42 M L W 321

S 114 III (a) (p 1203) To raise a presumption under this illustration, possession should be exclusive as well as recent. *Rajalingam v Emperor* A I R 1934 Rang 85 = 149 Ind Cas 31 = 35 Cr L J 994 see also *Emperor v Zahur* 150 Ind Cas 558 = 35 Cr L J 1092 = A I R 1934 All 455. *Jai Narain v Emperor* A I R 1933 Oudh 117 = 10 O W N 47 = 34 Cr L J 649 = 143 Ind Cas 835. *Emperor v Sangrim* 143 Ind Cas 152 = 34 Cr L J 545 = 9 O W N 1198 = A I R 1933 Oudh 85. *Hori Lal v Emperor* 1933 A L J 1534 = A I R 1933 All 893 = 1933 Cr C 1523. *Public Prosecutor v Kudimbachia* 1933 M W N 325. *Reoti v Emperor* 1933 A L J 523. *Joyanarain v Emperor* A I R 1935 Cal 650

S 114 III (a) (p 1203) S 114 III (a) does not entitle the Court to presume the knowledge of dacoity or dacoits and a person cannot be convicted under s 412 I P Code merely on the fact of possession of recently stolen goods. *Isthahar v Emperor*, 39 C W N 620

S 114 III (b) (p 1208) As a broad proposition it is correct to say that in spite of s 133 of the Evidence Act the rule of the Evidence Act the rule of practice that an accused person ought not to be convicted on the uncorroborated testimony of an accomplice has virtually become equivalent to a rule of law. But this proposition is subject to various qualifications and the true legal position is the following —

(1) An accused person can legally be convicted upon the uncorroborated testimony of an accomplice if the evidence is of such a nature that a prudent and good sense of the evidence in the case (3) *Prima facie* evidence is unworthy of credit (4) In a Sessions case the evidence is extremely dangerous to act upon (5) The evidence is of such a nature that a prudent and good sense of the evidence in the case (6) The evidence of an approver may be corroborated by the evidence of another approver, or by the confession of the accused person.

of a person who is being jointly tried with the accused for the same offence, implicating both himself and the accused, (7) it is the duty of the Court to scrutinize with much care such corroboration as that mentioned in (6) but whether it is to be treated as evidence against the accused or not is to be determined by the Court. *Emperor v Nirmal Jiban Ghose*, 39 C W N 744 = A I R 1935 Cal 513-62 C 238, see also *Bimal Krishna v Emperor*, 39 C W N 761, *Vinkaramanna v Emperor*, 1933 M W N 1129, *Bent Madho v Emperor*, A I R 1933 Oudh 355-146 Ind Cas 1064-10 O W N 68, = 1933 Cr C 97, *Bitha Babu v Emperor* A I R 1935 All 162, *Shiva Das v Emperor* A I R 1934 Cal 114-37 C W N 348-147 Ind Cas 1028-35 Cr L J 53, *Nissuddin v Emperor*, A I R 1934 Pesh 134-153 Ind Cas 71, *Chatumal v Emperor*, A I R 1934 Sind 185-1934 Cr C 1392, *Mahadeo Prasad v Emperor*, A I R 1934 Oudh 90-11 O W N 62-15 Cr L J 397-9 Luck 155, *Kinsu Ram v Emperor*, 15 Lah 491-36 P L R 346-A I R 1934 Lah 873, *Ali Mahammed v Emperor*, A I R 1934 Lah 171-1934 Cr C 349, *Gujar Singh v Emperor* A I R 1934 Lah 21-1934 Cr C 39, *Mahomed Panah v Emperor*, 150 Ind Cas 917-A I R 1934 Sind 78, *Hari Ram v Emperor*, 15 Lah 673, *Hafizuddin v Emperor*, 38 C W N 777-A I R 1934 Cal 678, *Mangal Singh v Emperor*, 150 Ind Cas 21-35 Cr L J 1046-36 P L R 121-A I R 193 Lah 346, *Nizam Din v Emperor*, A I R 1934 Pesh 11-1934 Cr C 381-35 Cr L J 719, *Kartar v Emperor*, A I R 1934 Lah 525-35 P L R 436, *Turab v Emperor*, A I R 1935 Oudh 1-11 O W N 1383-152 Ind Cas 473-1934 O L R 875, *Abdul Majeed v Emperor*, 39 C W N 1082, *Bal mukundo v King Emperor*, 39 C W N 1051, *Sundar Lal v Emperor*, A I R 1934 Oudh 315, *Turab v Emperor*, 11 O W N, 1363, *Ali Mahammed v Emperor*, A I R 1934 Lah-1934 Cr C 349, *Mallu Masheta v Emperor*, 146 Ind Cas 701-16 N L J 186-A I R 1933 Nag 352, *Venkat Girappa v Government of Mysore*, 11 Mys L J 239, *Madhusudan v Emperor*, 37 C W N 934, *Dhaju Manaal v Emperor*, 34 Cr L J 476-146 Ind Cas 934-A I R 1933 Pat 12, *Sudam v Emperor*, A I R 1933 Cal 148-34 Cr L J 675

S 114 (p 1208) Evidence of one accomplice can not be corroborated by evidence of another accomplice. *Kamboji Venkataramanna v Emperor*, A I R 1934 Mad 248-1933 M W N 1129-40 M L W 237-67 M L J 74 see also *Mallu Masheta v Emperor* 146 Ind Cas 701-16 N L J 186-A I R 1933 Nag 352, *Parbhoo v Emperor* 146 Ind Cas 364-34 P L R 639-A I R 1933 Lah 946, *Nasir v Emperor* A I R 1933 All 31-1932 A L J 1125-55 A 91-34 Cr L J 489

S. 114 ill (c) (p 1208) Rule laid down in s 114 (c) is affected by subsequent enactment of Negotiable Instruments Act

S 118 *Binnumul v Munshi Ram* A I R 1935 Lah 549 The difference between s 114 Evidence Act and s 118 Negotiable Instruments Act consists only in this that under the first, the Court has a discretion to make the presumption or not whereas under the second the Court is bound to start with the presumption. *Mallavarapu v Bogiripattu* A I R 1935 Mad 769 Illustration (c) is confined to acceptance and endorsement of bill of exchange. But s 118, Negotiable Instruments Act has wider scope. *Binnumul v Munshi Ram* A I R 1935 Lah 599 Under s 114 a strong presumption is raised that an obligation has been discharged when the bond duly signed is in the hands of the obligor. *Raigirappa v Sied* 30 N L R 196-A I R 1934 Nag 29 The explanation added to illustration (c) of s 114 only indicates that it is not meant to be exhaustive of its application. *Mallavarapu v Bogirappa*, A I R 1935 Mad 769

S 114 ill (d) (p 1209) The rule of evidence in favour of presuming the continuity of things shown to exist at a prior date. There is no rule of evi

dence by which one can presume backwards *Manmatha Nath v Girish Chandra* A I R 1934 Cal 707-38 C W N 763=153 Ind Cas 170, see also *Hemendra v Jnanendra* A I R 1935 Cal 702

S 114 ill (e) (p 1212) S 114 includes but is not limited to presumption of regularity *Hindas v Mammatha* A I R 1936 Cal 1

§ 114 ill (e) (p 122) Section 114 ill (e) does not presume that official act has been done. But if the act is proved to have been done it is presumed to have been regularly done *S A Kumari v Raj Kumar* A I R 1934 Rang 207=151 Ind Cas 337

S 114 ill (e) (p 1212) This section raises the presumption of legality and correctness of Court's proceedings. When a Judge signs a decree it is presumed that the decree is in accordance with his judgment *Rajhubir Singh v Rani Ryes vari* 146 Ind Cas 310-10 O W N 884=A I R 1933 Oudh 466. There is a presumption under this section in favour of the correctness of the record by a Judge in the judicial record II *Srinivasa Iyengar In the matter*, 12 Mys L J 311-39 Mys H C R 461. Where there is evidence of an attachment in the absence of direct evidence to the contrary it ought to be presumed that all necessary formalities were complied with *Mohd Akbir v Hadur Mian* 9 C W N 29 see also *Mohammad Akbir v Mian Musharraf Ali* A I R 1934 P C 217-11 O W N 1158-40 M L W 390=151 Ind Cas 221=59 C W N 89=67 M L J 641-61 I A 371=15 Lah 836, *Arjun v Emperor* A I R 1935 All 436 1935 A L J 390

S 114 (p 1212) There is a presumption in law that all official acts are regularly performed and when a document is attested by the Sub registrar as duly presented, there is an initial presumption that the document was duly presented and the person presenting it was duly authorized to do so *Mahamud v Fattah* A I R 1934 Lah 452=148 Ind Cas 209=15 Lah 694=36 P L R 525

S 114 ill (e) (p 1212) The pedigree table prepared in the course of each settlement is a part of the Record of Rights and as such there is statutory presumption of correctness attaching to it. It is however impossible to lay down a rule that the presumption is stronger in favour of one rather than the other. It is for the Court to decide in each case which pedigree table is to be preferred *Ditai Rani v Akasana Ram* A I R 1935 Lah 108

S 114 ill (e) (p 1213) The Court should not presume that the documents referred to in the order of sanction by the Governor General were the documents in question and that they were duly forwarded by the Governor General and reached complainant through the usual channel unless there be any indication on the face of the questioned documents to show that there were the annexures to the order of sanction *Sardar Dewan Singh v Emperor* A I R 1935 Nag 90

S 114 ill (e) (p 1213) Though official acts may be presumed to have been regularly performed such presumption cannot supply deficiency in the proof *Hoogly Chinsurah Municipality v Keshab Chandra Pal*, A I R 1933 Cal 347-143 Ind Cas 285=30 Cr L J 549=56 C L J 583=A I R 1933 Cal 347

§ 114 ill (e) p 1213) It may be presumed that official acts are regularly performed and a warrant once signed and issued remains actually in existence until such time it is known to have been destroyed *Emperor v Kalu* A I R 1933 Lah 159

S 114 (p 1213) The entry in a *Jamabandi* in the years following the partition to the effect that the field was joint while other fields have been recorded in the separate names of the parties raises a strong presumption that

the field was kept joint *Mishari v Kedar Nath*, A I R 193 Nag 130-29 N L R 272-A I R 1933 Nag 130-144 Ind Cas 948

S 114 ill (e) (p 1212) Where an election officer issues a circular to polling officer stating that it is used under direction of superior office, the presumption is that the statement is correct *Bijli Sihal Bahadur v Mahammad Asan*, 146 Ind Cas 572

S 114 ill (e) (p 1212) Where a document was registered under s 23 A of the Registration Act the presumption is that it was represented within time *Sudarsana Roy v Setharamaya*, 1933 M W N 1148

S 114 ill (e) (p 1212) The papers of a survey which do not reach the stage of final publication are not altogether inadmissible in evidence even though the weight to be attached is a different matter. The presumption of final publication but the presumption of official duties are taken to have been *Nund Lal*, A I R 1933 Pat 468

S 114 ill (g) (p 1215) In case of failures of party to produce account in his possession regarding certain expenses where money spent for such expenses by party is otherwise proved, the mere non production of accounts does not show that no expense has been incurred *Sijjad v Manammed*, A I R 1934 All 71

S 114 ill (g) (p 1215) Where a party does not produce certain material document Court is entitled to draw adverse presumption *Nimmag da v Adutumilli*, A I R 1935 Mad 310-41 M L W 298, see also *Deo Narain v Emperor* A I R 1934 Pat 132-15 P L T 647-35 Cr L J 693, *Baroda v Krishna* A I R 1934 Cal 414-38 C W N 33-151 Ind Cas 268, *Educational Book Depot v Dr Rabindranath Tagore*, 55 A 564-1933 A L J 791-A I R 1933 All 474 but see *Mt Boosa v Gur Prasad* 10 O W N 827 A I R 1933 Oudh 412

S 114 ill (g) (p 1215) No presumption of s 114, ill (g) arises if there is no evidence that the document could be produced *Popusi Ramayya v Putcha Lakshminarayana*, A I R 1934 P C 84-39 M L W 329-11 O W N 468-1934 A L J 402-61 I A 177-38 C W N 669-57 M 443-67 M L J 1

S 114 ill (g) (p 1215) The petitioner not giving evidence though he was the best informed person about the matter, may be taken as an indication that he could say nothing convincing to support his case *Piran Dis v Kartar Singh* A I R 1934 Lah 398 151 Ind Cas 32-36 P L R 280, see also *Piran Singh v Mathura Das* A I R 1934 Lah 126, *Bishan Das v Gurbaksh Singh* 148 Ind Cas 45 A I R 1934 Lah 63 but see *Kanhaya Lal v Bishan Das* A I R 1934 Lah 59-149 Ind Cas 1119

S 114, ill (g) (p 1215) Omission to call material witness raises inference that evidence would have been unfavourable *U Po v Edward*, A I R 1934 Rang 139 150 Ind Cas 898

S 114 (p 1215) It is open to a litigant to refrain from producing any evidence, not forming part of his case, that he considers irrelevant if the other litigant is dissatisfied it is for him to apply for its production and inspection as evidence in the case if he thinks proper if this is not done the Court is not entitled at his suggestion to draw an adverse inference and the presumption will also not arise when there is sufficient explanation *Shri a Prasad v Prayag Kumar* A I R 1935 Cal 59-61 C 711

S 114 (p 1222) The effect of conflicting presumption is to leave the party to have their case decided by evidence produced *Nanjil Dis v Nuthari*, 38 C W N 861

S 114 (p 1219) It is impossible to believe that evidence consisting of oral and documentary evidence of very great strength and conclusiveness and in possession of accused's near relatives would not have been produced at once by the accused or his relations and would have been concealed till the defence stage in sessions trial *Emperor v. Shro Janak Pande*, A I R 1934 All 27 = 56 A 354 = 147 Ind Cas 238 = 35 Cr L J 364 = 193, A L J 1573 (F B)

S 115 (p 1237) Estoppel is not a cause of action. It may, if established, assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action, or by preventing a defendant from asserting the existence of some facts the existence of which would destroy cause of action. It is a rule of evidence which comes into operation if (a) a statement of the existence of a fact has been made by the defendant or an authorized agent of his to the plaintiff or some one on his behalf, (b) with the intention that the plaintiff should act upon the faith of the statement and (c) the plaintiff does act upon the faith of that statement. There is no such thing as estoppel by waiver. A representation which can ground an estoppel must be representation of an existing fact and not of a future intention which may or may not be enforceable in contract. A statement to ground an estoppel must be clear and unambiguous. *Dunson Bank v. Nippon Menkwa*, 39 C W N 657 = A I R 1935 P C 79 = 1935 M W N 442 = 155 Ind Cas 1 = 1905 O W N 599

S 115 (p 1249) Where a party changed his position as a result of the representation intentionally made by the ancestors of the plaintiff in order to secure certain concession and the party's conduct was influenced by those representations. Held that the conditions requisite for an estoppel by conduct were satisfied. *Special Manager v. Tribeni Prasad* A I R 1935 Oudh 299.

S 115 (p 1250) The question of estoppel not being pure question of law it should be distinctly pleaded. *Kankhalal v. Bhatjatal*, 16 N. L J 248, see also *Fakir v. Ismail*, A I R 1933 Lah 179

S 115 (p 1251) No estoppel arises if truth of the matter was known to both the parties. *Rajib Nirain v. Bindeshwari* 15 P L T 596. But there is no obligation on person claiming estoppel in every case to make enquiry about truth of representation. *Shyam Lal v. Matadin*, 151 Ind C s 576 = 11 O W. N 1097 = A I R 1934 Oudh 40

S 115 (p 1252) To attract the applicability of estoppel in *pari passu* representation must be clear and unambiguous and it must be acted on by other party. *Jethibai v. Chabildas* A I R 1935 Sind 142, see also *Mohini v. Kadha*, A I R 1935 Cal 481, see also *Afeel Hussain v. Cheddi Lal*, A I R 1935 All 79 = 1935 A L J 217 = 155 Ind Cas 791, *Kadhulil v. Kishori Lal*, A I R 1935 Lah 527 37 P L R 301, *Mohammad Musa v. Qasim Hussain*, A I R 1935 All 739 155 Ind Cas 1063, *Ganru Dei v. Mohammad Yasin*, A I R 1935 Oudh 121 = 11 O W N 1571 = 1935 O L R 9 = 153 Ind Cas 585, *Fikar Khan v. Ismail Khan*, 14 Lah 218 = 141 Ind Cas 264 = 34 P L R 149 = A I R 1933 Lah 179, *T. Hirst v. Syamsundar Lal*, 61 C 61 = A. I R 1934 Cal 441 = 151 Ind Cas 334

S 115 (p 1254) As regards representation by conduct, vide *Saddha Singh v. Minal Singh* A I R 1935 Oudh 166 = 10 O W N 58 = 142 Ind Cas 860, *Sikhda v. Mathra*, 142 Ind Cas 606 = 34 P L R 115 = A I R 1933 Lah 412, *Bhargunath Prasad Singh v. Annapurna Devi* A I R 1933 Pat 644, *Ditto Shivram v. Babisahab*, 58 B 419 = 150 Ind Cas 555 = 36 Bom L R 359 = A I R 1934 Bom 114, *Secretary of State v. Rajaram*, 36 Bom L R 1055

S 115 (p 1262) As regards estoppel against minor, vide *Rangarao v. Sut Chorgmisil*, 152 Ind Cas 262 = 1934 M W N. 672 = 4 L W 261 = A.

I. R 1934 Mad. 560-67 M L J 257, *Umor Din v Abdul Huq*, 150 Ind. Cas 968-A I R 1934 Lah. 304

S 115 (p 1266) Where it is not proved that the witness knew of the contents of the deed at the time of attestation, the mere fact of attestation does not give rise to estoppel. *Hareli Sha* v. - - - - - 1933 Lah 703, see also *Fazol Husain v Jiwan* : - - - - -
Cas 454-34 P. L. R 196-A I R 19
v *Ven Kanna*, 145 Ind Cas 862-1933 M W N - - - - -
637-65 M L J 282, *Bhagwat v Gorakh*, 150 Ind Cas 765-A I R 1934 Pat 93

S 115 (p 1257) There is no estoppel against statute. *Barisal Co operative v Benoy bhusun*, A I R 1034 Cal 537-38 C W. N 457-151 Ind Cas 165, see also 15 P L T 661-A I R 1934 Pat 666 (F B), *Hakim Husain v Mustaq Husain*, 146 Ind Cas 482-A I R 1933 Oudh (F B), *Jai Sri Singh v Prabhu*, A I. R 1935 All 127-1935 A L J 21

S 115 (p 1258) The doctrine of estoppel cannot be invoked to render valid a transaction which the legislature has on grounds of public policy, enacted shall be invalid. *Gaura Die v Mohammad Yasin*, A I R 1935 Oudh 121-11 O. W N 1571-1935 O I R 5-153 Ind Cas 503

S 115 (p 1268) Where a Burmese Buddhist wife does not make any claim in husband's *payin* property but attested mortgage deed and makes payment of interest thereon, there is representation to creditor that she has no interest in it and she is estopped from claiming interest in such property. *Ma Shin v N R A* I R 1935 Rang 17

S 115 (p 1276) Even *bona fide* purchaser for value is representative. *Dara Sivarao v Kola Subharao*, A I R 1934 Mad 302-1934 M W N 316-39 M L W 431 A representative in interest is bound by the estoppel of his predecessor. *Tilak Rai v Pargash Rai*, A I R 1935 Pat 21-152 Ind Cas 823

S 115 (p 1276) Where the plaintiff stands in the shoes of and derives his title as successor in interest from one entitled to deny the defendant's title to certain property in suit he is not estopped from denying the title to certain property in suit he is not estopped from denying the title of the defendant merely because he was signatory to a deed of partition by which the property in suit fell to the share of the defendant. *Misbahuddin v Vidyasagar*, A, I R 1935 Lah 64-36 P L R 106

S 115 (p 1276) Judgment debtor is not estopped from urging that agreement for payment of enhanced interest subsequent to decree is not enforceable in execution. *Narendra v Oudh Commercial Bank*, A I R 1935 Oudh 465

S 115 (p 1276) The word 'representative' in s 115 is not to be limited to gratuitous transferee or volunteer and to a subsequent transferee for value. A derivative owner, estoppel is included. *Dara* 32-148 Ind Cas 612-1934
id 302-66 M L J 563.

S 115
Mortgagor
576-11 O

S 115 (p 1291) Party admitting partition in a previous suit cannot deny it in the subsequent suit. *Barod v Krishna*, A I R 1934 Cal 414-33 C W N 33-151 Ind Cas 268

S 115 (p 1291) In a case for money on accounts submitted, no estoppel arises unless the acts of the plaintiff in consequence of the accounts submitted are

necessarily referable to the representation made by the defendant *T A Hurst v Shyam sundar lal* A I R 1934 Cal 441-61 C 64-151 Ind Cas 334

S 115 (p 1291) A person who has held office under a registered agree ment for a period of years on certain terms and conditions and who has unreservedly accepted a fresh tenure of office on the same terms and conditions cannot be heard to say that he was not bound by the terms of his service *Gholam Hossain v Altaf Hossain* A I R 1934 Cal 328 58 C L J 333-61 C 80-149 Ind Cas 1215-38 C W N 214

S 115 (p 1291) Where person accepts before Settlement Officer his liability to pay rent he cannot subsequently turn round and seek declaration that some other person is liable for same *Man oor Hussain v Dawar Ali* A I R 1935 Oudh 409-1935 O W N 537 1935 O L R 290-155 Ind Cas 295

S 115 (p 1291) Acceptance of rent at rate specified in unregistered document requiring registration does not give rise to estoppel in suit to eject tenant *Datta Shitaram v Babu Sahib* A I R 1934 Bom 194-36 Bom L R 359-58 B 419

S 115 (p 1291) A mistaken interpretation made by Government officers of a grant by the Crown and their consequent mistaken acts would not be binding on the Crown and would not create an estoppel as against the Crown *Secretary of State v Faredoone* A I R 1934 Bom 434-36 Bom L R 761-154 Ind Cas 278

S 115 (p 1291) In case of ten porary arrangement for mutual convenience no estoppel arises : *Desto Din v Raj Narain* A I R 1934 All 75

S 115 (p 1291) Where in a previous partition suit plaintiff reserved right to sue separately for one item defendant is not estopped in a subsequent suit from challenging plaintiff's right *Gokul Prosad v Kunwar Bahadur* A I R 1935 Oudh 30-11 O W N 1359 1934 O L R 849-155 Ind Cas 322

S 115 (p 1291) Insurance Company is not estopped from asserting that premium is not paid because policy recites that premium has been paid *U San v New Zealand Insurance Co* A I R 1935 Rang 343-153 Ind Cas 387

S 115 (p 1291) The fact that some of the earlier grantees acquired the fresh grants being made by the Government on lands which they might have claimed for stop subsequent grantees from claiming acc
N 337-39 J R 1934 P C 17-38 C W
Cas 657-1934 O L R 103-11 Rang 136-66 M L J 239-6 J A 18-59
C L J 269

S 115 (p 1294) To estop a tenant from denying the landlords title under s 116 it is not necessary that the tenant should have been actually put into possession by the landlord It is sufficient being already in possession if he passes a rent note to the landlord acknowledging that a new tenancy had arisen *Krishna Rao v Gita or* A I R 193 Bom 144-36 Bom L R 1074

S 115 (p 1294) The words at the beginning of the tenancy mean at the time when the tenant was let into possession The distinction between the seeks to deny and possession seems to be vided by s 116 that his land he sense vitiate

the agreement which he has entered into with the landlord *Badraddin v Bhagloo Kheri*, A I R 1934 Pat 555-15 P L T 519, *Rachotappa v Kouchter*, A I R 1935 Bom 41-36 Bom L R 1083, *Alauddin v Asis*, 148 Ind Cas 684-A I R 1934 Pat 369, *Charubala v German Gones*, A I R 1934 Cal 499-59 C L J 66-152 Ind Cas 212, *Bel v Bel Ram*, A I R 1934 Lah 445-154 Ind Cas 52, *Chandrick v Bombay Buroda & Central India Ry*, A I R 1935 P C 59-1935 O W N 319, *Kumar Raj v Barboni Coal*, A I R 1935 Cal 368-62 C 340-63 C L J 477

S 116 (p 1294) Section 116 relates also to tenancies other than those in which tenant was first let in possession *Ram sans v Banshidhar*, A I R 1935 Oudh 385-1935 O W N 449-1935 O L R 230, *Bhattacharya v Ishtio*, 143 Ind Cas 838-10 O W N 48-A I R 1933 Oudh 129

S 116 (p. 1294) Where persons executing a lease deed are not let into possession of the property by the landlord but they were in possession long before they signed the lease, which was done under pressure, under a mistake and in ignorance of facts relating to the landlord's title, the execution of the loan does not raise any estoppel against person executing the lease *U Po Shin v Edward*, A I R 1934 Rang 139-150 Ind Cas 898.

S 116 (p 1294) No doubt a tenant may dispute his landlord's title, if he has been evicted by title paramount, or if under threat of eviction by a party having a title paramount, he has attorned as tenants. But if the tenant has attorned voluntarily, he is estopped from denying his landlord's title *Vayya prath v Chowa Khara*, A I R 1934 Mad 197-37 M L W 116-1934 M W N 38-66 M L J 355-147 Ind Cas 1218

S 116 (p 1302) Licensee or his assignee is also barred like tenants *Currimbhoy v Creet* 60 I A 297-60 C 980-1933 M W N 10-37 C W N 265-37 L W 253-35 Bom J R 223-57 C L J 264-1933 A L J 611-A I R 1933 P C 29-64 M L J 103 (P C)

S 116 (p. 1303) As regards estoppel by mortgagee *vide Mahamed Sherif v Syed Kasim*, A I R 1933 Mad 635-1933 M W N 642

S 118 (p 1314) It not likely for a child of seven years to distinguish between things which he has heard and those which he has seen, and when, inconsistent statement occurs in his evidence much importance should not be attached to his legitimacy *Ram Sakha v Emperor*, A I R 1934 Pat 651-15 P L T 586

S 128 (p 1330) *Vide Mahtab v Secretary of State*, A I R 1933 Lah 157

S 124 (p 1334) Report of confidential enquiry held under orders of Divisional officer for taking departmental action is privileged and inadmissible in evidence under s 124 *K v Mir Mahamed* A I R 1935 Sind 50-28 S L R 274-153 Ind Cas 651

S 124 (p 1334) Section 124 Evidence Act, involves two matters and there is distinction between the two (1) whether the particular document for which a claim is made is a public document and it is for the Court to decide whether the document is of the nature contemplated by the section then as to whether by its disclosure public interest would suffer of which the public officer himself is the sole Judge. The ground of privilege is only in regard to the second matter and not in regard to both *Srita v Secretary of State* A I R 1935 Mad 342

S 126 (p 1340) Things observed in course of employment are protected *Hakim v Emperor*, A I R 1934 Lah 269-1934 Cr C 507-152 Ind Cas 161-36 Cr L J 31

S 126 (p 1340) The privilege afforded to a legal adviser under s 126 is of a very limited character. It protects only such communications as are made to the legal adviser in confidence, in the course and for the purpose of employment. And if the communication is not made in confidence then the communication is in no sense privileged. *Bhagwan v Deoram*, A I R 1933 Sind 47-27 S L R 72-34 Cr L J 562.

S 126 (p 1351) Communications between a prosecutor in a Crown case and his attorney are not privileged. *Bhagwan v Deoram*, A I R 1933 Sind 47-27 S L R 72.

S 132 (p 1364) The compulsion referred to in s 132 is something more than being put in the witness box and being sworn to give evidence, but such compulsion may be express or implied. *Ghanshamdas v Nnumal*, A I R 1934 Sind 114-1934 Cr C 955-28 S L R 251-36 Cr L J 78.

S 132 (p 1364) Where a witness answers questions put by Court and thereby he is open to criminal prosecution, he must be deemed to have been compelled to answer and this entitles him to privilege of s 132 even though he has not objected. *Jagannath v Emperor*, A I R 1934 Lah 386.

S 133 (p 1372) A confession of a co accused requires to be corroborated as much as and in the same way as the sworn testimony of an accomplice, and a retracted confession is of no value at all as against the co accused. *Kasimuddin v Emperor*, 39 C W N 27, see also *Madhu Sudan v Emperor*, 37 C W N 934, see also *Venkataramanna v Emperor*, 1933 M W N 1129, *Nasir v Emperor*, A I R 1933 All 31-1932 A L J 1125-55 A 91-143 Ind Cas 67.

S 133 (p 1372) In order to sustain the conviction there must be independent corroboration of the testimony of the approver and the corroboration must be on a point material to the issue. *Jivan Singh v Emperor*, 34 P L R 866, see also *Arjun v Emperor*, 34 P L R 2, *Dhaju Mandol v Emperor*, A I R 1933 Pat 112-34 Cr L J 476-146 Ind Cas 934, *Raman Mohan v Emperor*, A I R 1933 Cal 146-34 Cr L J 638, *Shub das v Emperor*, A I R 1934 Cal 114-35 Cr L J 551, *Hafisuddin v Emperor*, A I R 1934 Cal 678-3 C W N 777-35 Cr L J 1357, 35 Cr L J 1335-A 1 R 1934 Cal 719 (F B), *Mahadev Prasad v Emperor*, A I R 1934 Oudh 90-11 O W N 62-1934 Cr C 260-35 Cr L J 397-9 Luck 355, *Bimal Prasad v Emperor*, A I R 1934 Lah 583-35 Cr L J 752-148 Ind Cas 745.

S 133 (p 1372) A confession of a co accused requires to be corroborated as much as and in the same way as the sworn testimony of an accomplice, and a retracted confession is of no value at all against the co accused. *Kasimuddin v Emperor*, 39 C W N 27.

S 133 (p 1372) In considering evidence of accomplice, Judge sitting without jury must treat himself as jury and apply same rule as in trials with jury. *Shiba Das v Emperor*, A I R 1934 Cal 114-37 C W N 934-147 Ind Cas 1124.

S 133 (p 1387) Evidence of accomplice can be used for purpose of corroborating evidence of approvers. *Maung Thaka v Emperor*, A I R 1935 Rang 491; but see *Parbhu v Emperor*, A I R 1933 Lah 916-34 P L R 639-146 Ind Cas 364.

S 135 (p 1350) Where the defence wants to cross examine the prosecution witnesses in a particular order by being allowed to postpone the cross examination of the complainant on the ground that the cross examination of the complainant before some other witnesses will embarrass and prejudice the defence case, the mere fact that the complainant, a sickly man

is present in Court and may not come on some other day due to his bad health is not sufficient to justify the Court in refusing to accede to the request of the defence; but the Court should exercise the discretion in favour of the defence *Moosa Haji v Emperor*, A I R 1933 Cal 169=37 C W N 238=142 Ind Cas 479=34 Cr L J 347

§ 155 (p 1390) Where the witnesses are not summoned at the instance of the accused for cross examination, but are summoned for examination in a *de novo* trial, the order in which the witnesses are to be examined in chief rests at the discretion of the prosecution *Sheikh Ibrahim v Emperor*, A I R 1934 Nag 209=1934 Cr C 980=152 Ind Cas 236

§ 135 (p 1391) The presence of a witness during the examination of the previous witness may well be turned an abuse of the process of the Court and therefore under s 151 the Court has inherent power to prevent that abuse and the Court can order that such witness should not be heard as a witness *Lalmani v Bejat Ram*, A I R 1934 All 840=1934 A L J 750=152 Ind Cas 30

§ 145 (p 1430) The provisions contained in s 145, Evidence Act relates to cross examination as to previous statements in writing but does not militate in any way against such previous statement being used by way of corroboration of statement put in under s 288, Cr Pro Code which are substantive evidence *Manir Ali v Emperor*, A I R 1934 Cal 124=37 C W N 1066=58 C L J 66.

§ 145 (p 1430) The previous statement must be put in strictly in accordance with the provisions of s 145 *Abdul Gafoor v Kulicharain* A I R 1914 Rang 273=152 Ind Cas 425

§ 145 (p 1430) A previous statement made by a party cannot be made legal evidence in the case and used against him as one admission by merely filing an attested copy of that statement without putting it to the party concerned *Secy of State v Akbar Shah* A I R 1934 Lah 753

§ 145 (p 1430) Admission by party in previous proceeding must be put to them before it is used against him in subsequent case *Daulat v Bishan*, A I R 1 34 Lah 750

§ 145 (p 1430) If questions are put and extracts included from depositions during the trial of a case it must be obvious that evidence has been admitted by the Judge and that it must form part of his record whether technically speaking it has been properly tendered or not. *Malla Khan v Emperor* L I R 1934 Cal 169=37 C W N 1061.

§ 145 (p 1430) A document which is used to contradict a witness must be put to the witness. Simply because the witness does not go into the witness box, the Court is not entitled to break the law and admit such document *Gajadhar Tewari v Nand Lal*, A I R 1934 Pat 55=150 Ind Cas 841=A A R 1934 Pat 215

§ 145 (p 1430) No doubt a witness can be contradicted by his previous statement recorded in writing under s 145, but before this is done it must be shown that the statements were voluntary *Nayab Shahana v Emperor*, A I R 1934 Cal 636=61 C 399=38 C W N 659=152 Ind Cas 44=35 Cr L J 1479

§s 145 146 (p 1432) Document for contradicting need not come from legitimate custody *Emperor v Raja Ram*, A I R 1934 Nag 85=16 N L J 193=145 Ind Cas 83=1934 Cr C 151

§ 145 (p 1432) Section 162 Cr Pro Code in its present form allows a Court no discretion to refuse an accused person copies of statements of witnesses recorded by the police in the course of an investigation whether such statements are recorded in a police diary or otherwise, unless proviso (2) to the

section applies. This is the case whether the statements are in extenso or in the form of a compressed memoranda and whether they are recorded in the third person or in the first person provided they are such statements as can be utilized to contradict a witness with his statement in Court in the manner provided by s 143 Evidence Act *Emperor v Hari and others*, A I R 1935 Sind 145 but see *Michael v Emperor*, 1933 M W N 1270, *Pakkiri v Emperor* 1933 M W N 919

S 145 (p 1432) Where under s 162 Cr Pro Code, a statement in a public diary is to be used to contradict a witness the procedure under s 145, Evidence Act is to be observed strictly *Raghuraj v Emperor*, A I R 1934 All 96, see also *Ponnusami Chetti In re*, 56 M 475 143 Ind Cas 424-34 Cr L J 582-1933 M W N 90-A I R 1933 Mad 372-64 M L J. 519, *Ram Bharosey v Emperor*, 14 L R 184 Cr

S 154 (p 1452) From the mere fact that a witness before the Sessions Court makes statement relating to a part of the prosecution case different from what he made before the Magistrate does not necessarily make him hostile *Nayeb Shahana v Emperor* A I R 1934 Cal 636-38 C W N. 659-61 C 399-152 Ind Cas 44-35 Cr L J 1479

S 154 (p 1452) Where it does not appear that the witness unexpectedly turned out hostile, it is not a proper exercise of discretion under s 154 for the Judge to allow him to be cross examined especially when the object of such cross examination is to introduce his retracted confession in evidence *Nayeb Shahana v Emperor*, A I R 1934 Cal 636 38 C W N 659-61 C 399-152 Ind Cas 44-35 Cr L J 1479

S 154 (p 1450) Although s 154 gives the Court an unfettered discretion to allow cross examination of a witness by the party calling him it ought not to exercise its discretion unless during the examination in Chief of the witness something happens which makes it necessary for the facts to be got from the witness by means of cross examination. That section does not entitle any party, for instance to say 'I propose to call my opponent and cross examine him' and the Court to allow such cross examination without anything more. Something more than the mere position in which the witness stands to the party calling him is required before the Court can exercise its discretion. Therefore, it is necessary before the procedure of s 154 can be adopted either for the permission of the Court to be obtained or for it to be given by the Court without its being sought. Such permission should not be tacit but should be signified if not in words by some other action of the Court indicating permission *Ammathazarammal v Official Assignee* A I R 1933 M 137-64 M L J 208-37 L W 233-144 Ind Cas 629-56 M 7

S 154 (p 1450) Before the party calling the witness can cross examine him, if it is not necessary that the witness should first of all be declared to be hostile and questions to cross examine can be allowed by the Court to be asked even though the witness does not show himself to be hostile *Ammathazarammal v Official Assignee*, A I R 1933 Mad 137-56 M 7-37 L W 233-A I R 1933 Mad 137-64 M L J 208

S 154 (p 1456) When the Court has exercised its discretion under s 154 it ought not to be interfered with by the appellate Court *Ammathazarammal v Official Assignee* A I R 1933 Mad 137-56 M 7-37 L W 233-A I R 1933 Mad 137-64 M L J 208

S 155 (p 1463) Where a previous statement by a witness is used to contradict him he should be given opportunity to explain it *Amrit v Gurcharan* A I R 1934 All 226-147 Ind Cas 591

Ss 155 157 (p 1470) Evidence of test identification is admissible under ss 155 and 157 and otherwise also *Krishna chandra v Emperor*, A I R 1935 Cal 311-39 C W. N. 488

S 157 (p 1773) A former statement admitted under s 157 can only be used as corroborative evidence. But it can not be used as substantive evidence. *Munda v Emperor*, A I R 1933 Rang 644, *Ram Das v Maya*

S 157 (p 1473) The first information can be used as corroborative evidence only of the person making the report. *Mt Misri v Emperor*, A I R 1934 Sind 100

S 157 (p 1473) Where a person has been examined as a witness, a statement said to have been made by him to another is not admissible when no question is put to the witness as to whether the particular statement had been made to such other person. *Mt Misri v Emperor*, A. I R 1934 Sind 100

S 158 (p 1474) Under s 158, prior statements of deceased persons are admissible both for contradiction and corroboration. *Sundarsana v Sutha ramamma*, 1933 M W N 1148.

S 159 (p 1475) Horoscope may be used for refreshing the memory as regards the age of the person whose horoscope it is. *Las Baba v Government of Mysore*, 12 Mys L J 133

Ss 159 161 (p 1475) Panchnamas may be used to refresh memories. *Baloch Pirwali v. Emperor*, 144 Ind Cas 772-34 Cr L J 848-A I R 1933 Sind 220

S 162 (p 1487) Even confidential document should be produced before Court and the Court is to decide how far the privilege claimed is reasonable and justified. *Karigowda v Government of Mysore*, 11 Mys L J 171

S 165 (p 1493) Under s 165 the Court can not order the production by a party of any document or thing no matter how irrelevant, into Court, unless the object is to obtain indicative evidence which may lead to discovery of relevant evidence of any fact in any matter then before Court. *Krishna Ayyar v Balakrishna*, A I R 1934 Mad 199-39 M L W 179-60 M L J 498-57 M 635-148 Ind Cas 79

S 167 (p 1500) Section 167 of the Act provides that if a Court finds that a certain piece of evidence has been wrongly admitted, the decision need not be reversed on the ground even in second appeal provided that the Court holds there is sufficient evidence on the record to justify the finding. *Soney Lal v Derbdeo*, 16 P L T 199 (F B)

S 167 (p 1500) Section 167 does not apply to second appeal on the civil side or cases tried by a jury on the criminal side, and not to first appeals where the facts are a matter of decision of the appellate Court. *Bhabendra chandra v Ajodhya chandra*, A I R 1934 Pat 605

S 167 (p 1500) If there is sufficient evidence upon which a case could be completely decided the appellate Court is precluded from remanding the cases for hearing under s 167. The question is not whether the Judge would or would not believe the evidence other than the inadmissible evidence but whether it was possible for him to come to such conclusion as he did in the absence of that inadmissible evidence. *Hari Ahir v Sri Sangat Chattri*, 152 Ind Cas 829-A I R 1934 Pat 617

S 167 (p 1500) The acceptance of inadmissible evidence is not a ground to set aside a judgment or grant a new trial if there is other evidence upon which the finding could be arrived at. And the High Court even in second appeal see whether there is such other evidence justifying the decision and if there is such evidence it cannot order a new trial. *Gajadkar v Nind Lal*, A I R 1934 Pat 55-150 Ind. Cas 841-A I R. 1934 Pat 55

SUPPLEMENT TO N D BASU'S INDIAN EVIDENCE ACT.

Amendments to the Indian Evidence Act, 1872

The Government of India (Adaptation of Indian Laws) Order, 1937.

AT THE COURT AT BUCKINGHAM PALACE.

THE 18TH DAY OF MARCH, 1937.

Present.

The King's Most Excellent Majesty In Council

WHEREAS by section two hundred and ninety three of the Government of India Act, 1935, (hereinafter in the recitals to this Order referred to as 'the Act') His Majesty is empowered by Order in Council to provide that from such date as may be specified in the Order any law in force in British India or in any part of British India shall, until repealed or amended by a competent legislature or other competent authority, have effect subject to such adaptations and modifications as appear to His Majesty to be necessary or expedient for bringing the provisions of that law into accord with the provisions of the Act

And whereas a draft of this Order has been laid before Parliament in accordance with the provisions of sub-section (1) of section three hundred and nine of the Act and an Address has been presented to His Majesty by both Houses of Parliament praying that an Order may be made in the terms of this Order

Now, therefore, His Majesty, in the exercise of the said powers and of all other powers enabling him in that behalf, is pleased by and with the advice of His Privy Council to order, and it is hereby ordered as follows,—

1 This Order may be cited as the Government of India (Adaptation of Indian Laws) Order, 1937, and shall come into operation on the first day of April, nineteen hundred and thirty seven

2 (1) In this Order the expression 'Indian Law' means a law as defined

or the interpretation of this
of Parliament

3 The Indian laws mentioned in the Schedule to this Order shall, until repealed or amended by a competent Legislature or other competent authority, have effect subject to the adaptations and modifications directed by those Schedules to be made therein or, if it is so directed, shall cease to have effect

4 (1) Whenever an expression mentioned in the first column of the Table hereinafter printed occurs (otherwise than in a title or preamble or in a citation or description of an enactment), in a Central or Provincial Act or Regulation whether an Act or Regulation mentioned in the Schedules to this Order or not, then, unless that expression is by this Order expressly directed to be otherwise adapted or modified, or to stand unmodified or to be omitted, there shall be substituted therefor the expression set opposite to it in column two of the said table

Table of General Adaptations

Governor General of India in Council	Governor	} Central Government
General of India	Governor General in Council	
Governor General	Government of India	

Governor in Council	Governor (except in the expression 'Governor's Province')	Lieutenant Governor	} Provincial Government
Governor in Council	Lieutenant Governor	Chief Commissioner (except in the expression 'Chief Commissioner's Province')	
	Local Government	Local Administration	

Gazette of India	local official Gazette	local Gazette	} Official Gazette
any other expression denoting a Gazette in which official notices of a government are published, not being the Gazette of a district or other sub division of a Province			

Any reference to the Governor (or Lieutenant Governor) of a named Province in Council shall be treated for the purposes of this paragraph as if it were a reference to the Governor (or Lieutenant Governor) in Council of that Province

(2) A direction in the Schedules to this Order that a specified Indian law or section or portion of an Indian law shall stand unmodified shall be construed merely as a direction that it is not to be modified or adapted in accordance with the foregoing provisions of this paragraph

5 (1) Where this Order requires that in any specified Indian law or in any section or other portion of an Indian law, certain words shall be substituted for certain other words or that certain words shall be omitted, that substitution or omission, as the case may be, shall except where it is otherwise expressly provided be made wherever the words referred to occur in that law or, as the case may be, in that section or portion

(2) Where this Order requires that in any Indian law a plural noun shall be substituted for a singular noun and *vice versa* or a masculine noun for a neuter noun or *vice versa* there shall be made also in any verb or pronoun in the sentence in question such consequential amendment as the rules of Grammar may require

6 (1) The following provisions shall have effect where any Indian law which under this Order is to be adapted or modified has before the commencement of this Order been amended, either generally or in relation to any particular area by the insertion or omission of words or the substitution of words for other words —

(a) effect shall first be given in the amending law to any adaptation or modification required by paragraphs three and five of this order to be made therein,

(b) the original law shall then be amended either generally or, as the case may be, in its application to the particular area, so as to give effect to the directions contained in the amending law or, where any adaptation or modification has fallen to be made under sub paragraph (a), in that law as so adapted or modified and

(c) all adaptations or modifications required by this Order to be made in the original law shall then be made in that law as so amended except so far as in the case of any particular area they may be inapplicable

(2) In this paragraph references to the amendment of a law by the insertion or omission of words or the substitution of words do not include references to an amendment which is effected merely by directing that certain words shall be construed in a particular manner

7 Subject to the foregoing provisions of this Order any reference by whatever form of words in any Indian law in force immediately before the commencement of this Order to an authority competent at the date of the passing of that law to exercise any powers or authorities or discharge any functions, in any part of British India shall, where a corresponding

new authority has been constituted by or under any Part of the Government of India Act, 1935, for the time being in force, have effect until duly repealed or amended as if it were a reference to that new authority.

8 In any Indian law in force immediately before the commencement of this Order any reference by name or description to any territory shall, unless the contrary intention appears or unless it has been, or is by this Order, otherwise expressly provided, be construed as a reference to the territory which bore that name or answered to that description at the date when the enactment containing that name or description came into operation.

Provided that in the application of any enactment to Madras, Bombay, Bihar or the Central Provinces, references in that enactment to Madras, Bombay, Bihar or the Central Provinces, as the case may be, shall be construed as exclusive of so much of those Provinces respectively as was separated therefrom on the constitution of the Provinces of Orissa and Sind.

9 The provisions of this Order which adapt or modify Indian laws so as to alter the manner in which, the authority by which, or the law under or in accordance with which, any powers are exercisable, shall not render invalid any notification, order, commitment, attachment, bye law, rule or regulation duly made or issued, or anything duly done, before the commencement of this Order, and any such notification, order, commitment, attachment, bye law, rule, regulation or thing may be revoked, varied or undone in the like manner, to the like extent and in the like circumstances as if it had been made, issued or done after the commencement of this Order by the competent authority and under and in accordance with the provisions therein applicable to such a case.

10 Save as provided by this Order, all powers which under any law in force in British India, or in any part of British India, were immediately before the commencement of Part III of the Government of India Act, 1935, vested in, or exercisable by, any person or authority shall continue to be so vested or exercisable until other provision is made by some legislature or authority empowered to regulate the matter in question.

11 Nothing in this Order shall affect the previous operation of, or anything duly done or suffered under, any Indian law, or any right, privilege, obligation or liability already acquired, accrued or incurred under any such law, or any penalty, forfeiture or punishment incurred in respect of any offence already committed against any such law.

12 For the avoidance of doubt it is hereby declared that—

(a) nothing in this Order transferring or assigning any functions to the Central Government shall be construed as excluding those functions from the operation of section one hundred and twenty four of the said Act.

(b) the transfer by this Order of any functions to the Central Government shall not be construed as excluding that jurisdiction from the operation of sub-section (2) of section two hundred and ninety six of the said Act.

(c) nothing in this Order shall affect the provisions of any Order in Council for the time being in force made under section one hundred and fifty eight, section one hundred and fifty nine or section one hundred and sixty of the said Act (which empower Orders to be made regulating the relations of India and Burma to their monetary systems, relief from double taxation, customs, and ancillary and related matters), or under any corresponding provisions in the Government of Burma Act 1935, and

(d) no repeal effected by this Order shall affect the operation of sub-paragraph (2) of paragraph fifteen of the Government of India (Commencement and Transitory Provisions) Order, 1936.

(sd) M. P. A. Hankey

1 The Indian Evidence Act, 1872

(1 of 1872)

Section 26 —In the explanation omit 'or in Burma'

Section 36 —For 'Government' substitute "any Government in British India"

Section 37 —For 'Act of the Governor General of India in Council' substitute 'Act of the Central Legislature' and for the words from 'for the time being' to the end of the section substitute "by any laws for the time being in force or in a Government notification or notification by the Crown representative appearing in the official Gazette or in any printed paper purporting to be the London Gazette or the Government Gazette of any Dominion, Colony or possession of His Majesty in a relevant fact"

Section 57 —Substitute for paragraph (1) —

"(1) all Indian laws"

In paragraph (4) for the words from "of the Councils" to 'relating thereto' substitute 'of the legislatures established under any laws for the time being in force in British India'

In paragraph (6) for 'the Governor General or any Local Government in Council' substitute "the Central Government or the Crown representative"

In paragraph (7) for 'the Gazette of India or in the official Gazette of any Local Government' substitute 'any official Gazette'

Section 78 —In sub section (1) for "the Executive Government of British India substitute "the Central Government", after the first 'departments' insert 'or of the Crown representative', and at the end of the sub section add "or, as the case may be, of the Crown representative", in sub section (2) for 'by order of Government' substitute "by order of the Government concerned", and in sub section (4) for "public act of the Governor General of India in Council" substitute "Central Act"

Section 79 —For 'Native State in alliance with Her Majesty' substitute 'Indian State' and for the Governor General in Council" substitute 'the Central Government or the Crown representative'

Section 81 —For 'the Gazette of India, or the Government Gazette of any Local Government, or' substitute any official Gazette, or 'the Government Gazette'

Section 83 —For 'Government' substitute "any Government in British India"

Section 118 —After 'any portion of British territory, has' insert "before the commencement of Part III of the Government of India Act, 1935"

■ The Banker's Books Evidence Act, 1891

(XVIII of 1891)

Section 2 —For sub section (1) substitute—

'(1) 'Company' means a company registered under any of the enactments relating to companies for the time being in force in any part of His Majesty's dominions or incorporated by an Act of Parliament or by an Indian law or by Royal Charter or by Letters Patent'

THE GOVERNMENT OF BURMA (ADAPTATION OF LAWS) ORDER, 1937.

WHEREAS by section one hundred and forty-nine of the Government of Burma Act, 1935, His Majesty is empowered by order in Council to provide that, as from such date as may be specified in the order, any law in force in Burma shall, until repealed or amended by the Legislature or other competent authority, have as appear to His Majesty ma :

And whereas a draft of this order has been laid before Parliament in accordance with the provisions of sub-section (1) of section one hundred and fifty-seven of the said Act and an Address has been presented to His Majesty by both Houses of Parliament praying that an order may be made in this terms of this order :

Now, therefore, His Majesty, in the exercise of power conferred on him in the aforesaid and of all other powers enabling him in that behalf, is pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered, as follows :—

1. This Order may be cited as the Government of Burma (Adaptation of Laws) Order, 1937.

2. This Order shall come into operation on the separation of Burma and India.

3. (1) In this Order, 'Burman law' means a law as defined in section one hundred and forty-nine of the Government of Burma Act, 1935.

(2) The Interpretation Act, 1889, applies for the interpretation of this order as it applies for the interpretation of an Act of Parliament.

4. (1) The enactments mentioned in the Schedule to this order shall, until repealed or amended by the Legislature or other competent authority, have effect subject to the adaptations and modifications directed by that Schedule to be made therein or, where so directed, shall cease to have effect.

(2) Save as otherwise provided in that or in any other Burman law, every Burman law shall be deemed to have effect throughout the whole of British Burma.

5. (1) Whenever an expression mentioned in the first column of the Table here-in-under printed occurs (otherwise than in a title or preamble or in a citation or description of an enactment) in any Burman law then, unless that expression is under the last preceding paragraph expressly directed to be otherwise adapted or modified or to stand unmodified or to be omitted, there shall be substituted therefor the expression set opposite to it in the second column of the said Table.

Table of General Adaptations.

Governor-General of India : Governor-General :	} Governor.
Governor-General of India in Council :	
Governor-General in Council :	
Chief Commissioner of British Burma :	
Chief Commissioner :	
Lieutenant-Governor of Burma : Lieutenant-Governor :	
Local Government of Burma ; Local Government.	

Gazette of India,
Gazette of British Burma,
Burma Gazette,
Local official Gazette,
Official Gazette,

} Gazette

(2) Any words contained in any Burman law, otherwise than in a title or preamble, which require the consent, assent, approval, sanction or control of the Governor General or the Governor General in Council in relation to any thing done by the Local Government or the Governor shall be omitted.

(3) A direction in the Schedule to this order that a specified Burman law or section or portion of a Burman law shall stand unmodified shall be construed merely as a direction that it is not to be modified or adapted in accordance with the foregoing provisions of this paragraph.

Where this Order requires that in any specified Burman law or portion of a Burman law certain words shall be substituted for certain other words or that certain words shall be omitted, that substitution or omission, as the case may be, shall unless the contrary intention appears, be made wherever the words referred to occur in that law or that portion.

7 (1) Where any Burman law has before the commencement of this order been amended by the insertion or omission of words, or the substitution of words for other words, the adaptations and modifications directed to be made therein by this order shall be made in the enactment as in force at the commencement of this order, that is to say, as so amended.

Provided that nothing in this paragraph shall be construed as extending the operation of any temporary amending enactment.

(2) In this paragraph references to the amendment of law by the insertion or omission of words, or the substitution of words, do not include references to an amendment which is effected merely by directing that certain words shall be construed in a particular manner.

8 Where this order requires the substitution in any enactment of a plural noun for a singular noun or *vice versa* or of a masculine noun for a neuter noun, or *vice versa*, or of a noun or adjective beginning with a consonant for a noun or adjective beginning with a vowel, or *vice versa* there shall also be made in any verb, pronoun or article in the sentence in question such consequential amendment as the rules of Grammar may require.

9 The adaptations and modifications which adapt or modify any enactment so as to be in conformity with the authority by which, or the law in or in accordance with which, the powers are exercisable, shall not render invalid any notification, order, commitment, attachment by law, rule or regulation duly made or issued, or anything done before the commencement of this order; and any such notification of order, commitment, attachment, by law, rule, regulation or thing may be revoked, varied or undone in the like manner, to the like extent and in the like circumstances as if it had been made, issued or done after the commencement of this order by the competent authority and under and in accordance with the provisions then applicable to such case.

10 Nothing in this order shall affect the previous operation of, or anything duly done or suffered under, any Burman law, or any right, privilege, obligation or liability already acquired, accrued or incurred under any such law or any penalty, forfeiture or punishment incurred in respect of any offence already committed against any such law.

11 Save as provided in this order, all powers which under any law in force in Burma or in any part of Burma were at the commencement of this order vested in or exercisable by any person or authority shall continue to be so

vested or exercisable until other provision is made by the Legislature or by some authority empowered to regulate the matter in question.

12 (1) References in any Burman law to that or any other Burman law, or to any section or portion thereof, shall, except in so far as the contrary intention appears, be construed—

(a) as respects any period before the separation of India and Burma, as references to that law, section or portion as in force in all places to which it then extended, whether within or without Burma

(b) as respects any period after the said separation as references to that law, section or portion as in force in Burma

(2) The foregoing provisions of this paragraph extend to references to, or to any section or portion of, any Burman law by means of the short title of the law, notwithstanding that the Schedule to this Order alters that short title and notwithstanding that no consequential alteration is made in the reference.

13 For the avoidance of doubt it is hereby declared that nothing in this order shall affect the operation of sub-paragraph (2) of paragraph eleven of the Government of Burma (Commencement and Transitory Provisions) Order, 1935, or of any order in Council made under Part XI of the Government of Burma Act, 1935

THE SCHEDULE

The Indian Evidence Act, 1872

(1 of 1872 ,

In the short title omit "Indian" and "1872"

Section 1—Omit "extends to the whole of British India and"

Sections 23, 126, 128 and 150—For 'barrister pleader attorney or vakil', and 'barrister, attorney or vakil' substitute "legal practitioner"

Section 57—In clause (12) and in section 127 for "advocates, attorneys proctors, vakils pleaders and "barristers pleaders attorneys and vakils substitute "legal practitioners"

Section 26—Omit "In the Presidency of Fort St George or in Burma or elsewhere"

Section 37—For 'Act of the Governor General of India in Council or of any other legislative authority in British India constituted for the time being under the Indian Councils Act 1861 the Indian Councils Acts 1861 and 1892 or the Indian Councils Acts 1861 to 1909' substitute "enactment in force at any time in British Burma or British India", for "Gazette of India, or in the Gazette of any Local Government" substitute "Gazette"

Section 57—In clause (1) for 'British India' substitute 'British Burma or British India'

For clause (4) substitute—

'(4) the course of proceeding of Parliament and of the Burma Legislature'

In clause (6) for 'British India and of all Courts out of British India established by the authority of the Government in Council' substitute "Government in Council substitute British Burma having the force of law in British India" substitute "Burma"

In clause (7) for 'Burma' and for 'Gazette of India or in the official Gazette of any Local Government' substitute "Gazette"

Section 65—In clause (f) for 'British India' substitute "British Burma"

Section 66—For "attorney" substitute "advocate"

Section 74—For 'British India' substitute "British Burma."

Section 78—For "Executive Government of British India in any of its departments, or of any Local Government" or any department of any Local Government" substitute "Government" and for "any such Government" substitute "the Governor"

For "public Act of the Governor General of India in Council" substitute "enactment in force in British Burma"

For "British India" substitute "British Burma"

Section 79—For "British India" substitute "British Burma" and for "Native State in alliance with Her Majesty" substitute "other part of Burma"

Section 81—For "*Gazette of India*, or the Government Gazette of any Local Government, or" substitute "Gazette of Burma or the Government Gazette".

Sections 85 and 86—Omit "or of the Government of India"

Section 86—Omit the words from "An officer" to "territory or place".

Section 91—For Exception 2 substitute—"Exception 2—Wills may be proved by any probate thereof having effect in British Burma"

Omit section 113

The Bankers' Books Evidence Act, 1891.

(XVIII of 1891)

Section 1—Omit sub section (2)

Section 2—For clause (1) substitute the following—

"(1) 'Company' means a company incorporated or registered by or under the law of the United Kingdom, British Burma, British India or any British possession",

In clause (6) for "a High Court" substitute "the High Court"

THE INDIAN EVIDENCE ACT.

— 0 —
ACT I OF 1872.
— — —

*Received the assent of the Governor-General on the
15th March, 1872*

WHEREAS it is expedient to consolidate, define and amend
the Law of Evidence; It is hereby enacted
as follows:—

Preamble

Title of an Act — "Originally, bills in Parliament were mere petitions to the King. They were entered on the rolls of Parliament, with the King's answer and at the records into Statutes to which they were first added about the eleventh century. The original title of a bill is amended at the eleventh century, when the alterations necessary, and in the body of the bill, in the third reading by Lord Mansfield in *Rex v. Poulter's Case*, was no part of the law, see al 11 R. p. 336, *Chance v. Jefferys v. E*, 15, *Poulter's Case*, 16, 6 O B N 8 1; 18, D 194 "The"

for the legislation; but remedy may both consistently and wisely be extended beyond the cure of that evil". In the well known *Sussex Peerage Case*, 11 C L & Fin 85, *Tindal C J* observed: "If the words of the Statute are in themselves precise and unambiguous then no more can be necessary than to expand those words in their natural and ordinary sense. The words themselves alone do in such case, best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the Legislature, it has always been held a safe means of collecting the intention, to call in aid the ground and cause of making the Statute, and to have recourse to the preamble, which according to *Chief Justice Dyer*, is a key to open the minds of the makers of the Act, and the mischief which they intended to redress". In the *Secretary of State v. Maharaja of Bobbili*, 43 M 529 P C Lord Shaw said "It is the section that governs an Act of Improvement of Calcutta, the preamble of an Act may be a most useful indication of a particular Act".

90) F B 145, *Kristonath v T T Brown*, C L J. 8, *Kesavalu Nicker v The* = 92 Ind Cas 1053 = A I R 1926 Mad

381 = 50 M L J 301, *Nepu v Sayer Pramanik*, 103 Ind Cas 662 = A I R 1927 Cal 763, *Raj Mal v Harnam Singh*, 104 Ind Cas 661 = 28 P L R 505 Where a section, or an Act, is capable of two renderings or is said to mean less or more, than it says it is a maxim of interpretation that one must look at the 46 A

I admin of the which we are bound to and I say so because it is not merely a fragmentary enactment, but a consolidatory enactment repealing all rules of evidence other than those saved by the last part of section 2 of that enactment"—*Per Mahmood J in Collector of Gorakhpur v Pulakdhar Singh*, 12 A. 1 F B at p 35

Interpretation of Statutes A Statute is the will of the Legislature, and the fundamental rule of interpretation, to which all others are subordinate, is that a Statute is to be expounded 'according to the intent of them that made it' 4 Inst 330, *Sussex Peerage*, 11 Cl & F 143 It is the fundamental principle of the interpretation of Statutes that their language must be understood in the most ordinary and popular acceptance *Per Mahmood J in Queen Empress v Abdullah*, 7 A 335 (398) (F B) The language of a Statute, taken in its

inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity repugnance or inconsistency, but no further' *Per Lord Wensleydale, in Grey v Pearson*, (1852) 7 App Cas (P) 132 (1853) 12 App Cas at p 114, as in substance laid down by *Hull & Bro Gt* It has been stated by Lord Cranworth (when Chancellor) as 'a Cardinal Rule' from which, if we

departed, we should hunch into a sea of difficulties not easy to fathom [Gundry v Punwiger, (1852) 1 De G M & G 502]. and as the Golden Rule when applied to Acts of Parliament, by Jervis C J, in Mathison v Hart, 23 L J C P 108, at p 114 "Marvell p 5 pretition of Statutes that when the law constructions, the Court should not an absurdity or obvious injustice, Khan Gul, Lakha Singh, A I R 1928 Lab 609 (F B) The Court and should construe an enactment in terms of the other Statutes which it ought to be so construed that if it can be prevented no clause, sentence or word, shall be superfluous, void or insignificant R v Bishop of Oxford, 4 Q B D 245, Hough v Windus, 12 Q B D 224, Vasanbai v Radhibai, A I R 1928 Sind 118

Rules of Construction, when language is plain 'It is not allowable' says Vattel, "to interpret what has no need of interpretation" (Law of N C 263) *Absoluta sententia expositore no indiget* (2 Inst 533). Such language best declares without more, the intention of the law-giver, and is decisive of it [Per Buller J in R v Hodnett 1 T R 966, Sussex Peerage (1811) 11 Cl & F 143 U S v Hartwell, Wallace 395, U S v Wiltberger, 5 Wheat 95] The Legislature must be in the Court is bound of the language of the Statute, even if the result of such construction leads to anomalies or be productive even of absurdity Rayib v Lakhan, 27 C 11-3 C W N 660 following, Bank of England v Fagholi, L R App Cas (1891) 197 p 145, St John Hamstead v Cotton 12 App Cas 6 (1896), see also, Alfred v Wilkinson, 47 B 843, R v City of London Court (1892) 1 Q B 273, Measey Docks v Turner, (1893) A C at p 477, British Farmers & Co. In re, 43 L J Ch 56, Crawford v Spooner 6 Moo P C 9, R v Allen 28 L J M C 94, Abey v Dale, 21 L J C P 104 The duty of the Court is not to make the law reasonable, but to expound it as it stands, according to the real sense of the word, Biffin v Yorke, 5 M & G 428, Dennis v Tozell 42 L J M C 33, Plasterers Co. v Parish Clerks Co, 20 L J Ex 362 A Statute need not be interpreted in the light of what is just and expedient, where it is otherwise clear from plain and unambiguous language Guyne v Burnell 7 Cl & F 572 "Our decision", says Lord Tenterden in R v Barham 8 B & C 99, "may in this particular case operate to defeat the object of the Act, but it is better to abide by this consequence than to put upon it a construction not warranted by the words of the Act in order to give effect to what we may suppose to have been the intention of the Legislature" The Act says Lord Abinger in A G v Lockwood, 9 M & W 395, "has practically had a pernicious effect not at all contemplated, but we cannot construe it according to that result" "I can not doubt" says Lord Campbell in Coe v Laurence, 22 L J Q B 140, "what the intention of the Legislature was, but that intention has not been carried into effect by the language used It is far better that we should abide by the words of a Statute than seek to reform it according to the supposed intention" It may have been an oversight in the framers of the Act, but we must see also R v Male, 22 L J Q B 225, L J Ch 372; Wilkins v Palmer v Thatcher,

even if the result of such construction leads to anomalies or be productive even of absurdity Rayib v Lakhan, 27 C 11-3 C W N 660 following, Bank of England v Fagholi, L R App Cas (1891) 197 p 145, St John Hamstead v Cotton 12 App Cas 6 (1896), see also, Alfred v Wilkinson, 47 B 843, R v City of London Court (1892) 1 Q B 273, Measey Docks v Turner, (1893) A C at p 477, British Farmers & Co. In re, 43 L J Ch 56, Crawford v Spooner 6 Moo P C 9, R v Allen 28 L J M C 94, Abey v Dale, 21 L J C P 104 The duty of the Court is not to make the law reasonable, but to expound it as it stands, according to the real sense of the word, Biffin v Yorke, 5 M & G 428, Dennis v Tozell 42 L J M C 33, Plasterers Co. v Parish Clerks Co, 20 L J Ex 362 A Statute need not be interpreted in the light of what is just and expedient, where it is otherwise clear from plain and unambiguous language Guyne v Burnell 7 Cl & F 572 "Our decision", says Lord Tenterden in R v Barham 8 B & C 99, "may in this particular case operate to defeat the object of the Act, but it is better to abide by this consequence than to put upon it a construction not warranted by the words of the Act in order to give effect to what we may suppose to have been the intention of the Legislature" The Act says Lord Abinger in A G v Lockwood, 9 M & W 395, "has practically had a pernicious effect not at all contemplated, but we cannot construe it according to that result" "I can not doubt" says Lord Campbell in Coe v Laurence, 22 L J Q B 140, "what the intention of the Legislature was, but that intention has not been carried into effect by the language used It is far better that we should abide by the words of a Statute than seek to reform it according to the supposed intention" It may have been an oversight in the framers of the Act, but we must see also R v Male, 22 L J Q B 225, L J Ch 372; Wilkins v Palmer v Thatcher, and from the words of the objects drafted with by the Statute Forlyre v Bridges, 1 H. L. Cas 1-11 Jur 157 Because the Court cannot depart from the words in which it is expressed at the time. Logan v Oorloun (L

silent as to them *Pelasha Reddi v Varala Reddi*, A I R 1929 Mad 236=29 M L W 210=1929 M W N 81=52 M 432

Construc Facts If the words are which if less correct gram the Legislature *Warrall* p 36 *Palmer*, 18 L J Ex 409; *Caledonian R Co v N* Bru R Co 6 App Cas 114 *Edinburgh Tramways Co v Torbain*, 1 App Cas 68 *Firstman Photograph Co v Comptroller of Patents*, (1898) A C 571, *Direct* T S Cable Co v *Anglo-American Telegraph Co* (1877) 2 App Cas 391, *Walton* Ex parte (1891) 17 Ch D 746 "The literal construction, then, has, in general, but *prima facie* preference. To arrive at the real meaning, it is always necessary to get an exact conception of the consider according to *Lord Coke* (*Hey* 10 Rep 731) (1) What was the law b mischief or defect for which the law had not provided, (2) What remedy ment was appointed and (3) the reason of the remedy *Maxwell* p 39 The same view is reiterated by *Lindley* M R in *Hayfair Property Co, In re*, (1890) 2 Ch 28 at p 35 in the following words "In order properly to interpret any Statute it is as necessary now as it was when *Lord Coke* reported (*Heydon's case* (1554) 3 Rep 7 (a)) to consider how the law stood when the Statute to be construed was passed what the mischief was for which the old law was and the remedy provided by Lord *Sinha* said "It is a statute as they stand and the previous state of the law be founded but when it is contended that the legislature intended by any particular amendment to make substantial changes in the pre-existing law it is impossible to arrive at a conclusion without considering what the law was previously to the particular enactment and to see whether the words used in the statute can be taken to effect the change that is suggested as intended" *Alidu* *Pahm v Syed Ibrahim* 5 I A 96-75 Cal 519=32 C W N 482=26 A L J 461=30 Bom L R 714=51 M L J 609 (P C) see also *Per Lord Sinha* in *Mt Poman v Mt Halanah*, A I R 1923 P C 2 *Han Ray v Krishna Lal* A I R 1928 Lah 361, *Gulab v Iala Sir*, *Prasad*, 29 C 517=5 C W N 610 Where intention is not clear pre-existing law can be referred to So reference to previous state of law is permissible for solving doubts in construing *Rogers* *Pratt v Secretary of State*, 52 (1=5) Ind Cas 273

It is an elementary rule that construction is to be made of all the parts together and not of one part only by itself *Co Litt 741 (a)* *Lincoln College* case, 3 Rep 59 (b) *Durband v Board of Trade*, 55 L J Q B 417, *Warrall* best harmonises with the *Warrall* p 31 An Act of

in the English language as upon very strong ground, derived from the construed *Hensley Local It v* Q B D 1=29 L J Q B 165 Or construed, so as to give some meaning to every part of it *Harmon v Hm* *Churan*, 22 C 833 (S W), *Suamiatha v Iutha* 15 M L J 116 (T B)=28 M 166 It is a well known rule of construction that each part of a Statute must expound every other part *Lah v Emperor*, 5 P L J 73=1 Pat L F 117= (1920) Pat 125=51 Ind Cas 891=21 Cr L J 190 The Court must in each

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752 = A. I. R. 1925 Nig 219 The Severance Act, 1897 was not retrospective, and did not apply to Wills made before the passing of that Act. *Richard Pies Slinner v Durga Prasad*, 31 A 239 = 21 A W N 213 = 3 Ind Cas 66, *Sarkar v Prosonomahce*, 6 C 791. The leaning against giving certain Statutes a retrospective operation rests upon the presumption that the Legislature does not intend what is unjust. This rule is based on the maxim *Novus constitutio futuris formam imponere debet et non praeteritis*. (A new rule ought to be prospective, not retrospective in its operation). Retrospective laws are, as a rule, of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought when introduced for the first time, to deal with future acts, and ought not to change character of past transactions carried on upon the faith of the then existing law. *Per Willes, J in Phillips v Fyfe*, 12 R 6 Q B 23. The case of *Mason v Durden*, 2 Ex Ch 22 is a leading case on the subject. That was a case in which the plaintiff claimed money on the basis of a wagering contract. During the pendency of the suit Stat 5 and 6 Vict C 169 was passed. That Statute made all wagering contracts null and void and all suits brought on such contracts not maintainable. The question raised was whether it operated to defeat the plaintiff's claim. The Court of Exchequer decided it did not. *Parke B* in delivering the judgment observed: 'The language of the clause, if taken in its ordinary sense, as in the first instance we ought to take it, actions both present and future, shall be void, shall be null and void to all'.

Coke says 'a rule in construction of Statutes is that they shall be construed to be prospective, and intended to regulate the future conduct of persons, is deeply founded in good sense and strict justice, and has been acted upon in many cases. But this rule, which is one of construction only, will certainly yield to the intention of the Legislature, and the question in this and in every similar case is, whether that intention has been sufficiently expressed'.

So it is abundantly clear that

which takes away or impairs vested rights acquired under existing laws, or creates a new disability in respect of transactions or considerations already past, must be presumed, out of respect to the rights of the public, to be intended to operate prospectively.

Dish v Junesa Khelun v Purna Kedar Nath v Netram 23 Ind 31 C W N 1007, 1 R 1927 Cal 763, *Delhi Cloth etc. Mills v Income Tax Commissioner, Delhi*, 54 I A 421 = 8 Pat L J 791 = 25 A L J 964 = 50 M L J 819 = A I R 1927 P C 242.

the procedure in *Gardner*. So no suit can, if during *Costa Rica* also *Wright v Stoom*, 22 Ind 1927 Cal 763, *Delhi Cloth etc. Mills v Income Tax Commissioner, Delhi*, 54 I A 421 = 8 Pat L J 791 = 25 A L J 964 = 50 M L J 819 = A I R 1927 P C 242. The question is more to be given rise than as without doing expressed in be construed Q B 551 must unless d before or e procedure All 657, see

also *Netram v. Netram*, 23 N L J 100 = 101 Ind Cas 284 = A. I. R. 1927

Nag 127. While provisions of a Statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them, provisions which touch a right in existence at the passing of the Statute are not to be applied retrospectively in the absence of express enactment or necessary intendment. *Delhi Cloth & Mill Co v* 121-8 Pat L. T. 791-
 25 A L J 8 - " 1927 P. C. 212 In *Rim*
Singha v. S/ B), a suit for arrears of
 rent for less Assistant Collector under
 the Agra Tenancy Act, when the old Tenancy Act, was in force. Before it could be decided, the new Act came into force, by which the right of appeal was taken away. The point of law that arises before the Full Bench, therefore is whether the coming into force of the new Tenancy Act, under which no appeal is provided, deprives the defendant of his right of appeal, which he would have had if the old Tenancy Act had continued to be operative. The Full Bench answered the question in the following terms: "It is clear to us that an appeal is a mere continuance of the original proceeding initiated by the filing of the plaint and that the right to continue that proceeding cannot be affected by a new Act unless it expressly says

Shyam Behari Lal, A. J. Ali
Alian v Genda, 26 A. 375 be
 deemed to have been overruled by the pronouncement of their Lordships of the Privy Council in (1905) A C 369 and in A I R 1928 All 437 (F B). So it is not a mere matter of procedure from the commencement of *gh v Rasulldar*, A. I R

alterations in the law of evidence are, therefore, retrospective in operation. *Potas Ram v Meena Kumar*, 1930 All 738-125 and Cas 762-28 A L J 793

Codifying Act. Construction of In *Bank of England v. Vagliano*, 100 L J

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 In a Statute, intended to embody in a Code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a Statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by ransacking over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior

only to which there would be reasonable exceptions. As the *First Chancellor* said: 'I am of course far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code. There are given some examples which I need not cite at length. But I have here to do, not with an Act of Parliament codifying the law, but with an Act to amend and to consolidate the law, and therefore it is I say the observations do not apply, and I think it is legitimate in the interpretation of the sections in this amending and consolidating Act to refer to the previous state of the law for the purpose of ascertaining the intention of the Legislature. When a clause in an Act which has received a judicial interpretation is re-enacted in the same terms the Legislature is deemed to have adopted that interpretation.' *Cumtill I parte, In re 5 L. R. Ch 703 23 L. J. 281-18 W. R. 1046, Belmont and Dubé, In the 11 L. R. 1930 All 82-128 Ind. Cas. 357*

Construction imposed by Statutes. The Legislature must be presumed to have known the interpretation put by Courts and others on the terms of a Statute, and when a provision of an earlier Statute is re-enacted in practically the same language in a latter Statute, it is legislative recognition of the correctness of the earlier interpretation. *Parmesan v. Imperion*, 5 Pat. L. J. 537-19 Cr. L. J. 251-14 Ind. Cir. 185-(1918) Pat. 97-1 Pat. L. W. 167 *Agenda v. Pear*, 21 C. L. J. 605-20 C. W. N. 312, *Kent County Council v. Ripate* (1891) 1 Q. B. 72-(10 L. J. Q. B. 433-65 L. L. 213-39 W. R. 115-55 J. P. 617, *per Lord FitzGibbon in Young v. ...* 26 *per Times L. L.* in *Dale's Case*, 6 Q. B. 143-144-145-146-147-148-149-150-151-152-153-154-155-156-157-158-159-160-161-162-163-164-165-166-167-168-169-170-171-172-173-174-175-176-177-178-179-180-181-182-183-184-185-186-187-188-189-190-191-192-193-194-195-196-197-198-199-200-201-202-203-204-205-206-207-208-209-210-211-212-213-214-215-216-217-218-219-220-221-222-223-224-225-226-227-228-229-230-231-232-233-234-235-236-237-238-239-240-241-242-243-244-245-246-247-248-249-250-251-252-253-254-255-256-257-258-259-260-261-262-263-264-265-266-267-268-269-270-271-272-273-274-275-276-277-278-279-280-281-282-283-284-285-286-287-288-289-290-291-292-293-294-295-296-297-298-299-300-301-302-303-304-305-306-307-308-309-310-311-312-313-314-315-316-317-318-319-320-321-322-323-324-325-326-327-328-329-330-331-332-333-334-335-336-337-338-339-340-341-342-343-344-345-346-347-348-349-350-351-352-353-354-355-356-357-358-359-360-361-362-363-364-365-366-367-368-369-370-371-372-373-374-375-376-377-378-379-380-381-382-383-384-385-386-387-388-389-390-391-392-393-394-395-396-397-398-399-400-401-402-403-404-405-406-407-408-409-410-411-412-413-414-415-416-417-418-419-420-421-422-423-424-425-426-427-428-429-430-431-432-433-434-435-436-437-438-439-440-441-442-443-444-445-446-447-448-449-450-451-452-453-454-455-456-457-458-459-460-461-462-463-464-465-466-467-468-469-470-471-472-473-474-475-476-477-478-479-480-481-482-483-484-485-486-487-488-489-490-491-492-493-494-495-496-497-498-499-500-501-502-503-504-505-506-507-508-509-510-511-512-513-514-515-516-517-518-519-520-521-522-523-524-525-526-527-528-529-530-531-532-533-534-535-536-537-538-539-540-541-542-543-544-545-546-547-548-549-550-551-552-553-554-555-556-557-558-559-560-561-562-563-564-565-566-567-568-569-570-571-572-573-574-575-576-577-578-579-580-581-582-583-584-585-586-587-588-589-590-591-592-593-594-595-596-597-598-599-600-601-602-603-604-605-606-607-608-609-610-611-612-613-614-615-616-617-618-619-620-621-622-623-624-625-626-627-628-629-630-631-632-633-634-635-636-637-638-639-640-641-642-643-644-645-646-647-648-649-650-651-652-653-654-655-656-657-658-659-660-661-662-663-664-665-666-667-668-669-670-671-672-673-674-675-676-677-678-679-680-681-682-683-684-685-686-687-688-689-690-691-692-693-694-695-696-697-698-699-700-701-702-703-704-705-706-707-708-709-710-711-712-713-714-715-716-717-718-719-720-721-722-723-724-725-726-727-728-729-730-731-732-733-734-735-736-737-738-739-740-741-742-743-744-745-746-747-748-749-750-751-752-753-754-755-756-757-758-759-760-761-762-763-764-765-766-767-768-769-770-771-772-773-774-775-776-777-778-779-780-781-782-783-784-785-786-787-788-789-790-791-792-793-794-795-796-797-798-799-800-801-802-803-804-805-806-807-808-809-810-811-812-813-814-815-816-817-818-819-820-821-822-823-824-825-826-827-828-829-830-831-832-833-834-835-836-837-838-839-840-841-842-843-844-845-846-847-848-849-850-851-852-853-854-855-856-857-858-859-860-861-862-863-864-865-866-867-868-869-870-871-872-873-874-875-876-877-878-879-880-881-882-883-884-885-886-887-888-889-890-891-892-893-894-895-896-897-898-899-900-901-902-903-904-905-906-907-908-909-910-911-912-913-914-915-916-917-918-919-920-921-922-923-924-925-926-927-928-929-930-931-932-933-934-935-936-937-938-939-940-941-942-943-944-945-946-947-948-949-950-951-952-953-954-955-956-957-958-959-960-961-962-963-964-965-966-967-968-969-970-971-972-973-974-975-976-977-978-979-980-981-982-983-984-985-986-987-988-989-990-991-992-993-994-995-996-997-998-999-1000-1001-1002-1003-1004-1005-1006-1007-1008-1009-1010-1011-1012-1013-1014-1015-1016-1017-1018-1019-1020-1021-1022-1023-1024-1025-1026-1027-1028-1029-1030-1031-1032-1033-1034-1035-1036-1037-1038-1039-1040-1041-1042-1043-1044-1045-1046-1047-1048-1049-1050-1051-1052-1053-1054-1055-1056-1057-1058-1059-1060-1061-1062-1063-1064-1065-1066-1067-1068-1069-1070-1071-1072-107

placed upon the provisions of the Code has been reproduced by the Legislature in successive Codes without alteration, the inference is that this constitutes a legislative affirmation of the construction adopted by the Courts.' *Palani Narai* 33 C L J 201=25 C W N 514=62 Ind Cis 318. In *Kahmudun Mollah v Sahibulun Mollah* 21 C W N 1 (F B) at p 11 *Mulherjee* J observed: 'It is a well settled principle of construction that the Legislature is presumed to know not only the general principle of law but also the construction which the Courts have put upon particular Statutes and therefore when a section of an Act which has received a judicial construction is re-enacted in the same words, such construction is to be followed.' *Deben* 14 C L J 316.]

The Legislature knows what the law is and has the power to alter the phraseology, if it inspires that its true contention has not been given effect to in judicial decisions the absence of such action on the part of the Legislature during a period of time may well be taken to indicate that the Courts have rightly ascertained its intention especially if in the interval, the Statute has been

on its words, and the Legislature in a subsequent Act in *just maintenance* of the
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Ch 118, *Hanson v R* 1 L J D 1 C 4 Jun 5 1805 1 D 5 1 27, 1 1
Ch 180 *Exp Thorne* 5 Ch D 457, *Attals Exp*, 5 Ch D 27, 1 1
Campbell L R 5 Ch 706, *Luton v Seal* 15 Q B D 405 *Henry v Wood*
(1891) 3 Ch 118, *Colonial Bank v Whinney* 30 Ch D 285

Legislative Proceedings An enquiry into the visitations which a measure
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in the Legislative Council cannot be referred to Sarat Chandra Chatterjee
31 C 628-5 C W N 575 It is a mistake to refer to the debates on the Bill

Emperor v. Lulman, 27 Cr. L. J. 1235-98, Ind. Cas. 1924 V. I. R. 1927, Sind. L. R. 1928 Bom. 11. The question whether a municipal not can be referred to for an exposition of the meaning of a section depends upon whether the not has been inserted by or under the authority of the Legislature. *Im Sarin v. Thajeri*, A. I. R. 1929 All. 534, 541 A. 111 (1 B).

Punctuation. In English for 1819 follows engros. I on purcha nt without punctuations and is such th y form l no part of th Act. Since 1819 punctuations app are th r ll of Parliam nt nevertheless it has been said they are not to be taken as parts of th Statut. *The City of London v C P* 21 *16 v 6 L R 11 Ch D 10* *Sutt n v Sutt n* 22 *Ch D 513* *Dale of Deauville v Gaur* 21 *Q B D 178*. It is an error to rely on punctuation in construing Acts of th Legislature. *The Mayor of Burton v Kesteven Hamlet* 11 *C 111* *10 (P C)* *Mumfry v Trustees for th Improvement of Collyer* 1 *C 13* *22 C W N 1-11 Ind C 770* *But* *Thimble Sisters v Thimble* 17 *Bom L R 39* *B 187* *27 Ind C 191*. Commas are no part of th Statut. *Levy v Thibault* 56 *I A 93* *3 C W N 323-7* *1-31 Bom L R 702 (P C)*.

Proviso Argument from a proviso which seeks to extend the operative effect of the substantive enactment are not legitimate unless there is real ambiguity in the substantive Act. *Held* *Daly v. City of New York*, 1927 A.C. 617. *Rumelant v. Trustees of the National Association of Manufacturers*, 1927 A.C. 617. *Rumelant v. Trustees of the National Association of Manufacturers*, 1927 A.C. 617. *Rumelant v. Trustees of the National Association of Manufacturers*, 1927 A.C. 617.

Schedule A schedule is a much part of the Statute and is as much in enactment as any other part. *Per Brett J* in *Att Gen v Lamplough* (1878) 14 D 220. Forms in schedules are inserted merely as examples and are only to be followed implicitly so far as the circumstances of each case may admit. *Per Lindall J* in *Burkitt v Ellis* (1843) 5 M & G 96. But where there is a contradiction between the schedule and the enacting portion, it would be quite contrary to the recognized principles upon which the Courts of law construe Acts to enlarge the conditions of enactment and thereby restrain its operation by any reference to the words of a mere form given for convenience sake in a schedule. *Per Lord Penance in Danby v Green* (1882) 8 P D 89. *Allen v Fisher* 10 A & F 640, *Ex parte Sell* 18 I J M C 106, *Interpretation of Deeds, Bills etc* p 206 and also *Ex parte Sims* 12 A & E 227. Schedules annexed to an Act in the headings under which they are placed are parts of the enactment, but they are not to be taken into consideration if the language of the enactment is clear. 30 C W N 331.

Illustrations of *The Law Commissioners' say* — 'The illustrations are not more a sample of what it is than the whole of the law without them,' are correct if and too it is merely importing that in view

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The power of construing the law in cases in which there is any real reason to doubt what the law is, amounts to the power of making the law. On this ground the Roman Jurists maintained that the office of interpreting the law in

doubtful matters necessarily belonged to the Legislature. The contrary opinion was censured by them with great force of reason, though in language perhaps too bitter and sarcastic for the gravity of a Cole.

"The decisions on particular cases which we have annexed to the provisions of the Code resemble the Imperial Rescripts in this, that they proceed from the same authority from which the provisions themselves proceed. They differ from the Imperial Rescripts in this most important circumstance, and that they are not *ex post facto*, that they cannot therefore be made to serve any particular turn, that the persons condemned or absolved by them are purely imaginary persons, and that, therefore, whatever may be thought of the wisdom of any judgment which we have passed, there can be no doubt of its impartiality." *Report of the Indian Law Commissioners* dated the 11th October 1837. In *Mohomed Syed Ali Agha v. Yeoh On Gai*, (1916) A C. 775=111 A 276=21 C W N 217 (P C) at page 261, Lord Shaw in delivering the judgment of the Court observed: "On the second point, their Lordships are of opinion that in the construction of the *Pvidence Act* it is the duty of a Court of law to accept—if that can be done—the illustrations given as being both of relevance and value in the construction of the text. The illustrations should in no case be rejected because they do not square with id as possibly derived from another system of jurisprudence as to the law with which they on the sections deal. And it would require a very special case to warrant their rejection on the ground of their assumed repugnancy to the sections themselves. The great usefulness of the illustrations, which have, although no part of the sections, been expressly furnished by the Legislature as helpful in the working and application of the Statute, should not be thus impaired. In *Lala Bala Mall v. Abad Sha* 35 M L J 614=16 A I J 905=29 C L J 163=23 C W N 231 (P C) at p 237, Lord Atkinson observed, "Our illustrations as part of the Statute. The illustrations authority is the Legislature." *Charleson*

Satish Chandra Chakravarty v. Rundayal De, 32 C L J 91=21 C W N 982 (1906 987) *Mr Justice Matherjee* observed: "We are not unmindful that an illustration is useful so far as it helps to furnish some indication of the presumed intention of

on the section.

Somaiy, 7 C 112

v. Ganeshu, 1 A

Queen Empress v. Palnaji, 1 B 491 (196), *Nanak v. Muktal* 1 A 487 (197),

Satiya v. Gobinda, 14 C W N 114, *Raj v. Lohmat* 1 B 147 *Chotay Lal v.*

Emperor, 85 Ind Cns 722=1925 All 220, *Omul v. Adhi*, 22 W R 307 *Sunjo*

v. Bessambhar, 23 W R 311, *Gomuda v. Hanayamal*, 28 M 57 (61), *Balaram v.*

Mangla, 14 C 950 *Hyee Kmal v. Wilson* a Co 23 M L R 320=4 Ind Cns

942 *K H Janoo v. Joseph Heap & Sons Ltd* 46 Ind Cns 197 *Balmalund v.*

Sohani, A I R 1929 Pat 164. But see *Pria Krishna Samsu v. Aiyappa* 21 Ind

Cns 924. If the meaning of the enactment itself were doubtful a reference to

the illustration in order to clear the meaning would be justifiable. But, if there

be any conflict between the illustrations and the main enactment, the illustration

must give way to the latter. *Sydnunissa v. Hadayat Hussain* 22 A I J

125=80 Ind Cns 896=1924 All 743. It is the duty of the Court to accept, if

that can be done illustrations given under the section as being of value in the

construction of the text, it would require a special case to warrant their rejection

on the ground of repugnancy with the section. *Durga P. v. Durga Lal*

Roy, 57 C 151=A I R 1928 Cal 201=109 Ind Cns 752

Illustrations and Marginal notes which is to be preferred. Illustrations do not stand on the same footing as marginal notes. Marginal notes may not

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"It is well

settled that marginal notes to the sections of an Act of Parliament cannot be referred to for the purpose of construing the Act. The contrary opinion was originated in a mistake, and it has been exploded long ago. There seems to be no reason for giving the marginal notes in an Indian Statute any greater authority

than the marginal notes in an English Act of Parliament. On the other hand illustrations are not and part of enactment and it is only when the Court is left upon to interpret a piece of an enactment which comprises both the substantive provision and an illustration of the same the Court is not justified in rejecting the illustration as a guide to the interpretation of the substantive provision. *Idam Lal v Emperor* *supra*, see also the observation of Lord Shaw in *Mithal v Jell Ariffin v Yoh On Gai*, 1916 (A C) 575-43 I A 261 P C.

May—**May** mean **shall**. The word **may** in certain circumstances means **shall**. There may be something in the nature of the thing to be done in the thing at for which it is done or in other circumstances which may convey the option in a duty. *Benpal v H. J. J. v Special Manager, Court of Wards*, 1911 (L J) 42-9 Ind C A 14-1 I R 19. *Outth*, 119, see also *Government v Munnayal v Jell Ariffin v Yoh On Gai*, 1916 (A C) 575-43 I A 261 P C.

Or—**And**. In construing statutes it is sometimes necessary to read the conjunctions **or** and **and** one for the other. *Varayan v Chairman of Murch* *Muneyal*, 87 Ind C A 29-1 I R 192, (A C) 1067.

New words to be read in a Statute. Words not to be found in a section may be supplied by necessary implication if the context so requires. *Q. Ind C A 180-1 I R 160-1 I R 197* All 610 (A B). But Judges are not entitled to read words into an Act of Legislature unless clear reason for it is to be found within the four corners of the Act itself. *Abhayant v Rameshwar* *Pat* 314-A I R 1930 Pat 95, *Ishtera v Franc* 79 L J K B 951 *Irrell v Bell*, 2 M A C 219 *Ishtera v Kalya Nath*, 11 C W N 621-A I R 1930 Cal 767.

Every word should receive proper connotation. In a statutory enactment every word used must receive its full and proper connotation in the construction of the provision. *Patil v Julla A I R 1927 Mat 949*. In the interpretation of every section of a Statute a reasonable construction must be given to every word contained therein. *Imperial v Sheri A I R 1923 All 207 (F B)-26 A L J 321-9 L R A C 51-9 L J 111 (F B)*. When two distinct words are used in the same section the ordinary rule of construction is that they do not mean identically the same thing. *Imperial v Phuchan*, A I R 1929 All 33 (F B).

Equity and good Conscience. Where there is a direction in an Act or Regulation that cases should be directed by equity and good conscience such a direction should generally be interpreted to mean that the rules of English law if found applicable to Indian society and circumstances are to be applied. *Per Lord Tomlin in Mehrban Khan v Makhna*, 57 I A 163-32 Bom L R 883-31 C W N 529-A I R 1930 P C 142.

Statutes ousting jurisdiction—Construction of. It is an elementary rule that a Statute which purports to oust the jurisdiction of a Civil Court must be very strictly construed. *Shaiba Prasad v Gollammanju*, (1919) Pat 147-50 Ind Cas 451, see also *Ganesh Das v Harid* 90 Ind Cas 279. An Act by which the jurisdiction of the ordinary Court is taken away must be strictly construed. *Cheta v Baya* 100 Ind Cas 507-A I R 1927 Lah 452 (F B), *Shevachiam v Ghulam*, 103 Ind Cas 410, *Budeo v Lal A I R Pat 1928, 615*. Jurisdiction vested in a superior Court is not ousted except by express language or by obvious inference from the provisions of a Statute. *Mahamed Abdul v Emperor* *Bannath*, 59 Ind Cas 960-3 U B R 212, *Kama v Bhayanlal*, 45 Ind Cas 654, *R v Abbot*, (1780) Dowd 553.

Repeal by implication. Repeal by implication is not favoured. It is a reasonable presumption that the Legislature did not intend to keep really contradictory enactments on the Statute Book, or on the other hand, to effect so do so. Such an interpretation is not to be adopted, unless it is inevitable. Any reasonable construction which affords an escape from it is more likely to be in consonance with the real intention. *Maxwell* p 296 cited in *Gola v Emperor* 63 (a). The Legislature does not intend to make any substantial alteration in

the law beyond what explicitly declares, (*Arthur v. Bokenham*, 11 Mod 150; *Harbert's Case*, 3 Rep 13 b.) either in express terms or by clear implication, or in other words, beyond the immediate scope and object of the Statute. In all general matters beyond, the law remains undisturbed. It is in the last degree improbable that the Legislature would overthrow fundamental principles, infringe rights, or depart from general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning when used either in their widest, their usual, or their natural sense, that which was actually intended, ever wide and comprehensive they . . . and as not altering the law beyond as Commissioners v Adamson, 1 Q 80 L J K. B 636 "Maxwell p. . . s not abrogate a special one by mere implication. It is remarked by Lord Selborne in the case of *Marcy Seward v The Vera Cruz*, (1894) 10 App Cas 59 "Where general words in a later Act are capable of extending them to subjects special not to hold that earlier and special derogated from merely by force particular intention to do so"

Application of the maxim—*Expressio unius est exclusio alterius*—A general rule of the construction of Acts of Parliament is *expressio unius est exclusio alterius* (The express mention of one thing implies the exclusion of another) *Per Sir Barnes Peacock in Blackburn v Manchester*, (1881) 6 App Cas 628 at p 634 In *Drumwater v Arthur*, (1879) 10 Sup Ct N S W. 103, *Hargrave, J* observed "If there be any one rule of law clearer than another as to the construction of all Statutes and all written instruments (as, for example, sales under powers in deeds and wills) it is this that where the Legislature or the parties to any instruments have expressly authorised one or more particular modes of sale or other dealing with property, such expressions always exclude any or, as it is otherwise 183 b), enunciates written instruments covenant as to be *Case*, 4 Rep 80, *Me R 59, Mathew v Bl* an express covenant by the tenant to repair,

authority is given expressly, though by affirmative words, upon a defined condition, the expression of that condition excludes the doing of the act authorised, under other circumstances than those defined *Expressio unius est exclusio alterius*,"

"Provisions sometimes found in Statutes enacting imperfectly or for particular cases only that which was already and more widely the law, have occu-

here in mind that the method of construction summarised in the maxim cannot be applied without limitation for a failure to make an *expressio* complete, may easily arise from the accidents of legislative procedure and it is common to find provisions put into Statutes *ex abundanti cautela* and at the instance of the parties interested. Consequently provisions sometimes found in Statutes enacting imperfectly or for particular cases only that which was already and more wisely the law have occasionally furnished ground for a specious argument, based on the maxim that an intention to alter the general law was to be inferred from the partial or limited enactment. But the maxim is plainly inapplicable in such cases. The only inference which a Court can draw from such superfluous provisions (which often find a place in Act to meet unfounded objections and idle doubts) is that the Legislature was either ignorant or unmindful of the real state of the law or that it acted under the influence of excessive caution.

This point of view is lucidly explained in the following passages from the judgment of *J. J. L. J. in Leve & Hartley* (1906) 2 K. B. 772-773 L. J. K. B. 1049. Acts of Parliament are not in my experience, expressed with such accuracy and precision as to justify the Court in striking out unambiguous words in order to make a sentence grammatical or logical. The generality of the maxim *expressio facit exclusio* which was relied on renders caution necessary in its application. It is not enough that the express and tacit are merely incongruous it must be clear that they cannot co-exist.

In *Colquhoun & Brooks*, 19 Q. B. D. 196, *Hall J.* says: "I may observe that the method of construction summarised in the maxim '*expressio unius exclusio alterius*' is one that certainly requires to be watched. Perhaps a few so-called rules of interpretation have been more frequently misapplied and stretch ed beyond their due limits. The failure to make the 'expressio' complete very often arises from accident, very often from the fact that it never struck the draftsman that the thing supposed to be excluded needed specific mention of any kind and the application of this and every other technical rule of construction varies so much under differing circumstances and is open to so many exceptions and what is meant."

In the same case (reported in 21 Q. B. D. 52) in the Court of Appeal *Lopes J.* observed: "the maxim *expressio unius exclusio alterius* has been pressed upon us, I agree with what is said in the Court below by *Hall J.* about this maxim. It is often a valuable servant but a dangerous master to follow in the construction of Statute and documents. The *exclusio* is often the result of inadvertence or accident and the maxim ought not to be applied, when its application having regard to the subject matter to which it is to be applied leads to inconsistency or injustice. See *Colquhoun & Brooks* 21 Q. B. D. 661 and on appeal to the Privy Council in (1893) 14 A. C. 493."

The warning given by *Lord Halsbury* in following the maxim is expressed in the following words: "It might be that modern Statutes were drawn up with greater particularity and minuteness. The misfortune in the framing of those Statutes was that any body of persons seeing a possibility of liability on their part, apply to Parliament to have special provisions inserted in their protection. That application was occasionally complied with and then the argument arose which their Lordships had heard that day namely that any body who is not taken to be excluded by the operation of the Statute from protection just because they were not excluded and others were. The doctrine applicable to such cases was that a great many things were put into a Statute *ex abundanti cautela* and it was not to be assumed that any body not specifically included was, for that reason alone, excluded from the protection of the Statute." *Mac Laughlin & Westgarth*, 75 L. J. P. C. 117-94 L. T. 831-22 T. L. R. 594.

Penal Statutes, Construction of. A Penal Statute when its language is ambiguous should be construed in the manner most favourable to the liberties of the subject, and this is more specially so, when the enactment is of an exceptional character. *Reg v. Bristaban Madanna* 1 B. 308 (F. B.). It should be construed very strictly. *In re Ganesh Narayan* 13 B. 600, *Q. v. Dorottam*, 13 B. 681. A penal Statute must be construed very strictly, that is nothing is to be regarded as within the meaning of the Statute which is not within the letter—

which is not clearly and is not to be taken as the rule of construction. *Empress v. Kola Lal*
Queen Empress, 28 C 50; *Empress*, 5 C W N. 10;
 1888, 25; *Lalhm Chan* v.
Petiga v. R., 51 M 75;
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Ram Chunder v. Gour Nath, 53 C 492=97 Ind Cas 376 In the case of penal
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 Ind Cas 593=A
Singh, 102 Ind Cas
 v *Bhai Kishan*, 28 P
 it is clear that cri
 accused *Said Ahm*

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of the doubt must be given to the subject and against the Legislature which has
 failed to explain itself properly and clearly, *Ismail v. Emperor*, 26 Cr L J
 1387=89 Ind Cas 523

The rule is slightly different in England "The rule which requires that
 penal and some other Statute shall be construed strictly was more rigorously
 applied in former time, when the number of capital offences was very large"
Maxwell p 462 "I cannot concur" says *Day J* in *Neuby v. Sims*, 68 L J
 impose penalties therefore
 ink that neither greater nor
 Statutes"

action of a penal Statute
 depended in great measure on the severity of the Statute When it merely
 imposed a pecuniary penalty, it was construed less strictly than where the rule
 was invoked in *furorem vite*" *Maxwell* p 466

Disqualifying provisions in an Act dealing with Municipal election are
 penal provisions and therefore ought not to be extended beyond their legitimate
 limit *Satyendra v. Chairman*, 53 C 180=53 C L J 236=31 C W N 972

Ejusdem Generis, Principle of "When two words or expressions are
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c. *generis* rule of interpretation would not arise. *Hallinglal Moosa v Secretary of State for India*, 43 M 65=37 M L J 332=53 Ind Cis 345.

"I accede to the principle." *Per Lord Campbell in R v Edmundson*, 23 L J M C 213, "laid down in all the cases which have been cited, that where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified." See also *Halt v Kesko* 51 Ind Cis 15.

Stare decisis, scope of the doctrine. The maxim of *stare decisis* (to stand by matter decided) is closely allied with another maxim, viz. *Communis error facit jus* (common error some times passes as law). The law so favours the public good, that it will in some cases permit a common error to pass for right. *Reg v Sussex*, 2 B & S 650 *Jones v Sapping*, 12 C B N. S. 846, s. c. 11 H L Cas 290 *Elitham v Sykes*, 1 Ld Ryam 42 *Broom's Legal Maxims* p 112. So *communis error facit jus* is a sound maxim. *Jagdish v. Shro*, 23 I A 100 109=5 C W N 602=23 A 367, see also *Bhagwan Singh v Bhagwan Singh*, 26 I A 153 (166)=21 A 412=3 C W N 154=1 Bom L R 311, *Kedar v Hari*, 43 C 1 (10). Though 15 Rich II enacted that the Admiralty should have no jurisdiction over contracts made in the bodies of counties, nevertheless seamen engaging in England have always been admitted to sue for wages in that Court (*Smith v Tilly* 1 Keb 712), where the remedy is easier and better than in the Common Law Courts, on the ground it has been said (*Per Lord Holt in Clay v Sudgate*, 1 Salk 33) that *communis error facit jus*, or rather as was observed by Lord Kenyon (in *R v Foxe*, 4 T R 591) not *communis error*, but uniform and unbroken usage, *facit jus*. *Maxwell* p 535. Where the language is obscure instead of being clear, we should not be justified in differing from the construction put upon it by contemporaneous and long continued usage. There would be no safety for property or liberty if it could be successfully contended that all lawyers and statesmen have been mistaken as to the true meaning of an old Act of Parliament. *Per Lord Campbell in Garham v Exeter* 15 Q B 73, see also *Herbert v Purchase* L R 3 P C 650, *Korgan v Craushay*, L R 6 H L 304 320.

The maxim of *communis error facit jus* although well known must be applied with very great caution. It has been sometimes said, observed Lord Ellenborough in *Isherwood v Olden* 3 M & S 396 397, '*communis error facit jus*', but I say *communis opinio* is evidence of what the law is—not where persons, but where it has been made the ground work and substratum of practice.

The judicial rule—*Stare decisis* does however admit of exceptions where the former determination is most evidently contrary to reason. *Broom's Legal Maxims* p 121. In *Chandra Benode v Sheikh Ula Bux*, 24 C W N 818 at p 851 Mr Justice Mukerjee observed, 'We are sensible of maintaining, wherever manifestly not of universal application. In *Young v Robertson*, 4 Mac H L C 314, Lord Cranworth observed, 'There is another duty incumbent upon a Court of ultimate appeal which has been invariably observed, namely, that as regards those rules which regulate the settlement and devolution of property, those Courts which have to interpret the instruments and acts of parties must take care to be very guarded against letting any supposed notions as to the invalidity of any rule which has in fact been acted upon induce him to alter it so as to endanger the security of property and titles.'

In *Mercy Docks v Cameron*, 11 H L C 443 at p 510, Lord Chelmsford observed, 'The Courts rightly abstain from overruling cases which have been long established because if they did so, they would only disturb, without finally settling, the law. But when an appeal from any of the judgments is made to this House, however they may be warranted by previous authorities, the very object of the appeal being to bring those authorities under review for final determination, the House cannot, upon principle of *stare decisis* refuse to examine the foundation upon which they rest. Equally explicit is the pronouncement of Lord Loreburn in *Wesham Union v Edmonton Union* (1908) A C 1 (4) where he observed, 'Great importance is to be attached to the old authorities, on the strength of which many transactions may have been adjusted and rights determined. But where they are plainly wrong, and specially where the subsequent

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do so by itself affirming them".

In a matter of fiscal enactment where the question is in doubt the rule of stare decisis should apply *Moti Singh v Harbajan Singh*, 103 Ind Cas. 657 = A I R 1127 Lah 635

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Queen Empress v Narpal, A

Proviso The office of a proviso is either to except something from the enacting clause, or to qualify or restrain its generality or to exclude some possible ground of misinterpretation of its extent *Reg v Vankatsuami*, 2 B H C 106 In case of repugnancy between a proviso and an enacting part, the former repeals the latter *A G v Chelsea*, Fit 29, 165

Saving clause A saving clause cannot properly be looked at for the purpose of extending an enactment, nor can it give a new or different effect to the previous sections of an enactment *Queen Empress v Sitaram* 11 B 657 Where the enactment and the saving clause, (which reserves something which would be the saving been in harmony. Rep 35 ground i The late should r bodied i

Rules of Interpretation of Evidence Act In considering the rules of matter *Gujju Lall v Fateh daree*, 14 W R 319 (320) wing statement of Mr Justice Jackson in *Gujju Lall v Fateh Lall*, 6 C 171 (F B) at pp 183-184 should be borne in mind "In order to arrive at a conclusion on this point (i.e. on a question of Indian Evidence the direction of the Act, as marked by careful and methodical arrangement, and that many of the more important expressions used in it are plainly interpreted It would be wholly inconsistent

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law, the principles, and the application of these principles to the cases of most frequent occurrence. It may be that as observed by *Jfr Norton* in his Preface (*Law of Evidence 8th Edition*), the framers of the Act overestimated what had been done, when he claimed to have reproduced within the compass of his 167 sections the whole of Taylor's Work that was applicable to India, and there can be no doubt that cases must arise for which no positive solution can be found in the Act itself and in such cases we shall probably be justified and shall always be wise in adopting English rules in so far as they follow or are in accord with the general tenor of the Act. But in respect of matters expressly provided for in the Act we must not start from the Act, and not deal with it as mere modifications of the law prevailing in England. See also *P v Gopal Das* 3 M 271, 279, 280. In *Induchis v Bahu* 10 B 139 (112) *Sargent C J* said: "It is true that although the code is in the main, drawn on the lines of the English Law of Evidence there is no reason to suppose that it was intended to be a verbatim copy of it." See also *Is that is Dhat v Fishambir Pandit* 8 B 313 321.

In *Junagar Mithal v Jyoti* (1917) M W N 229=17 M L T 215=25 M L J 379=16 Cr L J 91 25 Ind Cas 518=39 M. 419 *Seshagiri Aiyar J* observed: "The question remains whether the provisions of the Act are exhaustive of the rules of evidence and whether we can invoke the aid of the principles of jurisprudence of English Law as supplementing and explaining the rules of evidence given in the Act. The high authority of *Elgar C J* in the *Collector of Ferozpur v Datt Dhru Singh*, 12 A 1 (F. B) can be cited for the proposition that English decisions relating to evidence can be relied upon in India. I cannot agree with the learned Public Prosecutor that we are not entitled to refer to English decisions as the Act is self contained. Such a practice has the authority of a prominent Judge in India and I am not prepared to depart from it." See also *Winter Sher v V. Dhurumsey S W Co*, 4 B 776 (81). In the *petition of Jani Lal* M 18 1 v *Peary Lal*, 4 C L R 705 *Framji v Mohan Singh* 15 B 73 *K v Lallu* 1, 1 B 392, *R v Ram Dutt* 2, 3 B 17 *L v Bhatt* 7 A 100 *Sunder v Ditta Ghella*, 17 B 129 (141).

In *Queen Empress v Euphras* 16 B 111 at 143 *Telani J* observed: "According to the principle therein stated by *C J*, *C J* in *Hamabi v Pamanji* 7 Bom H C Rep (A C J) p 11 we are justified in looking to English decisions to elucidate the meaning of the Evidence Act, and evidence which the Judges in England have admitted and jurists have acted upon must be held to be clearly within the terms of sections 11 11 15. In *Framji v Mohan Dutt*, B L R Sup vol F B 159 English, American and Scotch laws were referred to.

"There is a school of legal thought in India which holds that in construing Acts of the Indian Legislature the natural meaning of the sections should be given effect to regardless of previous decisions, and especially of decisions other than those of Indian Courts. The Indian Evidence Act in general and s. 27 in particular are examples which in my opinion in bear the falsity of this point of view." *Per Lord Williams in Superintendent v Bhayo*, 57 C 1062=31 C W N 106.

English Cases. English cases on construction of English Statutes are of great assistance, sometimes in construing Acts of the Indian Legislature but of course, it is always necessary to see that the Indian Statute and the English Statute resemble one another in their purposes, and not only in a portion of a section which, for convenience of drafting, has been adopted by the draftsmen of the Indian Act. *Persad Singh v Ram Pratab Roy*, 23 C 77 (81, 85). Where an Indian Act was passed for the purpose of extending to India the provisions of the English Act, English decisions may be referred to as a guide to the Act. *Ganesh v Harihar* 26 A 299 P C=31 I A 116=8 C W N 521=14 M L J 190=6 Bom L R 505, *Seth Loom Fasmal v Seth Haridas*, 4 S L R 26=7 Ind. Cas 595, *Mitchand Sunga Chand*, 1 B 23, but see *Mahomed v Ali Haidar*, 12 O L J 1. "In construing a section of an Indian Act which is professedly based on English enactment, which in fact reproduces word by word the language of the English enactment, we are in practice if not in theory, bound by the decisions of the English Court." *Per Mookerjee J in Ramendra v Brojendra*, 21 C W N 791=41 Ind Cas 944. "When we are

construing an Act which in many instances is taken, word for word, from an English Act, and when we are dealing with a branch of law which is essentially bound by it, yet we ought certainly of the English Court of appeal.

India Ltd v The Official Assignee of India, help authoritative as the Indian Law is

may be derived from the decisions of the Superior similar or the same their authority is conclusive 12 Q B D 724, see also

Loveluck and Leves v Malabar Timber Yards and San Mills, 13 M L T 282 Unless the English Statute, and the Act of the Indian Legislature are

in pari materia references, to English decisions, instead of affording any help will tend to confuse the consideration, of the matter in issue *Tara v The*

Secretary of State, 30 C 36-7 C W N 249 In construing a section of the Indian Act, cases bearing upon the construction of the similar provisions of

an English Act, different in its language, can be of little or no assistance, *Collector of Dinapore v Ganga Nath*, 25 C 356 A Judge should not interpret

Statutory law, when it provides for a specific procedure, by reference to a decision pronounced under a different system of procedure *Rudha v Lalhm*,

31 C L J 233-24 C W N 151-56 Ind C 541 But where the point to be decided arises up

ary *Per Lord Shau* *The Delhi* *W N 159-22 A* *R 1024 P C*

40 So also rules relating to procedure under an Indian Act should not be interpreted, relating to another Statute in England

even when *Projal v Shauju* *Lakhm*, 24 C W

N 431 law but in its application the Courts acquainted with Indian

Courts which deal with people with habits and intellectual development *Syed Mohammad v Syed Ali Hyder*,

O W N 803 'It is a sound rule of interpretation' *Lord Sinha*, 'to

take the words of the Statute with

law

Sec *Lah 304, Silhan v Emp* 197=10 Lah 283

American Cases, Value of In *Scaramanga v Stamp* 5 C P D 295, at

p. 303, *Cockburn C J* observed 'Although the decisions of the American

Courts are of course not binding on us, yet the sound and enlightened views of American lawyers in the administration and development of law—a law

confidence in our authorities made

on as I do upon

principle, I am much strengthened by the American authorities to which my

attention has been called' The following observations of *Sir John Woodoffe*,

J in the preface to the Ninth Edition of his *Evidence Act* should be

taken into consideration, while interpreting the same 'Amongst the text-

books laid under contribution we wish particularly to indicate the work of

Professor J H Wigmore, a valuable and exhaustive book, written in an original and modern spirit a

nonsensical reasons' for the obtain and and the de England (*Scaramanga v Stamp*, L R 5 C P D 295, 303) and *Sir Lawrence Peel* observed in India (*Braddon v Abbot*, *Taylor and Bills Reports*, 342, 359,

360, *Malcolm v. Smith*, *supra*, 253-258), of great value to a correct determination of questions for which our own or the English law offers no solution". See also Preface to this book. But in this connection the advice given by Lord Halsbury L. C. in *Re Missouri Steamship Co.* 12 C. L. D. 321 (330) should also be borne in mind. In that case he observed: "We should treat it with great respect the opinion of eminent American lawyers on points which arise before us, but the practice which seems to be increasing of quoting American decisions, as authorities, in the same way as if they were decisions of our own Courts, is wrong. Among other things, it involves an inquiry, which often is not an easy one, whether the law of America on the subject in which the point arises is the same as our own." But this apprehension of his lordship is not applicable in interpreting the Indian Evidence Act. With reference to this book.

English Law of Evidence its origin, growth and peculiarity. "At once, when a man enters his eyes on the *Perf. Thoms* from the common law system of evidence and looks at foreign systems he is struck with the fact that our system is radically peculiar. Here again it may be said, logically an imperative rule, while the rule matter is not thus excluded anywhere else. English speaking countries have what we call a law of evidence, but no other country has it, we alone have generated and evolved this large, elaborate, and difficult doctrine. We have done it, not by direct legislation but, almost wholly, by the slowly accumulated rulings of Judges made in the trying of cases in print but, in the practice and tradition of the trial Courts, and only during the last half or two-thirds of this period have they been reviewed, reasoned upon, and generalized by the Courts in *Law*.

When one has come to perceive these striking facts, he is not long in finding the reason for them. Indeed the very structure of the system thus produced points to the reason when we observe its constant, anxious, and over-anxious endeavour to prevent the tribunal to which the evidence is principally addressed from being confused and misled and from dealing with questions which it has no right to deal with. It might seem strange and not worth while to keep alive so long a tribunal which has needed so much watching and so many safeguards, if one did not recall the immense persistence of legal institutions and usages as well as the deep political significance of the jury and its relation to what is most valued in the national history and traditions of the English race. It is this institution of the jury which accounts for the common law system of evidence—an institution which English speaking people have had and used, in one or another experiment of their public affairs, ever since the Conquest. Other peoples have had it only in quite recent times, unless, indeed, they may belong to those who began with it centuries ago, and then, allowed it to become obsolete and forgotten. England alone kept it, and, in a strange fashion, has developed it.

This institution, the jury, which is thus the occasion of our law of evidence, and which is also at the bottom of our system of pleading and procedure, and of very much in all branches of the substantive common law, has a peculiar interest for us. . . . I hope that those who attentively consider the long and strange story of the development of the English jury and the immense influence it has had in shaping our law, will find here a basis for conclusions as to the scope and direction of certain much needed reforms in the whole law of evidence and procedure.

"A system of evidence, like ours thus worked out at the forge of daily experience in the trial of causes, not created, or greatly changed, until lately, by legislation, not the fruit of any man's systematic reflection or forecast, is sure to exhibit at every step the marks of its origin. It is not concerned with nice definitions, or the exacter academic operations of the logical faculty. It is attending to practical ends. Its rules originate in the instinctive suggestions of good sense, legal experience, and a sound practical understanding, and they are seeking to determine, not what is or is not, in its nature, probative, but rather, passing by that enquiry, what, among really probative matters, shall, nevertheless, for this or that practical reason, be excluded, and not even heard by the jury. From the diversity and multitude of the casual rulings by the Judges,—rulings often hastily made, ill-considered, and wrong,—from the endeavour to follow

be made is often unfavourable to clear thinking, and the law of evidence largely shaped at this time took on a general aspect which was vague, confused, and unintelligible. One thing in particular added greatly to the confusion, namely the habit of assuming whenever evidential matter was rejected or received, that the result was attributable to some principle of the law of evidence, while very often indeed, the reason lay wholly in the rules of pleading, procedure or substantive law which happened to control the case. In this way the law of evidence came to be monstrously overloaded and was made to swallow up into itself much which belonged to other branches of law or to the wide regions of logic or legal reasoning. Thus not only were many of these other subjects clouded and thrown out of focus, but the law of evidence itself was intolerably perplexed. *Thayer's Preliminary Treatise on Evidence* pp 1—1

Gradual change in the Law of Evidence as Jury system changed. The old forms of trial were chiefly these (1) Witnesses, (2) The party's oath, with or without fellow swearers (3) The ordeal, (4) Battle. Trial by witnesses appears to have been one of the oldest kinds of 'one sided proof'. To such witnesses, no cross-examination was allowed. They were to state the facts on oath only. (*Thayer* pp 161) In my opinion says Brunner (Schw 205) 'undoubtedly we are to include under the head of the formal witness proof these (1) the proof of age, (2) the proof of property of property D 1234) in a moveable chattel'. In Bracton's time (c. 1362 (in 1220) we find that age proved by twelve legal men produced by him. Now these twelve men are not at all a 'jury' for the party selects them himself. (*Thayer* Pre Trial p 19) In a particularly interesting part of his great work on the jury, Brunner points out that the old witness proof was in some cases transformed at the hands of the royal power into an inquisition so that the witnesses were selected by the public authority, as they were in ordinary jury. (*Thayer* p 19) A witness to prove age must be 42 years of age. By 1515 A. D. it was settled that a trial of a person's age 'shall be by twelve jurors, but in giving their verdict every juror should show the reasons inducing his knowledge of the age, such as being son or daughter of the same age, or by reason of an earthquake or a battle near the time of the birth and the like. (*Willoughby* 176 177) Gradually the peculiar function of the jury as being triers—grew to be the chief and finally as centuries passed their only one, while that of the other witness was more and more defined, refined upon and hedged about with rules. It is surprising to see how slowly these rules came about. The attitude which long held its place as the only way of removing a false verdict

When they appeared the jury could disregard all they said and those who were not accordant with what they knew. Gradually it was recognized that while the jury might not be bound by the testimony, yet they had a right to believe it and that they were the only ones to judge of the credibility. *Thayer* Pre Trial pp 137 138. Originally the jury was punished for a false verdict, but in the course of time in case of unreasonable verdict without punishing the jurors a new trial was granted.

In granting new trials it became necessary for the Courts to know the facts which the jurors knew. Accordingly the old doctrine of basing the jurors' verdict on their personal knowledge began to be discouraged. The jurors were told that if any of them knew anything relating to the case they ought to state it publicly in Court.

In 1670 in *Bushell's Case* Vaughan 130, 142, Vaughan, C. J. finally laid down the different functions of the witnesses and the jurors in the following words. A witness swears but to what he hath heard or seen, generally or more largely, to what hath fallen under his senses. But a jurymen swears to

what he can infer and conclude from the testimony of such witnesses by the act and force of his understanding, to be the fact inquired after, which differs nothing in the reason, though much in the punishment from what a Judge, out of various cases considered by him infers to be the law in the question before him'. So two things stand out prominently in *Langbein's* opinion in *Jusell's Case*, (1) The jury are judges of evidence. (2) They act upon evidence of which the Court knows nothing, and may mischievously decide a case without any evidence publicly given for or against either party. *Thayer's Treatise* p. 164. When the jury existed merely as a body of witnesses, supposedly familiar with the facts, who from their own knowledge went to what the facts were the Court could, in the application of the law to the facts, exercise a control over the result which was impossible when the character of the jury changed. With the development of the jury into a reasoning inference drawing body of men, possessing the power to determine the ultimate facts in issue and by their verdict to judicially settle the controversy the situation to the mind of the Judge, was full of embarrassments. To what conclusions might not these men come, men ignorant of the law and its methods, unfamiliar with the ways of counsel, open to the influence of testimony and argument presented solely for the purpose of playing upon their sympathy, passion and prejudice. This was a situation to be deplored, and to be relieved of its dangers as far as possible. In the eyes of the Judge the jury was an uncertain quantity which needed to be guarded against. The jury, from the time it began to take on the character of an arbiter of the facts must have been a disturbing element in the work of the Court.

In the submission of the facts which constitute the evidence in a case there have been embarrassments real or imaginary which have resulted in the development of a set of rules. These rules relate to the use of facts in Court as evidence and make up the 'Law of Evidence'. Accordingly with the beginning of the use of evidence before juries we find the beginning of the law of evidence. Statements to which the Courts might listen without impunity were carefully kept from the jury by excluding rules established by the Judges.

It must not be supposed that these excluding rules came into being all at once. The development of the jury into its final shape was a gradual one, and the growth of rules governing the use of evidence before the jury was equally gradual. It is immaterial to enquire here as to the kind of evidence, which was excluded, that is to be found in any English treatise on the law of evidence. It is sufficient to say that in general everything except what was actually within the personal knowledge of the witness was considered unsafe to put before the jury. Thus, hearsay and opinion were both objectionable. In this way the susceptibility of the jury played its part in moulding the law of evidence into its modern form.

The supposed ignorance of the average jury was also an important factor in the evolution of the rules of evidence. Things likely to complicate the case to confuse the mind or mislead as to the real facts in issue were accordingly excluded—*Melchey's Law of Evidence* pp. 9-10.

How important a part the jury played in the development of the Law of Evidence may be realised when one considers such a decision as that in *Dell v. Haller*, 74 N.W. 617, where it was held that the admission of improper evidence in a case tried without a jury is not ground for reversal, and every practitioner is familiar with the custom prevailing where cases are tried before the Judge alone, or in reference, of taking little account of the ordinary rules of evidence.

Other Factors, having influence to shape the Law of Evidence. With the expansion of the work of the Courts and the ever increasing volume of business brought before them, a necessity arose for the shortening of trials and the expediting of the work in every possible way. This influence was a powerful one in its effect upon the admission of evidence. Much that was logically relevant, and indeed worthy of consideration if minute inquiry were possible, became inadmissible, upon the theory that it was too remote, or of slight importance. Collateral matters these were in the main—matters likely to lead to prolonged collateral inquiry, with a merge result in the way of inference—compelling proof when finished. Other things operated to make it easy and natural for the Courts to establish rules relating to the use of evidence. The policy of the law in respect

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must be cast, building barriers within which they must be confined, and, wearing grooves along which the wheels of judicial inquiry must run. *Melchior, Law of Evidence*, p. 10

Law of Evidence what it is. "What is our Law of Evidence?" asks *Prof. Thayer*. Then he answers the question in the following words: "It is a set of rules and principles affecting judicial investigations into questions of fact, for the most part controverted questions. It is concerned with the operations of Courts of Justice, and not with ordinary inquiries *in pais*, and even within this limited range, it does not undertake to regulate the processes of reasoning or argument, except as helping to discriminate and select the material facts upon which the court is to operate." *Thayer Pre. Lea* p. 263. "The law of evidence"

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facts may, and what may not be proved in such cases. II. What sort of evidence must be given of a fact which may be proved. III. By whom and in what manner the evidence must be produced by which any fact is to be proved. After defining under the first head facts in issue and facts relevant to the issue he names four classes of facts which to the issue: 1. Facts similar (Res inter alios acta) 2. The asserted existence of any fact (Hearsay) 3. The fact that any person is of opinion that a fact exists (Opinion) 4. The fact that a person's character is such as to render conduct imputed to them probable or improbable (Character)

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manner in which the proof of a particular fact must be made he lays it down that when a fact is to be proved evidence must be given by the person upon whom the burden of proof lies, or by his co-defendant, or by a witness called by him.

petent, that the witness may be examined and cross-examined and his credit tested. That brief statement, says the learned Judge, will show what he regards as constituting the Law of Evidence properly so called. With such valuable dicta for comparison, the statutory definition of the Law of Evidence seems to cover all the ground necessary for the guidance of its administration. In the California Code of Civil Procedure, section 1825 and Hord's Oregon Laws section 687, which may be taken as fair types of code definitions it is thus comprehensively dealt with:

The law of evidence is a collection of general rules established by law

'1 For declaring what is to be taken as true without proof,

'2 For declaring the presumptions of law both those which are disputable and those which are conclusive

'3 For the production of legal evidence,

'4 For the exclusion of whatever is not legal,

'5 For the determining in certain cases, the value and effect of evidence'

The Blue Book of Evidence § 1

Things excluded from the Evidence Act. This brief statement says Sir James Fitz James Stephen in his Introduction to his Digest of the Law of Evidence "will show what I regard as constituting the Law of Evidence properly

le so called. My view of it excludes many things which are often regarded as forming part of it. The principal subjects thus omitted are as follows —

I regard the question, What may be proved under particular issues? (which many writers treat as part of the Law of Evidence) as belonging partly to the subject of pleading, and partly to each of the different branches into which the substantive Law may be divided.

"Again, I have dealt very shortly with the whole subject of pre-summptions. My reason is that they also appear to me to belong to different branches of Substantive Law and to be unintelligible except in connection with them. Take for instance the presumption that every one knows the law. The real meaning of this is that speaking generally ignorance of the law is not taken as an excuse for breaking it. This rule cannot be properly appreciated if it is treated as a part of the Law of Evidence. It belongs to the Criminal Law. In the same way numerous presumptions as to rights of property (in particular easements and incorporeal hereditaments) belong not to the Law of Evidence but to the Law of Real Property. The only presumptions which, in my opinion ought to find a place in the Law of Evidence are those which relate to facts merely as facts, and apart from the particular rights which they constitute. Thus the rule, that a man not heard of for seven years is presumed to be dead, might be equally applicable to a dispute as to the validity of a marriage, an action of ejectment by a reversioner against a tenant *pur autre vie*, the admissibility of a declaration against interest and many other subjects, after careful consideration I have put a few presumptions of this kind into a chapter on the subject, and have passed over the rest as belonging to different branches of the Substantive Law.

Practice, again, appears to me to differ in kind from the Law of Evidence. The rules which point out the manner in which the attendance of witnesses is to be procured, evidence is to be taken on commission, depositions are to be authenticated and forwarded to the proper officers, interrogatories are to be administered, etc. have little to do with the general principles which regulate the relevancy and proof of matters of fact. Their proper place would be found in Codes of Civil and Criminal Procedure. I have however noticed a few of the most important of these matters.

"A similar remark applies to a great mass of provisions as to the proof of certain particulars. Under the head of Public Documents, Mr Taylor, gives amongst other things a list of all or most of the Statutory provisions which render certificates or certified copies admissible in particular cases.

"On several other points the distinction between the Law of Evidence and other branches of the law is most difficult to trace. For instance, the law of estoppel, the law relating to the interpretation of written instruments, both run into the Law of Evidence. I have tried to draw the line in the case of estoppels by dealing with estoppels *in pari* only, to the exclusion of estoppels by deed and by matter of record, which must be pleaded as such; and in regard to the law of written instruments by stating those rules only which seemed to me to bear directly on the question whether a document can be supplemented or explained by oral evidence.

PART I.

RELEVANCY OF FACTS

CHAPTER I.

PRELIMINARY

Short title 1 This Act may be called the Indian Evidence Act, 1872

It extends to the whole of British India, and applies to all
judicial proceedings in or before any Court,
including Courts-martial, (other than Courts-
martial convened under the Army Act)* (or the Airforce Act)†
but not to affidavits presented to any Court or officer, nor to proceedings before an arbitrator,

Commencement of Act and it shall come into force on the first day of September, 1872

The Law of Evidence—*lex fori* 'The law of evidence is the *lex fori* which governs the Court' Whether a witness is competent or not, whether certain evidence proves a certain fact or not, that is to be determined by the law of the country where the question arises, where the remedy is sought to be enforced, and the Court sits to enforce it' *Per Lord Brougham in Bain v Whitehaven and Furness Junction Railway Company* 3 H L C 1 at p 19 *Hamlyn & Co v Fulshear Distillery*, (1894)
is taken in one country
commission or with the
must be the law of the country where the suit is actually pending for which the evidence is taken as being the true *forum* See *per Cockburn C J in Dessilla v Iels*, 40 T L R 423—*Foot's Private International Law* p 530 but see the observation of *Woodroffe J in, In the matter of Rudolph Stallman*, 39 C 161-15 C W N 1053 at p 1065 cited under the head *the Act is not a Complete Code* under section 2 *infra*

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* Inserted by Act XVIII of 1919

† Inserted by s 2 of the Repealing and Amending Act X of 1927.

1. Kolhim in the District of Singhbhum—see Gazette of India 1881, Pt I p 501 (the Lohardigha or Ranchi District included at this time the Palam District separated in 1891) and the Lohardigha District of the Province of Bihar, 1876 Pt I p 505, Ganjam and Verapagam—see Gazette of India, 1899, Pt I, p 730, and under ss 3 and 4 of the same Act it has been held that the powers of a Local Government and those of a High Court were at the same time conferred on the Asst Governor General Central India, for the purposes of this Act—see Government of India 1911, p 9.

British India. The definition of "British India" in section 3 Cl (7) of the General Clauses Act (X of 1897). The following places or within British India—Andaman Islands (see *Queen v. Chandra Khetri* 11 M 23); Andaman and Nicobar Islands (*Queen v. B. C. R.* 10, 9 B 211), Island of Port Blair (*Queen v. Murali* 10 B 211) and Ajmer and Merwara (see *Queen v. Murali* 10 B 211) and Ajmer and Merwara (see *Queen v. Murali* 10 B 211). The Native States and Tributary States not within British India, see *Empress v. Purna* 10 B 184, *Empress v. Khetri* 10 B 211, *Queen v. B. C. R.* 10 B 211, *Empress v. Chandra Khetri* 11 M 23.

Application of the Evidence Act in places outside British India. A complaint filed in a place to which the Indian Evidence Act (I of 1872) has been declared to apply in the *Proclamation of the Evidence Ordinance of Ceylon* is merely the application to Ceylon of the Indian Evidence Act (*Indra Prasad v. Chintamani* 72 I A 372=A I R 192) P C 229.

Judicial proceedings. An enquiry is judicial if the object of it is to determine a legal relation between one person and another, or a group of persons or between him and the community generally, but even a Judge acting without authority in a case is a judicial officer. *Queen v. Tulja*, 12 B 36 (d). *Alexander v. H. J.* 10 M 1 A 340. According to section 4 (m) of the Criminal Procedure Code, judicial proceedings include any proceeding in the course of which evidence is or may be legally taken on oath. A proceeding under s 318 of the Criminal Procedure Code of 1861 was held to be a judicial proceeding. *Liquor v. Magistrate of Kheola*, 13 H C A C J 153.

The proceedings under Chapter XXXI of the Code of Criminal Procedure, 1898 are judicial in their nature and must not be conducted as if they were merely ministerial matters. The notes of evidence, therefore, must not be of fact. *Lorain v. Rani* 5 A 221=A W N 183, 220. A Magistrate's order under Ch XX of the Criminal Procedure Code is a judicial proceeding. *Rhondhor v. Panchlour* 12 C L J 619=8 Ind Cas 1106=12 Cr L J 21, see also *Sahar v. Cradattulla* 37 C 642 (F B), *Emperor v. Sheo Sanharpur*, 10 N L R 177, *Chaman v. Crown* 1 P R 1910, *Bholanath v. Emperor*, 10 C W N 55, *Dalhusiear v. Harish Chandra* 10 C L J 450. An enquiry in which evidence is legally taken is for the purposes of the Act included in the term "judicial proceeding". *Queen v. Tulja*, 12 B 36 (42). Where the Legislature has authorised the formation of a judgment, and the grant or the withholding of a certificate on that judgment the inquiry is a judicial enquiry. *Queen v. Price* L R 6 Q B 418, see also *Aichayya v. Gangayya*, 15 M 138 (F B) at p 147.

An enquiry conducted by a Magistrate into the truth of allegations against a subordinate official, contained in a petition presented to a Deputy Commissioner, is a judicial proceeding. *Emperor v. Anna Sak*, 28 A 89=A W N 1905, 195=2 A L J 717=2 Cr L J 454. The test which has to be applied to a particular proceeding before a Court to determine whether it is or is not a judicial proceeding "for the purposes of s 476 is, whether, in the course of that proceeding, the Judge has power legally to take evidence on oath not whether he has actually taken such evidence. *Chaman v. Crown*, 1 P R 1910 Cr = 161 P L R 1910=5 Ind Cas 257=11 Cr L J 90.

An enquiry under the Legal Practitioners Act is a judicial proceeding. *Subba Chetti v. Queen* 6 M 252 (253), *Gouri Sankar v. King Emperor*, 9 A L J 136, *Nallaswami v. Ramalingam*, 32 M L J 402=18 Cr L J 785. So also

is an enquiry by a Magistrate before issuing an order under section 145 of the Criminal Procedure Code. *Queen Empress v Lounarasinha*, 19 M 18. The proceeding of a Court holding a preliminary enquiry under s 476 of Criminal Procedure Code is a judicial proceeding. *Abdulla v Emperor*, 37 C 52.

An enquiry under s 8 of the Reformatory Schools Act is not a judicial proceeding. *Queen Empress v Manaji*, 11 B 381.

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Tax Act is a Revenue Court and his

Emperor v Rup Singh, 44 P R 1905 Cr

The announcement of an order under

is a stage in a judicial proceeding. *Queen Empress v Salig Ram* 18 P R

1897 Cr An investigation by the police, under s 161 Cr Pro Code is a stage

of a judicial proceeding. *Nga Po Ke v Queen Empress*, U B R (1897-1901)

Vol I, 31 An order made under s 202 of the Bengal Municipal Act is a

judicial proceeding. *The Nabadurp Municipality v Purna Chandra*, 29 C W

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Gholam Ismail, 1 A 1 (13), *Alexandar v Amirunnessa*, 10 M 1 A 340 An

enquiry by a Act is not a judicial proceed

ing, *Extra v* *rga Das v Queen Empress*,

27 C 820 to a crime alleged about to be

committed is not a judicial enquiry. *Chandrasingha v Mohan Singh*, 4 C L J

181=8 Bom L R 705 (P C)=30 M 523=1 M L T 301 A departmental

enquiry under section 197 of the Bombay Land Revenue Code is not a judicial

proceeding. *In re Chota Lal*, 22 B 936 An order passed by a first class

Magistrate under sections 518, 520 of the Criminal Procedure Code 1872, was

held not to be a judicial proceeding. *Reference No 62 of 1877* Rat Un Cr C

129 A Magistrate cannot be said to be acting judicially in directing a search

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doubtful whether the proceeding under the Land Registration Act is a judicial

proceeding. *Hira Nand Ojha v Emperor* 9 C W N 127

Court—For definition of the term vide s 3 infra

Courts Martial

1869) It is also appl

(vide s 68 of Act XIV.

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martial can be compelled to answer any question or produce any document

which he could not be required to answer or produce in similar proceedings in a

criminal Court, *Pouell* p 28, Army Act, 1881, (44 and 45 Vict (58 sections

127, 128) This is an exception to the general rule that the *lex fori* determines

the law of evidence (*Woodroffe* p 105)

Affidavits Order XIX of

regards affidavits, under rule 1

the Court (i) to order any parties

1. (ii) to allow the affidavit of any witness to be read at a hearing or trial on such conditions as it may think reasonable, with this proviso that when the opposing party in a *sue* desires to cross-examine a witness, and the witness can produce such evidence as shall not be allowed to be given by affidavit. The first of these powers, which can be exercised by the Court even against the wishes of both parties, can be advantageously employed to the manifest ends of economy in proof of formal matters. The second, which, subject to the proviso, can be exercised by the Court at the instance of one party, but against the wish of the other, enables a proper review of the evidence of an absent witness to be brought before the Court without the expensive interposition of a commissioner or examiner. *Powell* p. 69. An affidavit is ordinarily not evidence, unless it is of order XIX. *Am. Ind. Madhuca*, 63 Ind. party desires to cross-examine be read at the trial if it cross-examining party (by etc. *Mithun v. Bhol* 7 Ch D 69. An affidavit once filed cannot be withdrawn for the purpose of preventing the deponent being cross-examined therein. *In re Quarrell*, etc. 21 Ch D 612. This rule is applicable to a foreigner sent out of jurisdiction making an affidavit. *Stuart v. Wells* (1881) 8 T L R 239. *The Iranian*, (1857) 13 P D 10. If the Court has a hesitation to refuse to order the attendance of a witness for cross-examination. *In re Central Bank* W N (1857) 205, *Stuart v. Wells* (1881) 8 T L R 239. Where it is not possible to cross-examine the deponent the Court may act upon the affidavit. *Shea v. Green*, (1896) 2 T L R 533. It is essential where evidence by affidavit is given that it every effort is taken by the solicitors and others engaged in their preparation that the affidavit should represent the real facts in order that they may be thoroughly relied upon. See the remarks of *Lord Justice Russell* (1910) 129 L F J 263. An affidavit of information and belief not stating the source of information and belief is inadmissible in evidence whether on an interlocutory or a final application. *P. J. Young Manufacturing Co v. Young*, (1900) 3 Ch 753 C A.

But in the case of arbitrators, the proceedings before arbitrators, etc.

In the Evidence Act is not applicable.

Tracy v. Wilson 4 C 231, the

on the ground that the arbitrator

used in evidence a letter written by a party's attorney and stated to be without prejudice. An application to confirm the award was refused by the learned Judge of the first instance upon the ground that the defendant had not

in the course of negotiation between the attorneys on both sides for an amicable settlement of the dispute. The court held that the letters were clearly

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Fisher said "The

parties have agreed to go before an umpire who is not bound by the strict rules
of evidence enforced in a Court and to be bound by his decision, and in my
judgment the Court ought not to fetter the arbitrator or the parties by its own
rules of evidence, but should consider whether something has been discovered
since the award which the arbitrator might think material, and which might alter
his decision

This rule is of course contrary to the decision laid down by Chief Baron
Alexander in *Attorney General v. Davison*, 4 Mele & Y 160 166 where he
observed "But I have already understood that arbitrators are bound by the
same rules of evidence as the Courts of law But in India an award of the
arbitrators cannot be se strict
compliance with the rules M 85
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Krishna v Bilja 2 B L R Ap 25 Where an arbitrator has taken no evi
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opportunity of proving his contention he is guilty of misconduct *Dholi v*
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Repeal of enactments laws shall be repealed —

- (1) all rules of evidence not contained in any Statute,
Act, or Regulation in force in any part of
British India,
- (2) all such rules, laws and regulations as have acquired
the force of law under the 25th section of the
Indian Councils Act, 1861,* in so far as they relate
to any matter herein provided for, and
- (3) the enactments mentioned in the schedule hereto, to the
extent specified in the third column of the said
schedule

* 24 & 25 Vict c 17

But nothing herein contained shall be deemed to affect any provision of any Statute, Act or Regulation in force in any part of British India and not hereby expressly repealed.

Repeal of enactments Where an Act is repealed, and the repealing enactment is repealed by another, which manifests no intention that the first shall be *ab initio* and not merely from the passing of the second Act, the rule was that the repeal of the second Act does not apply to repealing Acts passed since the first Act was repealed. *Hippool, 10 B & C 39; Tuttle v Grimwood, L J Ch 321, Kemp v Waddingham, (1866)*

1850 So the mere repeal of a Repealing Act, or the repealing portion of a Repealing Act does not by itself repeal the portion thereof 1 Weir 781-7. c 63, s 11
In the absence of a contrary intention, the repeal of an old Act cannot be deemed to affect the new Act, and the rule of estoppel based on a dictum that a more

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rules of evidence which
once in British India. Nor

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Repeal by implication. Statutes are not to be considered as repealed by implication unless the repugnancy between the new provision and a former Statute be plain and unfavorable. *Satapathu v Queen*, 6 M 32. One Statute may be impliedly repealed by a subsequent Statute necessarily inconsistent with it, but the inconsistency must be so great that they cannot both be to their full extent obeyed. *Emperor v Mulshankar* 12 Bom L R 750-7 Ind Cn 963-11 Cr L J 548. For such a repeal the provisions of the latter Act must be so inconsistent with or repugnant to those of an earlier Act that the two cannot stand together. *Co Litt* 112, *Shep Touchet* 88, *West Ham v Fourth City*, (1892) 1 Q B 654, *O Flerty v McDowell*, 6 H L Cn 143, *Brown v W R Co*, (1885) 9 Q B D 753, *Sims v Doughty*, 5 Ves 243; *Constantine v Constantine* (1801) 6 Ves 100.

The Act is not a complete Code. The Indian Evidence Act is not a fragmentary enactment but a consolidatory enactment repealing all rules of evidence other than those saved by the last part of this section. *Collector of Gorakhpur v Palakdhari* 13 A 1 at p 35. The Indian Evidence Act has re-
*Lehrer v employ
 "itself"*

"The evidence Act does not contain the whole law of evidence governing this country. Section 2 of the Act Statute, Act or Regulation in force. 1 Evidence Act and in other Acts and matters of evidence. One of such S which, as applicable to this country Evidence Act. Per Woodroffe J in 164-15 C W N 1053 at p 1065. In the same case the learned Judge continued "Where evidence is taken in this country the evidence receivable must be governed by the rules of procedure here in force. It has however been argued that where evidence is received from abroad its admissibility is governed by the law of the country from which it is received."

15 A 141 (113), he was held not to be a Court. In *Queen Empress v Fulja* 12 B 36 (12), the enquiry contemplated by sections 73, 75 of the Registration Act (III of 1877) appears to have been the evidence of the Queen's High Court in the

otherwise. In delivering therefore clear to my mind that the Registrar exercises more than mere administrative function—in the examination of witnesses he is bound to observe the rules of evidence, and he is to consider the form his own conclusions. The Registrar appeared to consider the Registrar the fact appears to have mainly influenced

Nath v I I Bhowan and other, 11 C 176. A District Registrar is not a Court within the meaning of section 622 of the Code of Civil Procedure of 1882. *Malavala v Govindan*, 30 M 326. Under the Land Acquisition Act, the proceedings of the Collector regarding the measurement and valuation of the land and resulting in his award are administrative and not judicial. *Era v The Secretary of State* 1 C L J 27 = 32 C 605 = 9 C W N 151 affirming 7 C W N 219, *Durga Das v Queen*, 27 C 820, *Galstun v Banku* 31 C W N 825. A proceeding under ss 69 and 70 of the Bengal *Kofil*, 17 C 872. So also a Certificate of the Bengal Public Demands Recovery at 23 C 217, but see *Jhara Lal v Mohant*

2 Pt 257. Similarly a Deputy Collector is a Court when he is holding an enquiry under the Bengal Land Registration for registering the name of a person. *Panga Singh v Haru Khul* 17 Ind Cas 710, see also *Queen Empress v Munda* 24 M 121. A tribunal constituted under the Calcutta Improvement Act (V of 1911) is also a Court. *Nundo Lal v Khetra Mahan*, 45 C 585. So also is an Income Tax Collector. *Natarana v Emperor* 36 M 72, *In re Punam Chand* 38 B 642. A District Judge is a Court while he determines election disputes under s 22 of the Bombay District Municipalities Act (Bom Act III of 1901). *Jaiso Nanchand* 37 Bom 865.

A commissioner appointed to take down evidence of a witness is not a Court. *Seadul Ali v Emperor* 11 C W N 909. Neither is an arbitrator appointed by a Court is a Court. *Mula Mal v Chuanji* 3 P R 1914, *Fuliah v Teera Sami* 17 M L J 420.

As regards the meaning of the word "Court" in s 19 of the Criminal Procedure Code vide *Kanhayalal v Bhagwan Das*, 48 A 63, *Lilas v Emperor* 47 A 934, *Galstun v Banku* 31 C W N 825, *Nunda v Khetra* 45 C 585.

Fact

"Fact" means and includes—

- (1) any thing, state of things, or relation of things capable of being perceived by the senses
- (2) any mental condition of which any person is conscious

Illustrations

- (a) That there are certain objects arranged in a certain order in a certain place is a fact
- (b) That a man heard or saw something is a fact
- (c) That a man said certain words is a fact
- (d) That a man holds a certain opinion has a certain intention acts in good faith, or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation is a fact
- (e) That a man has a certain reputation is a fact

Facts different meanings of 'Fact' in English Law books for various transactions completed and operative transaction with executing a certain sort of writing, (factum) (c) As designating what exists fully, exist,—*de facto* as contrasted with *de jure*, (d) And so generally, as

S. 3.

indicating things, events, actions, conditions, as happening, existing, really taking place. This last is the notion which concerns us now. It is what Locke expresses (*Vide Human Understanding*, Book IV C 16, s 5) when he speaks of 'particular existence' or as it is usually termed, matter of fact'. The fundam conception is that of a thing as existing or being true. It is not limited to is tangible or visible or in any way the object of sense; things invisible, thoughts, intentions, fancies of the mind, when conceived of as existing or true are conceived of as facts. The question of whether a thing exists or l is the question of whether it is or whether it exists whether it be fact or inquiry into the truth, the reality, the actuality of things, are inquiries he fact about them. Nothing is a question of fact which is not a question the existence, reality, truth or something of the fact which is not a question t p 191. Ordinarily, a fact is something which is certain. Flumer's *Proc Tr*
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Fact legal meaning of
Jan 1870 10 How Pr (N Y) 175 Hon 150 Ind 370-50 N E 299, *fact*
ok Huter v Guggenheim 89 Fed 59 A fact is something fixed, unchanging

Fact legal meaning of Mr. Stephen in the first two editions of his *Digest* is a thing that is in the following words: "It means (1) every thing which is perceived by the senses (2) every mental condition of which a person is conscious." For this definition he was keenly criticised by a very able writer in *the Solicitors Journal* as being too narrow and not taking into account the proper meaning of the word among the legal profession.

really applicable only to the fullest form of
 thought no definition was necessary. The
 edition, and all later ones substituted in art 1 this "Fact" included
 of which any person is conscious, exists, and in his preface to the third
 edition, after saying that he "had been led to modify the definition of fact by
 an acute remark made on this subject in the Solicitors' Journal," he added that,
 "the real object of the definition was to show that I used the word 'fact' so as
 to include states of mind." *Thayer Pre. Treat. E. p. 192* "No satisfactory defini-
 tions of the term 'fact' has been or perhaps can be given. Broadly it means
 whatever is the subject of perception or consciousness."
 A "fact" as the term is used or said, an act or action which
 state of mind at a given time is
 anger, the feeling is a fact. If the operations of the mind produce an effect, as
 knowledge, skill, intention, this effect on the mind is a fact. When the mental
 process is led up to and produce a desire or intention to do a certain thing, such
 state of mind is a fact. Wilfulness is a desire or intention to produce a certain
 result; hence wilfulness is a fact. This, at least, is the general rule. We
 ascertain the existence of a fact by means of evidence. The evidence, and each
 item of the evidence are not necessarily such facts as call in operation of the
 law. *Burr Jones, Ev § 10(a)*
 What is the real

What is the real meaning of the word "fact"? The popular acceptance of the term "fact" does not include any mental condition of which any person is conscious. It stops at a fact being an existing or true thing. The legal meaning is not limited to what is tangible or visible or in any way the object of sense. *Burr Jones, Ex § 10(a)*. The framer of the Evidence Act also intended that the word be not understood only in its popular sense as denoting some event which occurred or something which was done, as opposed to something said or some opinion or feeling of mind or body. So under this definition statements, feelings, opinions and states of mind -- we became aware of as to relevancy are

* purpose of proving or disproving

the matter to which they relate. *Cunning L* p 80, see also *Stephen's Dig L*. S. 1
Preface to Third Edition The state of a man's mind is as much a fact as the
state of digestion. *Buen L J* in *Edington v Pitmaurice*, 29 Ch D 483
cited in *Field's Evidence 8th Ed* p 14.

Bentham's definition Bentham defined fact as follows — "By fact is meant
the existence of a portion of matter, inanimate or animate, either in a state of
motion or in a state of rest." This is very uninformative. *Mr Best* has given no
definition, but he seems to have endorsed the definition given by *Bentham*. But
all such definitions, including that of *Bentham* endorsed by *Best*, labour under the
disadvantage that no accurate definition has yet been given of what is legally
understood.

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Bentham's Classification of Facts
and psychological, (2) events and
This division of course does not accord
Thayer Pre Treat L p. 191.

is a fact considered to
be being, by virtue, not
those which it has in
logical fact is considered

to have its seat in some animate being; and that by virtue of the qualities by
which it is constituted animate. *Bentham, Jud. Ev C 3; Best Ev § 12* Thus
the existence of visible objects, the outward acts of intelligent agents, the res
gestae of a law suit etc, range themselves under the former class; while to the
latter belong such as only exist in the mind, as for instance
the sensations or recollections of

any proposition, the desires
intention in doing particular acts,
his introduction to his Evidence Act, classifies facts stated in clause (1) as
external facts and those stated in clause (2) as internal facts. "During the whole
of our waking life" he says "we are in a state of perception. Indeed conscious
ness and perception are two names for one thing according as we regard it from
the passive or active point of view. We are conscious of everything that we
perceive, and we perceive whatever we are conscious of. Moreover, our percep
tions are distinct from each other, some both in space and time, as is the case
with all our perceptions of material objects, as for instance, as is the case
with all our perceptions of

External
Internal
facts—Whatever is
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with which we are
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5. 3. intention will, wish, knowledge, opinion, are all perceived by the person who feels them. When it is affirmed that a man is angry that he knows the meaning of a word that he is by accident, each proposition relates to a perceived as a noise or a flash of light. The classes of propositions is this, when it is affirmed that a man has a given intention, the matter affirmed is one which he is affirmed that a man is sitting or standing the he perceived not only by the man himself, and favourably situated for the purpose. But the circumstance that either even is regarded as being or as having been capable of being perceived by some or the other, is what we mean and all that we mean, when we say that it exists or existed, or when we denote the same thing by calling it a fact. The word 'fact' is sometimes opposed to theory, sometimes to opinion, sometimes to feeling but all these modes of using it are more or less rhetorical. When it is used with any degree of accuracy it implies something which exists and it is as difficult to attach any meaning to the assertion that a thing exists which neither is, nor under any conceivable circumstances could be perceived by any sentient being as to attach any meaning to the assertion that anything which can be so perceived does not, or at the time of perception did not, exist. See the Introduction, pp 19 to 21

How psychological events are proved. It was formerly considered that psychological facts were incapable of direct proof by the testimony of witnesses and their existence could only be ascertained either by confession of the party whose mind is their seat or by presumptive inference from physical facts. See Art 12. But it is now recognised

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What passes in a man's mind can be collected from his acts. *R v Shipley*, 4 Dong 73 (177), *Field Ex 8th Ed 14*

Events and states of things. There are two other divisions of facts which deserve to be noted. One, is that they are either events or states of things. By an "event" is meant some motion or either in the course of nature or through latter case it is called "an act" or "an act" the existence of the tree is a state of things. *on Evidence § 13*

Positive or Negative facts. The remaining division of facts is into positive or affirmative, and negative. In this may be seen a distinction, which belongs not, as in the former case, to the nature of the facts themselves, but to that of the discourse which we are under the necessity of employing in speaking of them.

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instances, according to the mode of expression commonly employed in speaking of it, the real nature of it is disguised. Thus, by health, is meant nothing more than the absence, the non-existence, of disease, by minority, the individual's non-arrival at a certain age, by darkness, the absence of light, and so on. — *Bentham Jud 1st Vol 1, p 50*

as to effect as understood in the Statute

"In the first place what is 'fact' to mean and include of being perceived by the person is conscious. This

then, is the only sense in which, in interpreting the Statute, I can understand the word fact." *Per Mahmood J in Queen Empress v Abdullah*, 7 A 385 (399) F B. "A misrepresentation as to the intention of a person (in stating the purpose for which the consent is asked) is a misrepresentation of a 'fact' within

the meaning of section 3 of the Evidence Act " *Emperor v Soma*, 36 Ind Cas 851 (854) = 17 P. R 1916 Cr = 18 Cr. L J 18; see also *Re N Jaladu*, 36 M. 453 The word "fact" as used in s 157 of the Evidence Act, does not mean merely "event" but also a continuing fact such as possession. *Muthalagiri v. Pappu Narayan*, 25 Ind Cas 510

Matter of fact **Matter of law** "Matter of fact" is anything which is the law' is the general law of the land, of which *Red Ex. 8th Ed p 19* The true question though related senses It means, in the first place, a question which the Court is bound to answer in accordance with a rule of law—a question which the law itself has authoritatively answered, to the exclusion of the right of the Court to answer with what is considered to be questions are questions of fact—to include everything that is not more than one meaning. In

Illustrations Illustrations (a), (b), and (c) are illustrations of the first clause and (d) and (e) of the second This division which was made by Bentham has been adopted in the Code, to prevent any metaphysical doubts as to "mental conditions" being facts *Norton p 93, Stephen's Dig Ex 3rd Ed Introduction*

• One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts

Relevant facts The relevant facts are facts other than facts in issue which that to them word words must be taken in, the

admissibility of facts says *Phipson* "is for the most part determined by their logical relevancy to the issue, or that connection between the two which, in the ordinary course of events, renders the latter probable from the existence of the former admissi the tw which "evident or "pri evident fact I. first d law of evidence, namely logical relevancy, for the purpose of determining whether or not the fact offered can be evidence If the fact meet this test, it may

3. or may not be admitted. For flanked around the general principle in the law of evidence, that what is logically relevant is admissible, are numerous excluding rules, which say that this or that fact though logically relevant, is inadmissible. *McKelvey's Law of Evidence* p 13. The word 'relevant' in the Indian Evidence Act, means admissible. *Per Lord Hobhouse in Lal Lalhmi Chant Harder Shah*, 3 C W N 268 (notes). So a fact in order to become relevant must be admissible in evidence under any one of the sections 5 to 55. Such facts which are themselves in issue may affect the probability of the existence of facts in issue. *Stephen's Introduction* p 13.

English Law—Test of relevancy The meaning of the term according to Scottish law comes nearer to the conception of the term according to English lawyers namely, the sufficiency in law of what is alleged in support or defence of an action. (*Standard Dictionary*) The word comes from the French, *relater* to assist. So whatever testimony was offered, which would assist in knowing which party spoke the truth of the issue was relevant and when to admit it did not overrule other formal rules of evidence it ought to have been taken. *Plantier v Plantier*, 78 N Y 11. It is not necessary however that it should itself bear directly upon the point in issue for if it be but a link in the chain of evidence tending to prove the issue by reasonable inference, it may nevertheless be relevant. *Schuchardt v Allen* 1 Wall (U S) 359. Relevancy is that which conduces to prove a pertinent theory in a case. *Levy v Cimbell*, (Tex) 20 S W 196. But there is no definition or Statute or theory of relevancy which can very greatly aid in solving the constantly recurring problem, whether a given fact offered in evidence is relevant to prove the proposition in issue. *Burr Jones* § 135. *Prof Thayer*, who seems of all the writers on evidence to have acquired a giant grasp of his subject, says 'There is a principle not so much a rule of evidence as a presupposition involved in the very conception of a rational system of evidence as contrasted with the old formal and mechanical system—which forbids receiving anything irrelevant not logically probative. How are we to know what these forbidden things are? Not by any rule of law. The law furnishes no test of relevancy. For this it tacitly refers to logic and general experience—assuming that the principles of reasoning are known to its Judges and ministers just as a vast multitude of other things are assumed as already sufficiently known to them. There is another precept which should be laid down as preliminary in stating the law of evidence, namely, that unless excluded by some rule or principle of law, all that is logically probative is admissible. These rules of exclusion have had their exceptions, and so the law has come into the shape of a set of primary rules of exclusion, and then a set of exceptions to these rules. *Preliminary Treat, Evidence* pp 263—264.

Reasons of the exclusionary rules The qualification to the general rule is that it does not always follow merely because a fact is logically relevant that it is always admissible. There may be a very great number of minute details all logically relevant but which if they existed in many cases would take such a long time to be given in evidence that the business of the Court would be clogged. In *Amosheag Co. v Head* 59 N H 333, *Doe v J* thus stated the reason. 'The trial to which parties are entitled is not an endless one nor one unreasonably protracted and exhausting. There may be a vast amount of evidence, relevant in a certain legal sense but not so unimportant, when compared with an abundance of better evidence easily available, as to be properly excluded. The parties being allowed upon collateral issues an equal range amply sufficient for the purposes of justice under the circumstances of the particular case, they are not necessarily entitled as a matter of law, to go further in that direction.' But there is another reason for the exclusion of logically relevant evidence. It is thus stated by *Prof Thayer* 'Some things are rejected as being of too slight a significance, or as having too conjectural and remote a connection, others, as being dangerous in their effect on the jury, and likely to be misused or over estimated by that body, others as being impolitic or unsafe on public grounds, others on the ground of precedent. It is this sort of thing, as I said before,—the rejection on one or another practical ground, of what is really probative,—which is the characteristic thing in the law of evidence, stamping it as the child of the Jury system.' *Thayer Pre Treat Ev* p 266.

"Facts in issue"

The expression "facts in issue" means S.
and includes—

any fact from which, either by itself or in connection with other facts the existence, non-existence, nature or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows

Explanation.—Whenever under the provisions of the law for the time being in force relating to Civil Procedure, any Court records an issue of fact, the fact to be asserted or denied in the answer to such issue is a fact in issue.

Illustrations.

be in issue :—

that A intended to cause B's death ;
that A had received grave and sudden provocation from B ;
that A, at the time of doing the act which caused B's death, was, by reason of unsoundness of mind, incapable of knowing its nature

" Facts in issue, what are they " Facts in issue are those facts which are pleading in a civil case ;
"not guilty," in a criminal is therefore, little difficulty

in the case of a civil case, the facts in issue are, y the
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'principal fact' Vide *McKelvey's Evidence*, p 5

"Document" means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

Illustrations

A writing is a document .
Words printed, lithographed or photographed are documents
A map or plan is a document .
An inscription on a metal plate or stone is a document .
A caricature is a document

Many so-
l evidence
which the
thoughts of men are represented by writing, or any other species of conventional

3. mark or symbol', and expressly includes mark in a score, exchequer tally, and the like (Best p 213) Stephen's definition is similar, though more restricted. "Any substance having any matter expressed or described upon it by marks capable of being read" (*Ind Law Tr Act 1*). Within those definitions, a ring or banner with an inscription, a musical composition, and a savage tattooed with words intelligible to him. If would all be documents. Photographs, caricatures, wooden tallies and the like would probably be excluded under Stephen's definition not apparently under the others. Best p 213. The definition given in this Act is wider than the definition mentioned in Stephen's Digest. This definition seems to include all those things mentioned above. This definition is in accord with the definition of the term given in s 29 of the Indian Penal Code and s 1 (16) of the General Clauses Act (X of 1897). Where a draft petition was prepared with the intention of being used as evidence of a matter, it was held that it fell within the terms of this section. *O v Shusfast Ally*, 10 W R Cr 61 = L R 12. An agreement in which some of the executors signed is a document. *Jama v McIntosh*, 41 W 789 = 43 Ind Cas 523 = 19 Cr L J 177. Letters or marks unprinted on trees and intended to be used as evidence that the trees had been passed for removal by the Ranger are documents. *Imjeor v Khandajja*, (1925) A I R 327 = 27 Bom L R 599 = 26 Cr L J 1014 = 47 Ind Cas 39.

What is defines a document as an instrument upon which is recorded, by means of letters, figures or mark, matter which may evidentially be used. In this sense the term applies to writings, to words printed, lithographed, or photographed on seals, plates or stones on which inscriptions are cut or engraved, to photographs and pictures, to maps and plans. So far as concerns admirability, it makes no difference what is the thing on which the words or signs offered may be recorded. They may be in stone or gems or on wood as well as on paper or parchment. *What is* Ev s 14, see also *Reg. v Daye*, (1938) 2 K B 38. A book is of course a document. *Id v Lauluet Val Water Co* 26 All 55.

Evidence.

'Evidence' means and includes—

- (1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry
such statements are called oral evidence,
- (2) all documents produced for the inspection of the Court
such documents are called documentary evidence.

The ambiguity of the word 'evidence'. The meaning of the word 'evidence' in English Text Books is ambiguous. It sometimes means the words uttered and things exhibited by witnesses before a Court of Justice. At other times, it means the facts proved to exist by those words or things, and regarded as the ground work of inferences as to other facts not so proved. Again, it is sometimes used in meaning to assert that a particular fact is relevant to the matter under enquiry.

Evidence—Different meanings of the word. The ambiguity of the word, is the cause of a great deal of obscurity apart from that which it gives to the rules above mentioned. In scientific inquiries, and for popular and general purposes, it is no doubt convenient to have one word which includes—(1) The testimony on which a given fact is believed, (2) the facts so believed, and (3) the arguments founded upon them. In judicial inquiries however, the distinction is most important, and the neglect to observe it has thrown the whole subject into confusion by causing English lawyers to overlook the leading distinction which ought to form the principle on which the whole should be classified. I mean the distinction between the relevancy of facts and the mode of proving relevant facts.

"The use of the one name 'evidence' for the fact to be proved, and the means by which it is proved, has given a double meaning to every phrase in which the word occurs". Thus, for instance the phrase 'primary evidence' sometimes means a relevant fact, and sometimes the original of a document as opposed to a copy. 'Circumstantial evidence' is opposed to 'direct evidence'. But circumstantial

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evidence usually means a fact from which some other fact is inferred, whereas 'direct evidence' means testimony given by a man as to what he has himself perceived by his own senses. It would thus be correct to say that circumstantial evidence must be proved by direct evidence—a clumsy mode of expression which is in itself a mark of confusion of thought. The evil, however, goes beyond mere clumsiness of expression. People have naturally enough supposed that circumstantial and direct evidence admit of being contrasted in respect of their cogency, and that different canons can be applied to each. But this is wrong. They ought to satisfy before the Court the same theory of proof, and is an abuse of the word 'evidence'. *Stephen's Introduction* pp. 4, 5, 8, 9.

Evidence,—meaning of the word generally When we look back to the derivation of the word "evidence," we are awed by the vast area the subject

evidence is understood to be anything that makes evident or clear to the mind or such things collectively, any ground or reason for knowledge or certitude in knowledge; proof whether from immediate knowledge or from thought, authority or testimony; a fact or body of facts on which a proof, belief or judgment is based; that which shows or indicates

Evidence—Meaning of the word in the Act The word “evidence” in the Act

Evidence—Meaning of the word in the Act signifies only the instruments before the Court, viz., witnesses and documents, in the case of murder [see *post*, section 7, illustration (b)] is not evidence in the sense in which the term is used in the Act, but a 'relevant fact' to be proved by 'evidence,' the oral testimony of those who saw it. *Norton v. Brown*, 113, Mass. at p. 137. So the definition of "evidence" in this Act is defective. When in a controversy between a tailor and his customer, involving the fit of a coat the customer puts on the coat and wears it during the trial, (as in *Brown v. Foster*, 113, Mass. at p. 137), a basis of inference is supplied otherwise than by reasoning or by statements, whether oral or written; and it seems impossible to deny to this the name of "evidence". It is what *Bentham* called "real evidence". It is what *Thayer* called "Gopal" when

it does include those facts which in directly to the sense of the Court or *Prof Greenleaf* "evidence in legal which any alleged matter of fact, the ... approved" *Green*

truth of which is submitted to investigation, is established or disproved." *Green Et al v I* § 1. It "includes all the legal means, exclusive of mere argument, which tend to prove or disprove every matter of fact, the truth of which is submitted to judicial investigation." *Taylor v I* p 1, *Powell Et al* 1.

The word "evidence" as defined in this Act does not include the whole material of a case. - S. 2002. Judge may

S. 3. "Evidence for inspection of the Court" So also would be the examination of the accused before the committing Magistrate when given in evidence at the Sessions trial. When one of the several accused persons makes a confession involving himself and some of the co-accused, it may be taken into consideration as against all the persons so involved (111e & 10 infra). Such statements are also excluded from the definition of the word "evidence". *Cun Fe p 81*. The term "evidence" in its ordinary sense signifies that which makes apparent the truth of a matter. It is no doubt more frequently applied to proof before a judicial tribunal but it is not necessarily confined to this sense; it applies with equal correctness to express the information acquired by any person who undertake an enquiry on any matter in question. *Srinivas v Queen 4 M 393 (394)*. The demeanour of a witness is evidence, *111e H v Mathub 21 W R Cr 13, 14*. "The manner of giving his evidence both in chief and upon cross examination, is often times not less material than the testimony itself." *Starke Ld 4th Ed 82, 823, H 12-13*. *Destrant 1 R 1 P 615*, see also *Hoomesh v Rashmoni, 21 C 279 (244)*.

So it is clear that the definition of evidence is incomplete. It does not include the statements and admissions of parties their conduct and demeanour before the Court and circumstances coming under the direct cognizance of the Court and having a material bearing on the question in issue. It does not include the absence of probable witnesses or evidence, as to which 111e section 114 certain notorious facts of which without proof the Court takes judicial notice (111e & 10 infra) and the facts which the Court either must or may presume. These are also not evidence under the Act (111e *Cun Ev p 91*). In an action for breach of promise to marry the fact that the defendant was silent on a certain occasion has been held to be "inimutory evidence" corroborative of his promise to marry (111e *Brayley v Stern 2 C P D 266 (1)*) though it would not fall under Stephen's definition (111e *p 10*). When relevant fact is proved and is expressly authorized by law to be taken into consideration, it is "evidence", though the result has not been expressed in these words by the legislature, and must be used in the same way as everything else that is evidence." *R v Ashworth 4 C 492 (1 B)*. Confession made by one prisoner affecting himself and others jointly under trial for the same offence is evidence, although the Act has not so called it (111d, referred to in *R v Arshana Bhat, 10 B 326*, but see *Queen v Khanda 15 B 66*, *Reg v Bayan Rat 1 N Cr C 311*, *K E v Pakiri, 2 L B R 372*). A statement made by an accused person during a police investigation, on solemn affirmation before a Magistrate is evidence. *Queen v Alagar, 10 M 421* distinguishing *Queen v Bhama 11 B 702*. The term "evidence" is not necessarily confined to proof before a judicial tribunal but applies also to information acquired by any person, who undertakes an inquiry on any matter in question. *Srinivas v Queen 4 M 393 (396)*.

The terms "evidence" and "proof". The terms are often used in such a manner as to include at one time the media by which the facts are established and at another the effect or conclusions produced by the same. It is an attempt that has been frequently made but it is not successful. The difference between the terms "evidence" and "proof" is that evidence is in the full meaning of the word, while proof is in the legal sense. More accurate medium 277; Ja 73. "We must not all of the evidence" *J N W 925*, *101 Ga 9*, *Am St Rep 108 N Y*, *convince the*, *proof in that*, *Common*.

Testimony. The dictionary meaning of the word testimony is "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." Webster. In *Bouvier's Law Dictionary*, the following definition occurs: "The statement made by a witness under oath or affirmation." So testimony is evidence, therefore, differs from proof as *111e H v Mathub 21 W R Cr 13, 14*; *Green 1 Ev 1*.

is a species of evidence by means of witnesses. The broader term 'evidence' includes that which is given by witness, or offered by documents. *Carroll v Banker*, 43 La Am 1078. Clause (a) defines testimonial evidence.

Testimony—Evidence—Proof The three words, 'testimony', 'evidence' and 'proof' stand in their order of importance as follows: (1) *Testimony*—that kind of evidence which consists of verbal declarations of a witness. (2) *Evidence*—the means of proof, subdivided into several species or kinds, one of which is testimonial evidence. (3) *Proof*—the result of evidence.

ought under the circumstances of the particular case, to act upon the supposition that it exists." "It would appear, therefore, that the Legislature intentionally refrained from using the word, 'evidence' in this definition but used instead the words, 'matters before it'. For instance a fact may be orally admitted in Court. The admissibility of the word 'evidence' as given in the definition before whom the admission is made, in order to determine whether the fact is proved. *C J (Sir Ramesh Chandra) with Maclean J concurring in Joy Coomar v Bundhollal* 9 C 363 (366), see also *Ahar Rai v Jhanjur Puri*, 16 C W N 476, *Per Maclean C J and Banerjee J in Dinka Nath v Prosonno Kumar*, 1 C W N 682.

Difference between oral and Documentary evidence "Legal Evidence is not confined to the human voice or object capable of making a truthful statement. It is classified as documentary evidence. It is the thing which speaks, in documentary evidence the witness is the thing who speaks. In either case the witness must be competent, i.e. must be deemed competent to make a truthful statement, and in either case the competency of the witness is tested by cross examination, and in documentary evidence the difference being that in oral testimony, and in documentary evidence the witness is tested by cross examination, while in documentary evidence the credit of the witness is tested by the cross examination of those who must be called to have this competency." *Per Hamersley J, in Curtis v Bradby*, 65 Conn 99-43 Am St Rep 177.

Several classification of Evidence By the text writers evidence is classified under the following heads: (1) Direct or circumstantial evidence (2) real or personal, (3) original or unoriginal.

lighted the fire or in the case of a witness who has seen the facts than with that of a person who has concluded, from the evidence, that the fire was lighted.

on experience and observed facts and coincidences establishing a connection

3. between the known and proved facts and the facts sought to be proved. *Commonwealth v Webster*, 5 Mass (Wiss) 295=52 Am Am Del 711 (723); *Adarar v Emperor*, 11 C W N 1035 *Legal Remembrancer v. Moti Lal*, (S B) 41 C 173=17 C W N 1233 See also sections 6-16 of the Act. So direct evidence is that which proves the fact in dispute directly without any inference or presumption, and which if itself true conclusively establishes the fact. Indirect evidence is that which tends to establish the fact in dispute by proving another, and which though true does not of itself conclusively establish the fact, but which affords an inference or presumption of its existence. Direct evidence is that which immediately points to the question at issue. Indirect, or circumstantial evidence is that which only tends to establish the issue in proof of various facts sustaining by their consistency the hypothesis claimed. *Vide Cal Code Cr. Pro* §§ 1831, 1832. So evidence is either direct or indirect according as the principal fact follows from the evidence—the *factum probandum* from the *factum probans*—immediately or by inference. *Vide Best* § 27 *Emperor v Ali* 4 Bur L R 97. Various kinds of circumstantial evidence are codified under ss 6-16 of the Evidence Act.

Classification defective—It is clear from the definition given above that direct evidence means testimony given by a man as to what he has himself perceived by his senses whereas circumstantial evidence usually means a fact from which some other fact is inferred. These facts are called relevant facts in the Evidence Act. But a relevant fact or a fact which is called circumstantial requires to be proved by some evidence oral or documentary. So it is correct to say that circumstantial evidence must be proved by direct evidence—a clumsy mode of expression which is in itself a mode of confusion of thought. *Vide Stephen's Introduction* p 4. In direct evidence the facts apply directly to *factum probandum* while circumstantial evidence is proof of a minor fact which by indirection, logically and rationally demonstrates the *factum probandum*. *Beason v State* 43 Tex Cr 442. But in *Harris v Vealand* 10 N C 122, a different definition is given of circumstantial evidence. Evidence is of two kinds that which, if true, directly proves the fact in issue, and that which proves another fact from which the fact in issue may be inferred. But this definition of circumstantial evidence is against the accepted definition of the term. *Vide Burrill on Circumstantial Evidence* p 19.

"When the existence of any fact is attested by witnesses as having come under the cognizance of their senses or is stated in documents, the genuineness and veracity of which there seems no reason to question, the evidence of the fact is said to be direct or positive. By circumstantial evidence, on the contrary, is meant that the existence of the principal fact is only inferred from one or more circumstances, which have been established directly." *Best on Presumptions* p 246. In *State v Goldsborough*, 1 Hurst C C (Del) 302, *Gulpin v J* in charging the jury, thus defines circumstantial evidence. Circumstantial or presumptive evidence is, where some facts being proved, another fact follows as a natural or very probable conclusion from the facts actually proved so as readily to gain the assent of the mind from the mere probability of its having actually occurred. It is the inference of a fact from other facts proved, and the fact thus inferred and assented to by the mind is said to be presumed that is to say, it is taken for granted until the contrary be proved. And this is what is called circumstantial or presumptive evidence."

"Direct and circumstantial evidence" says *Burr Jones* are not different in their nature. For as *Wharton* says, All evidence consists of reason and fact co-operating as co-ordinate factors. Circumstantial evidence is merely direct evidence indirectly applied. And direct evidence, when closely analysed is found to possess the inferential quality. Direct and circumstantial evidence are not, therefore, in any sense opposed to each other." *Burr Jones Ev* § 6 b.

Circumstantial evidence, value of Circumstantial evidence to be relied upon must not merely point to the inference to be drawn but it must be of such a nature that it can possibly lead to no other inference. *Kamal v Nandatal* 56 C 738=33 C W N 711=116 Ind Cas 378=A I R 1929 Cal 37; *Pri Chord v Emperor*, 30 L J 18=112 Ind Cas 800; *Okraguddin v Emperor*, 15 Cr L J 193=23 Ind Cas 501=18 C W N 1147. The facts proved by circumstantial evidence should be inconsistent on a reasonable hypothesis with the innocence

pronounced *Emperor v Surnomoyee*, 14 S. C 621; *Hurju Mull v Inan Ali*, 8 C W N 4 Cr L J 316-19 Ind Cas 1004=244 f. 684.,
Emperor v Jyot Ram, 49 Ind. 13 Ind Cas. 129-65 P L 1909,
Arajala v. Emperor, 30 C W. I 16 Cr ;
Johua Bibi v Emperor, 35 C C. 391
(409) ; *Daulat v Emperor*, 77 I N 446.

stances
and cor
439=A
evidence against an accused but forming
him cannot sustain a conviction *Sum K*
But circumstantial evidence of the strong
Queen v Elahi Bux, 5 W R Cr 80 (91)

J 465
was not intended to exclude circumstantial
seen, heard and felt *Neel Kanto v Juggo-*
umstantial evidence of the most strongest
Queen v Elahi, 5 W R Cr 80 p 94

Where no *prima facie* case had been made out against the accused, it is open
to the accused to rely safely on presumption of innocence or on the infirmity
of the evidence for the prosecution But when *prima facie* case is made out
and the presumption of innocence is displaced, then the force of circumstantial
evidence is augmented whenever the party attempts no explanation of facts
which he may reasonably be presumed to be able and interested to explain *Issar*
Singh v The Crown, 7 S L R 109-15 Cr L J 497-24 Ind Cas 585

In the absence of direct evidence a person may be convicted solely on
circumstantial evidence *Empress v Ananla Ashore*, 4 C W N cxvi

"Where there is nothing but the evidence of circumstances to guide you"
said Mr Justice Bailey, those circumstances ought to be closely and neces
sarily connected and to be made as clear as if they were absolute and positive
proof" *Re v Daunung*, Salop Summer Assize, 1822 cited in *Wills' Cir Ev*
p 288 Every circumstance therefore which is not clearly shown to be really
connected with the hypothesis it is supposed to support must be rejected from
the judicial balance, in other words, it must be distinctly established that there
exists between the *factum probandum* and the facts which are adduced
in proof of it a real connection, either evident and necessary, or so highly
probable as to admit of no other reasonable explanation *Wills' Cir Ev* 289
Sir Alfred Wills in his admirable book lays down the following rules specially
to be observed in the case of circumstantial evidence "(1) The facts alleged
as the basis of any legal inference must be clearly proved, and beyond reasonable
doubt connected with the *factum probandum* (2) The burden of proof is
always on the party who asserts the existence of any fact, which infers legal
evidence, the
e of the case admits (4) In order
facts must be incompatible with

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witness should swear to a fact forming only one link in a chain of circumstances, the rest of the witnesses being honest, he will be in danger of detection from the discrepancy between his testimony and theirs; when he might be sworn positively, but falsely, to the commission of the crime by the accused, without the possibility of being contradicted. For this reason, although from the imperfection and uncertainty which must ever exist in all human tribunal, I have no doubt that there have been cases in which innocent persons have been convicted on pre-emptive proof, yet from my knowledge of criminal jurisprudence, both from reading and observation I have no hesitation in expressing the opinion that when there has been one unjust conviction upon circumstantial evidence alone, there have been three innocent persons condemned upon the positive testimony of perjured witnesses." In *Commonwealth v. Harman*, 1 Pa. 259 Chief Justice Gibson of Pennsylvania observed "Circumstantial evidence is, in the abstract, nearly, though perhaps not altogether, as strong as positive evidence; in the concrete, it may be infinitely stronger. A fact positively sworn to by a single eye-witness of blemished character is not so satisfactorily proved as is a fact which is the necessary consequence of a chain of other facts sworn to by many witnesses of undoubted credibility."

Circumstantial evidence where to be resorted to—"The argument founded upon the abundance of the circumstances" says Sir Alfred Wills, "and the consequent opportunities of contradiction which they afford, belongs to another part of the subject. While each of these incidents adds greatly to the probative force of circumstantial evidence in particular cases, they have clearly no connection with an inquiry into the value of circumstantial evidence in the abstract. However numerous may be the independent circumstances to which the witnesses depose, the result cannot be of a different kind from, or superior to, that strong moral assurance which is the consequence of satisfactory proof by direct testimony, and for which, if such proof be attainable, every tribunal and every reasonable mind would substitute indirect or circumstantial prima facie afford strong reason for

p 18

Danger of circumstantial evidence in jury trial In a jury trial great caution is to be observed by the Judge as regards circumstantial evidence. In cases of such evidence process of inference and deduction are essentially involved, frequently of a delicate and perplexing character liable to numerous sources of fallacy. The mind itself, which has been an uneven mirror, imparting its

Ev 18, *Rest on Presumptions*,

XV § IV.

Circumstantial Evidence—Two kinds of Circumstantial evidence is of two kinds, *conclusive* and *presumptive* "conclusive," when the connection between the principal and evidentiary facts—the *factum probandum* and *factum probans*—is so direct and certain that the inference is irresistible. Circumstantial evidence is only probable, whatever be the degree of persuasion which it may generate. *Best Ev* § 293

Real or Personal Again evidence is either real or personal. By real evidence is meant evidence of things, the source, persons being to them in common with the "res" of the civilians

immediately, where where its existence

the the and tion ment term, 150—

3. 1168 The real evidence is known by the name of "immediate" evidence. For obvious reason there is no class of evidence so convincing and satisfactory to a Court or a jury as that which is addressed directly to the senses of such Court or jury. Such objects are, when it is convenient, brought into the court room for such inspection. If this is not convenient or possible, the Judge or Jury may if it seems practicable and necessary, view the object or premises in question. That the Court, the tribunal has been desirous to pay a high tribute to this class of evidence is shown by the fact that where the point of issue was evidently the "object of sense," the Judges sometimes dispensed with a Jury and decided the question on their own senses. *Black Com* 331. It is by oral testimony of witnesses and by things which can be seen by the Jury, subject always to consistency demands that if the ends of justice require it should be produced by them. It is not calling for any unusual exercise of any of their senses. *Burr Jones* § 11. In *Reel v. Territory*, 120 Am St Rep 861, *Turnman P J* observed: "But this does not make them witnesses in the case. They have simply tested the credibility of the witnesses by the personal experience and observations of the jurors. A thousand things in the lives and observations of the jurors may influence them in doing this, but a knowledge of these things has never been regarded as making the jurors witnesses in this case. In this case the jurors were not trial witnesses, but the contents of the bottles were not learned by the prosecuting witnesses. If the witnesses did not learn any of her words, they were not witnesses before them to test their true character." Similarly in *Gentry v. Mc Guinness*, 3 Dana, (Ky) 282, *Robertson C J* said: "The counsel denies that personal inspection by the jurors on the trial is proper or allowable evidence. To a rational man of perfect organization the best and highest proof of which any fact is susceptible is the evidence of his own senses. This is the ultimate test of truth and is therefore the first principle in the philosophy of evidence. Hence autopsy, or the evidence of one's own senses, furnishes the strongest probability, and indeed the only perfect and indubitable certainty of the existence of any verifiable fact. Others, do not see the fact. Their own senses are the only satisfactory testimony to them. Hence the policy of the law has been permitted to require that the body be produced whenever it was practical and convenient."

So the remains of a deceased person may be produced when in a fit condition for an autopsy.

for an autopsy from the post mortem examination and

Jury may decide of a person. On inspection; and so with a putative body *infra*

written evidence is delivered through oral (5) When real evidence is reported, either by word of mouth or otherwise *Best* § 29

Hearsay Evidence "There is a great head of the law of evidence, comprising indeed, with its exceptions, much of the largest part of all that truly belongs there, forbidding the introduction of hearsay. The true historical nature of this rule is hinted by the remark of an English Court, two centuries ago and over, when they checked the attempt of a woman to testify what another woman had told her. The Court, it was quietly remarked, 'are of opinion that it will be proper for Wills to give her own evidence'. [*Ellis v. Canning's Case*, 10 St. Tr. 383 (106)] That is to say, the objection went to the medium of communication; witnesses before the jury, in giving ordinary testimony, had by that time been allowed for some three centuries and over, as they said in the witnesses to Courts in older times not be testimony at second hand *vide* § 60 *infra*

A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists

A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

"Not proved" A fact is said not to be proved when it is neither proved nor disproved

"Proved", meaning of "Proof" said Lord Moulton in *Hawkins v. Powell's Coal Ltd*, L R (1911) 1 K B 600 at 605-606 T T W R 700-701 T T 265 "does not mean impossible. It means

in our acts, in our thoughts we act upon just and reasonable convictions *Per Lord Coleridge J in Rex v. I* cited in *Wills' Cir Ev* p 50 So case it is never meant that he must prove can be done is to adduce such evidence

done by direct evidence or by inference fit to rest in surmise, conjecture or *Powell's Coal Co Ltd, u/s supra*

W N. 265 at ¶ 270 *Jenkins C J*

thus observed; "Demonstration or a conclusion at all points logical can not be

3. expected nor can a degree of certainty be demanded of which the matter under investigation is not reasonably capable. Accepting the external test which experience commands, the Evidence Act in conformity with the general tendency of the day adopted the requirements of the prudent man as an appropriate concrete standard by which to measure proof. See also *Prasanna Mohi v. Balanthe*, 49 C 132; *Gowshi v. Lalani*, 23 C 1 J 209. So none but Mathematical truth is susceptible of that high degree of evidence, called demonstration, which excludes all possibility of error, and which, therefore, may reasonably be required in support of every mathematical deduction. Matters of fact are proved by moral evidence alone by which is meant, not only that kind of evidence which is employed on subjects connected with moral conduct, but all the evidence which is not obtained from intuition, or from demonstration." *Greenleaf Ev* § 1

Standard of belief of a prudent man

to be left to South rarely

the consequence of strictly logical process. It is either partially or entirely the outgrowth of education—bias, affection, fear, or some other influencing passion. We believe what we wish to believe, and what we are in the mood of accepting as true. The same evidence which to one may be convincing to another may seem absurd. Per Vice-Chancellor Pitney, in *Duval v. Duval*, 34 Atl. Rep 885 at p 896. So there is no standard by which the weight of conflicting evidence can be ascertained. Per Sutherland J in *People v. Superior*, Ct 5 Wind (N Y) 14 (126). In estimating the weight of ounces, pounds, or tons, and yet we know from the lightest feather to the most abiding is to note all the facts and circumstances and relative weight by the lights of conscience and experience. *Loylan v. Miller*, 26 N J H 274 (333). We have no test of truth of human testimony, except its conformity to our own. Per Vice-Chancellor in *Jersey City Bank v. O'Rowl* which all evidence rests upon the mind is determined by observation and experience, the only original instructors of wisdom. *Whitaker v. Farler* Per Beal J 42 Iowa, 650 (587).

Evidence which will satisfy one Court may not satisfy another. Any attempt to lay down a provision that such evidence as does not satisfy a particular Court shall be insufficient in the future to prove a similar fact before any other Court is an attempt to make law rather than interpret it. *Raghupat v. Emperor*, 100 Ind Cas 535=28 Cr L J 311=A 1 R 1927 Oudh 140.

Legal proof, what it is. In *Barindra Kumar Ghose v. The Emperor* 37 C 467=14 C W N, 1114 at p 1178, Carnall J observed "Legal proof

he defines Evidence as existing

so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists' When the section speaks of the matters before the Court, it means of course, the matters properly before it; whence it follows that, if and when relevant matter has been admitted in evidence, one must be careful—I would here refer to the provisions of section 167 c.

any conceivable, admit proof of probable

between the rule that this is not upto juris et de

pure Emperor v. Shrinivas, 7 Bom L R 969=3 Cr L J 33, see also *Jarat Kumari v. Bissessur*, 39 C. 245; *Bonsogomoff v. Nahapiet Jute Co.*, 6 C W. N 495 (505).

Suspicion conjecture, etc., probative force of "Suspicion cannot give probative force to testimony which in itself is insufficient to establish or to justify" *Per Andrew C J in People v Tansley*, 143 N

(C C no upon it, is without rudder and compass" (C conjecture or suspicion to take the place of legal proof' *Per Carduff J in Barindra v Emperor*, 37 C 467-14 C W N 1114 at p 1178 In the same case *Jenkins C J* observe: "Another matter to which I desire to allude is the general character of the evidence From the nature of the case it is to a large extent circumstantial, and in dealing with it, the rules especially applicable must be borne in mind There is always the danger in a case like the present that conjecture or suspicion may take the place of legal proof, and therefore it is right to recall the warning addressed by *Mr Baron Allerson* to the jury in *Reg v Hages* 2 Lewis C C 227 Where he said 'the mind was apt to take a pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected whole, and the more ingenious the mind of matters to over reach and take for granted some to render them complete' there may be a strong mo 25 W R Cr 43

So neither juries nor Courts are permitted to render verdicts or judgments upon guesses or surmises *Laggle v Allen*, 24 N Y App Div 594, see also 511 (P C) 'It is not the habit of *The Ship Henry Eubank*, 1 Summ

possibilities" A mere conjecture built upon a bare possibility will not suffice to transfer the money another *Pauley v St* 1039 P C-12 C becomes inconsistent plaintiff has produced sufficient evidence to establish his case he is not to be defeated upon mere surmise or conjecture *Lord Chief Justice Kenyon* said, he remembered in instance, 'bordering on the ridiculous where in an action on the game law not charged with fright, and to grant a new trial *in person v Layton* 14 14 200

In *Mina Kunari v Bhoj Singh*, 44 I A 72 at p 77-44 C 662-21 C W N 585 *Sir Lunceford Jenkins* observed that though in cases of alleged benami transactions there may be grounds for suspicion, yet the Court's decision must rest not upon suspicion but upon legal grounds established by legal testimony See also *Alfred v 28 C W N 62-21 Ind Cts 667, Promode*

Kumar Ro Singh, 25 *Mani Lal v Raja Bhoj* *eeaman Chander v Gopal* *nat Indu* 23 C W N *Bipin Krishna v Priya*

must rest not upon suspicion but testimony *Lachnam v Radha Char* 15, *Jasoda Lal v Balaram*, 35 C *Nagendra* 66 Ind Cts 691 *Motilal Kumar v Bhoj* 21 C W N 585 *Balwant v Daulat* 8 A 315 *Iac v 14 14 200, 14 14 200* *Mahatir*, 9 C 656, *Kali Chandra v Shub Chandra*, 6 H L R 501

Mere suspicion of fraud 'Astute as Courts should be' says *Knaff J in Muirhead v Smith* 35 N J Eq 303 (309) 'in the detection of fraud, they are no justified in finding it on grounds which show no more than its possible existence When the acts of parties admit of a reasonable interpretation in favour of honesty and fair dealing, they should receive it' In a suit to set aside a fraudulent conveyance "tangible facts must be proved, from which a legitimate inference o

which is a third class & other cases -

they are not evidence as defined by the Act

L J 138 So also commissioner's report is to see that it is filed as an 301-51 M L J 637 Ordinarily of great importance *Abdul v Emperor*, 37 C 340-14 C W

N 422 there are no doubt passages in the judgment of *Woodroffe J*, which might seem to imply that the observation of a fact by the Magistrate could not be admitted. But a careful perusal meant is that mere observation evidence and a case cannot be the Court locally. If in looking at a place in order to understand the evidence the Magistrate thereby understands that the description of the place given in the evidence is erroneous or false he is certainly not precluded by the laws of evidence from holding that the facts stated by the witnesses who gave that erroneous or false himself a witness shown that most important matters before

To hold otherwise would be in direct conflict with *Joy Comar's case* 9 C 363 which so far as we know has never been dissented from *Altaf Rai v Jhangur Tewari* 16 C W N 426 (429)-39 C 476 But a Judge without giving evidence in a case as a witness cannot import into a case his own knowledge of particular facts *Haropersad v Sheo Dyal* 26 W R 55 P C-3 I A 286 see also *Mithan Bibi v Bashere Khan* 11 M I A 213-7 W R P C 27

only for the it should Ind Cas 60 The generally

the wrong impression from the mind of the Magistrate by cross examining him. The danger is intensified if the Magistrate holds the local enquiry *ex parte* *Ram Sahai v Durla Singh* 61 Ind Cas 712-1 P L T 569 So where a Magistrate makes use of knowledge derived from a local inspection without affording the accused an opportunity to cross examine or to explain the points against him he acts with material irregularity sufficiently to vitiate the trial *Moran v Emperor*, 61 Ind Cas 791-2 Pat L 1 455 It is not only not objectionable but shot bear not his :

rule 9 Civil Procedure Code a Judge in a civil case makes a local inspection in person at his discretion. The decisions in *Pai Krishori Ghosh v Humudini Kanti Ghosh* 14 Ind Cas 377-15 C L J 138 *Anant Lal v Gokul Sahu* 35 Ind Cas 344 and *Durla Prosad v Malhu Lal* 52 Ind Cas 211 are cases the decisions of which are based on the omission from Order XXVI rule 9 of the Code of Civil Procedure of the words that occurred in section 392 of the old Code which provided for the issue of a commission for a local investigation only in cases where it could not be conveniently conducted by the Judge in person. *Safapathy v Perumal* 62 Ind Cas 790-41 M 640 As the rule now stands a Judge may issue a commission in any case when he deems it fit to do so irrespective of his own inconvenience. *Ibid* Sometimes the question arises whether the report of a process server can be considered by a Court as matters before it. But the report of a process server is not admissible in evidence unless he be examined as a witness with regard to it *Fateh Muhammad v Hafiz Khan* 96 Ind Cas

825-A 1 R 1926 Lah 620 So the Court can take into consideration the following things which do not fall within the definition of the word evidence in deciding a case (1) any material object brought before it (111e s 60 of the Evidence Act and section 218 of the Criminal Procedure Code), (2) the demeanour of witnesses, (3) facts of which the Court can take the parties or the accused and her by a Court (7) or by commissioners appointed by a Court vide *Munipuri v. Qurn*, 4 M 393 (395)

But personal knowledge of the Judge and matters not relevant duly proved cannot be the basis of any judgment. *Durga Prasad v. Ram Doyal*, 38 C 133, see also *Thurpershad v. Shro Dyal*, 31 A 286, *Mitham v. Basir*, 7 W. R. 27 (P. C.), *Narain v. K. E. 50 C 37* *Rousseau v. Pinto*, 7 W. R. 190, *R v. Ramcharan*, 24 W. R. Cr 28, *Lallabha v. Mathusulan*, 12 W. 495, (500); *Sooraj v. Khode*, 22 W. R. 9 The same rule is true in cases of arbitration *Kanhye v. Ram*, 24 W. R. 81 "A Judge is not entitled to rely on specific facts not proved by the evidence in the case but known to him personally or otherwise but he may use his general knowledge and experience in determining the credibility of evidence adduced before him and apply it to a decision of the specific facts in dispute in the case" per *Sunder Ayyar J* in *Lalshamaya v. Varadaraja*, 26 M 168, see also *British South African Co v. Lennon*, 34 I. A. 273 (P. C.) In the

unless both the parties after he so mentions to them his said personal knowledge of that particular incident, state that they have no objection to his continuing as Judge"

Probable—Probability is the term generally used to express the preponderance of the evidence or arguments, in favour of the existence or non existence of a particular event or proposition, and sometimes as assertion of the abstract and intrinsic credibility of a fact or event *Hills' Civ. Ev. p. 8*

Prudent Man—Truth being a phrase used in reference alike to things capable and to things incapable of absolute and quasi-mathematical demonstration, the evidence appropriate to inquiries after truth must necessarily be different according to the class of the events or propositions which are the subjects of inquiry. This classification, however, is not founded on any essential difference in the nature of truths themselves, and ability of perceiving them, the object of knowledge is in absolutely and really as it is. of probability of a prudent man is laid down *vide* next topic

Distinction between Factum Probandum and Factum Probans Evidence is always a relative term. It signifies the factum probans, or proposition to be proved

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offered that *John Doe* left the vehicle at such a time, it is in its turn becoming a proposition, the *Doe's shoes* fit the track left becoming a proposition, may be stand who has placed the shoe in the track. Here each fact in its turn becomes a proposition requiring the facts, more or fewer Proposition or Evidentiary of the moment — *Wigmore's Principles*

Distinction between Inference and proof "Inference is the persuasive operation of each separate evidentiary fact, as to an *Interim Probandum*. Proof is the persuasive operation of the total mass of evidentiary facts, as to a *Probandum*."

"We are dealing here, always, with a state of mind, a mental process, and analogies are helpful."

"An inference may be likened to a push given to a wheel chair in which the thinker is sitting. The door of the house is open towards the door. Party A gives the push; Party B does not."

"The wheel may or may not have reached the door. — In studying the various kinds of evidence, therefore, we are not expecting proof from any one piece, but only an inference. No question of proof arises until all the evidence—pushes, have been given."

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"The process may or may not result in our belief that he lost it or that he never put it on, but in either case our belief as to one or the other propositions is distinct from our inference. The advocate asks the tribunal to infer, and the tribunal proceeds to infer, as to think probatively, but this inference may or may not result in belief. The term 'inference' has been some times used ambiguously to include either or both the process and the result." *Wigmore's Principles of Judicial Proof* § 4

Real Foundation of Proof "The real foundation of Proof is always the recognition of resemblance and difference between things or events known and observed, and those which are on their trial,—whether such recognition is based (1) on knowledge already reached and formulated in names or propositions or (2) on direct observation and experiment. (1) In proportion as we openly and distinctly refer to known principles (already generalised knowledge) is Proof deductive. (2) in proportion as we rapidly and somewhat dimly frame new principles, is Proof inductive. That is under the shadow of the sweep within the sweep broader than itself."

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of which to bring our thesis, we reach no foundation no assurance beyond what has been found to contradict the the required for all rationalization that a certain sign is trustworthy an assertion that the sign is the Thesis. In other words all rationally. But there is yet a method and deductive), and, with certain make some use of it.

deductive That is under the shadow of the sweep within the sweep broader than itself.

'Although the legence of my Thesis on its Reason must be rationalized —we must have the underlying principle made clear—before the testing operation can be called complete yet in regard to special dangers it makes considerable difference whether that principle is at first definitely apprehended or not—

Proof—and that which rests upon what is or perception of resemblance and difference or observation and experiment —that which is commonly known in its highest form as Inductive Proof —as the Argument from Analogy The required limitations the first place, a clear recognition or law connecting the cases is in the case of Inference commonly dropped out of sight or at least left highly indistinct yet the whole cogency of Inductive Proof depends upon the extent to which such principle is first rendered definite and then confronted with observable or

make it of course extremely difficult in practice to label every case at once with one or the other name. Some times as where the Reason is a direct statement of the Principle itself or again where it consists of a record or some experiment no hesitation need practically be felt as to where the danger lies but in a large number of cases we have no means of deciding whether the argument may best be classed as empirical or deductive or both. "But because

if we can be an argument. However we action between them has a certain real importance as already shown, and all that is intended to be done with it is to recognize that so far as the given argument may be seen to belong to one or the other class so far we are already on the track of special dangers'—*vide Professor Alfred Sidgwick Fallacies* pp 212. A brief examination will show that in the offering of evidence in Court the form of inference is always inductive.

Suppose to prove a charge fixed design to kill the deceased to kill B therefore A probably resemblance of a syllogism. The form of inference is exactly the same when we argue yesterday Dec 31 A slipped on the side walk and fell, therefore the side walk was probably coated with ice' or 'To day A who was bitten by a dog yesterday died in convulsions therefore the dog probably had hydrophobia. So with all other legal evidentiary facts whether circumstantial or testimonial we may argue last week the witness A had a quarrel with the

nd with a After B's probably an adult of an affray obably true that B did strike first. In all these cases we take a single or isolated fact and upon it base immediately an inference as to the proposition in question. This is the Inductive or Empirical process.

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prominence the implied Law or generalization on which it rests more or less obscurely. Thus it is nothing peculiar to litigious inference that this possibility of turning it into deductive form exists here also. But it is not a question of what the form might be—for all inductive may be turned into deductive forms—but of what it is, as actually employed; and it is actually put forward in inductive form.

"(2) Even supposing this transmutation to be a possibility, it would still be usually undesirable to make the transmutation for the purpose of testing probative value; because it would be useless. We should ultimately come to the same situation as before. Thus, in one of the instances above 'A repaired machinery after the accident, therefore A was conscious of a negligent defect in it'; suppose we turn this into deductive form: 'People who make such repairs show a consciousness of negligence, A made such repairs, therefore, A was conscious of negligence.' We now have an inference sound (in form, at least) deductively, if the premises be conceded. But it remains for the Court to decide whether it proves, probably shows, etc.) that they are conscious of negligence.' But here we come again, after all, to an inductive form of inference. The consciousness of negligence is to be inferred from the fact of repairs, just as the presence of electricity in the clouds was inferred by Franklin from the shock through the kite string, i. e., by a purely inductive form reasoning. So with all other evidence when resolved into the deductive form, the transmutation is useless because the Court's attention is merely transferred from the syllogism as a whole to the validity of the inference contained in the major premise, which presents itself again in inductive form.

For practical purposes, then, it is sufficient to treat the use of litigious evidentiary facts as generally inductive in form." *Wigmore's Principles of Judicial Proof*, § 9

Form of Inference—Occasional deductive form. Nevertheless the deductive form occasionally may be used,—even must be used, in seeking to discover the real points of weakness of inference. The two commoner cases of this used general involving a *Principles of*

Practical Inference — — — — — the loophole these, we shall in weighing the opponent thus set forth source of fall convenient of causes, or unknown antecedents, or of arguing *esthe. post hoc ergo propter hoc* or *per enumerationem simplicem*, or of neglecting to exclude alternative possibilities, or of forgetting that facts may bear more than one interpretation or of failing to see below the surface, or—perhaps on the whole the best of all—of unduly neglecting points of difference.

"The form of proposed inference is, a case or cases brought forward, of which a certain conclusion is asserted to be the best explanation. If, then some better explanation is possible, the theory as stated is impeachable. By the of all possible w, is narrowed, ible way against on the cure, the : nment conduct of real value ble theories are all precautions

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right one out of all those conceivable? The methods of Inductive Proof may
 be viewed as attempts to answer this question." *Subsequent Fallacies* p 270
 The peculiar danger, then, of Inductive Inference is that there may be other
 explanations, than the alleged Probandum one, for the fact taken as the basis
 of proof. Therefore this principle is to be examined from the point of view of
 the opposing parties in a legal trial. Proponent and opponent in turn offer
 evidence. Both counsel and the tribunal therefore need to examine each piece
 of evidence, first, from the proponent's point of view, next, from the opponent's
 point of view, and finally, from the tribunal's point of view. *Wigmore*
Principles of Judicial Proof § 11

Same from the View point of the Proponent of Evidence "If the
 potential defect of Inductive Evidence is that the fact offered as the basis of
 the conclusion may be a failure to exclude a point of proof, a fact
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of inference, evidence of an extraordinary degree of probability. The propo-
 sitional text, then, from the point of view of valuing the inference, would be
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upon the practical availability of stronger facts. But the general op-
 mode of reasoning of the Courts substantially illustrates the dictates of scientific
 logic." *Wigmore's Principles of Judicial Proof* § 12.

Same from the view point of the opponent of evidence "Where the scientist is dealing with the subject of Proof in Logic, the single stage of the inquiry is whether the argument offered as involving Proof does really fulfil the logical requirements. But wherever, in the applications of logical principles to specific practical purposes, two parties are found contending, the proponent and the opponent—as in a formal debate, and, pre-eminently, a trial at law—the treatment of the inference falls into two stages. Whenever, on the evidential fact—
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admitted in evidence, but its for
showing that some explanation of it other than the proponent's is the true one

"Thus every sort of evidentiary fact may call for treatment in a second aspect, by the opponent, viz. What are the other hypotheses which are available for the opponent as explaining away the force of the fact already admitted?

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Principles of Judicial Proof § 10

There are other processes available to the opponent in opposing the proposed Inference. He has three processes in all. He may, (1) As already seen, seek to explain away the proposed inference. Or, (2) he may deny the existence of the evidentiary fact itself. Or, (3) he may offer some new and rival evidentiary fact, tending independently to disprove the Probandum.

"But in neither of the latter two cases is he using any new logical principle. In (2) he is not contesting the logical value of the proponent's inference but

inference pointing directly at the Probandum, but negatively, he thus becomes a Proponent, in turn as to that new rival evidentiary fact; and the same logical principle applies, in valuing his new proposed inference, that applied to the Proponent's original inference.

"To illustrate

"To charge A with murder, the prosecution shows a specific threat, an old quarrel, and traces of blood on his clothes. The defendant may answer:

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admission, here the defendant is simply a proponent of new evidentiary facts, just as the prosecution was for its own evidence, thus new question of relevancy depends on precisely the same tests as the prosecution's original evidence.

"All an opponent's modes are reducible to these three. In the first, he is an opponent by logical nature of his argument. In the second, he is an opponent from the contradictory point of view, but this may require him to become a proponent of either a new circumstance or a new witness. In the third, he becomes himself the proponent of a new argument, which the original proponent may now attack as an opponent. The first is inherent in the probative use of the proponent's original fact, the other two are not inherent, and may or may not be resorted to"—*Wigmore's Principles of Judicial Proof* § 14.

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applicable more fruitful of results against a concrete or an abstract thesis than against a directly abstract one. And the right of the truth over all its possible rivals, depends entirely upon the depth of the conditions under which

is the main lesson of Logic

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right one out of all those conceivable? The methods of Inductive Proof may be viewed as attempts to answer this question. *Salmuth's Fallacy* The peculiar danger, then, of Inductive Inference is that there may be explanations, than the alleged Probandum one, for the fact taken as the point of proof. Therefore this principle is to be examined from the point of view of the opposing parties in a legal trial. Proponent and opponent in turn offer evidence. Both counsel and the tribunal therefore need to examine each point of evidence, first from the proponent's point of view, next, from the opponent's point of view and finally from the tribunal's point of view. *Wigmore's Principles of Judicial Proof* § 11

Same from the View point of the Proponent of Evidence. If the potential defect of Inductive Evidence is that the fact offered as the basis of the conclusion may be open to one or more other explanations or conclusions, the failure to exclude a single other rational hypothesis would be, from the stand point of proof, a fatal defect, and yet, if only that single other hypothesis were open, there might still be an extremely high degree of probability for the Inference desired. When *Robinson Crusoe* saw the human foot print on the sand, he could not argue inductively that the presence of another human being was absolutely proved, there was at least (for example) the hypothesis of his own somnambulism. Nevertheless, the fact of the foot print was, as a basis of inference, evidence of an extraordinary degree of probability. The provisional text, then from the point of view of valuing the inference, would be something like this: Does the evidentiary fact point to the desired conclusion (not as the only rational hypothesis, but as the most plausible or most natural one) state the requirement more

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"This test for the probative value of a proposed inference may be illustrated from various sorts of evidentiary facts

"The fact that A left the city soon after a crime was committed will raise a slight probability that he left because of his consciousness of guilt, but a greater one if his knowledge that he was suspected be first shown. Here the evident notion is that the mere fact of departure by one unaware of the charge is open to too many innocent explanations but the addition of the fact that A knew of the charge tends to put these other hypotheses into the back ground, and makes the desired explanation or conclusion—the guilty consciousness—stand out prominently as a more plausible hypothesis—

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"Thus, throughout the whole reasoning the theory of the inductive

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upon the practical availability of stronger facts. But the general spirit and mode of reasoning of the Courts substantially illustrates the dictates of scientific logic." *Wigmore's Principles of Judicial Proof* § 12

probative value if they were substantially similar to each other in all respects except the presence of x . This test is of comparatively rare employment in circumstantial evidence, because instances rarely occur which fulfil this requirement, unless where prearranged experiments are possible, but in testimonial evidence, the argument is frequently employed.

To illustrate. The injury to the by the defendant to sewer gas; for under conditions as nearly as possible, except the absence of sewer gas, argues that the sewer gas was the cause.

The purpose in using both these subordinate tests is always the same general one—to secure a fair probability for the claimed hypothesis, as against and in competition with other possible ones—*It ignores Principles of Judicial Proof* § 19

... evidence does not involve any already analyzed Corroboration may be several mental processes frequent use of the term 'corroboration' witness or two, duplicating the assertion of some prior witness. But this is not a new logical process.

(2) But the term "corroboration" is also used to signify the auxiliary evidential facts offered by opponent seeks to weaken the proponent, and in

... consists in offering data (as above noted) this may attempt to establish of them may cause these grounds of

prop any the hesitation. The mere fact of the witness's making an assertion does not require us to believe the matter asserted, our knowledge of human nature forbids this. Hence the fact that

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Proof in Civil and Criminal Cases "Demonstration, or a conclusion at all points logical cannot be expected nor can a degree of certainty be demanded of which the matter under investigation is not reasonably capable. Accepting the external test which experience commands, the Evidence Act in conformity with the general tendency of the day adopted the requirements of a prudent man as an appropriate concrete standard by which to measure proof. The Evidence Act is at the same time expressed in terms which allow full effect to be given to

... of the day adopted the requirements of the prudent man as an appropriate

conscience of the Court can never be bound by any rule, but that which coming from itself dictates a conscientious and prudent exercise of its judgment. And

3. speaking for myself where whatever be the form of proceeding, charges of a fraudulent or criminal character are made against a party thereto it is right to insist that such charges be proved clearly and beyond reasonable doubt though the nature and extent of such proof must necessarily vary according to the circumstances of each case. There is a presumption against crime and misconduct, and the more heinous and improbable a crime is the greater of necessity the force of the evidence required to overcome such presumption. I cannot

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See also *Starke* 12 817 *Best* 12 76 *Taylor* 10 112, *R v White* 4 Fort & 1 in 383 *J v Madhub* 21 W R Cr 13, *R v Behare*, 3 W R 23 25 *R v Gocool* 2 W R Cr 34 *Trial of Lord Cornwallis* 77 St Trials 149 *Trial of R 1 Cro sfell* 26 St Tr 218 The phrase proof beyond a reasonable doubt by no means imports a proof which calls for a mathematical reduction in the shape of the demonstration of guilt but is often far removed from it. *Burr Jones* 5 A reasonable doubt is not to be a mere quibble, an idle doubt created by questioning for the sake of a doubt nor suggested without some foundation in the evidence. It is such a doubt only as in a fair reasonable effort to reach a conclusion upon evidence using the mind in the same manner as in other matters of importance prevents the jury from coming to a conclusion in which their mind is satisfied. *Commonwealth v Costley* 118 Mass 1 (18)

Perhaps the best definition of reasonable doubt ever promulgated was that uttered by Chief Justice Shaw in *Commonwealth v Webster*, 5 Cush 295-52 Am Dec 711 (730). He observed in that case. Then, what is reasonable doubt? It is a term use I probably pretty well understood but not easily defined. It is not mere possible doubt because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which after all the evidence leaves the mind of the jury feeling an abiding conviction to the truth of the charge. The burden of proof is upon the independent evidence and in favour of innocence and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances that the fact charged is more likely to be true than the contrary but the evidence must establish the truth of the fact to a reasonable and moral certainty, a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are found to act conscientiously upon it. This we take to be proof beyond reasonable doubt because if the law which mostly depends upon considerations of a moral nature should go further than this and require absolute certainty, it would exclude circumstantial evidence altogether. In *Leopold v Strong* 30 Cal (Am) 151 150 *Currey C J* says that it is "probably the most satisfactory definition ever given to the world" reasonable doubt in any case known to criminal jurisprudence.

Similarly in *Com v Costley*, 118 Mass 1 *Gray C J* said. Proof beyond a reasonable doubt is not beyond all possible or imaginary doubt but such proof as preclude every reasonable hypothesis except that which it tends to support. It is proof to a moral certainty as distinguished from an absolute certainty. As applied to a judicial trial for crime the two phrases are synonymous and equivalent each has been used by eminent judges to explain the other, and each signifies such proof as satisfies the judgment and conscience of the jury, as reasonable men and applying their reason to the evidence before them, that the crime charged has been committed by the defendant and so satisfies them as to leave no other reasonable conclusion possible.

The general rule
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degree of proof referred to in 3 of the Evidence Act has been that. In *Emperor v Agn Potha*, U B R (1913) 2nd Cr 170-28 Ind Cas 166-14

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Stricter degree of proof in criminal cases Section 3, lays down what degree of certainty is sufficient to hold that a fact is proved *Abdul v Crown* 32 P R 1873 Cr Under s 3 a fact is said to be proved, when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought under the circumstances of a particular case, to act upon the supposition that it exists. A stricter degree of proof is required in criminal proceedings, the persuasion of guilt must amount to such a moral certainty as convinces the mind of the tribunal as reasonable men, beyond all reasonable doubt. It is the business of the prosecution to bring guilt home to the accused, to the satisfaction of the minds of the jury but the doubt, to the benefit of which the accused is entitled, must be such as rational, thinking sensible men may fairly and reasonably entertain, not the doubt of a vacillating mind, that has not the moral courage to decide, but shelters itself in a vain and idle scepticism. There must be doubts, which men may honestly and conscientiously entertain *Ali Lok v King Emperor*, 3 L B R 216-4 Cr L J 383. There is a strong and marked difference as to the effect of evidence in civil and criminal cases. In the former, a mere preponderance of probability, due regard being had to the burden of proof, is a sufficient basis of decision, but in the latter, especially when the offence charged amounts to treason or felony, a much higher degree of assurance is required. The serious condemnation both to the accused and eater evils which flow from it than from a laws of every wise and civilised nation to lay down the principle, though often lost sight of in practice, that the persuasion of guilt ought to amount to a moral certainty.

as convinces the mind of the tribunal as reasonable men, beyond all reasonable doubt" P

Cooper v Slade,

2 Law C C 241, R v Lee 11 L J 111

that it is better that ten guilty men

man should suffer" Per Holroyd J in

see also Hale P C Ch 39, *Wills' Cir Ev* 511. The lower the crime is, the less the proof required

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discovering truth, and are an integral part of our legal system, essential alike

for private and social security. Nevertheless language of most dangerous

tendency in regard to them has occasionally fallen from the learned judges,

which implies that they may be modified, according to the enormity of the

crime.

under any circumstances they may be relaxed according to notions of supposed

expediency, they cease to be in any correct and intelligible sense, rules for

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relative enormity or penal consequences. Thus the law which

3. "moral certainty" is here used in certainty properly so called, for the accused person can never be excluded of criminal evidence, that degree of assurance which induces a man of sound mind to act upon it without doubt upon the conclusion to which it leads. *Black's Law Dict.* It is also defined as a high degree of impression of the truth and fact falling short of an absolute certainty, but sufficient to justify a verdict of guilty even in a capital case. *Buriall Cr. 1 v. § 189*

In ordinary civil cases a Judge of fact must find for the party in whose favour there is preponderance of proof although evidence be not entirely free from doubt. In criminal cases no weight of preponderance of evidence is sufficient short of that which excludes all reasonable doubt. *Per Birch J. in Queen v. Madhub Giri 21 W. R. Cr. 13 at p. 20*. Convictions must be based on substantial and sufficient evidence not merely moral convictions. *Queen v. Sorob Faj 2 W. R. Cr. 28*. When prisoners confess in the most circumstantial manner to having committed a murder the finding of the body is not absolutely essential to conviction. *Queen v. Petta 4 W. R. Cr. 19*, see also *Queen v. Poorusoolah 7 W. R. Cr. 14*. A Judge was held to have exercised a proper discretion in not passing sentence of death in a case in which the dead body was not found. *Queen v. Baljuruddern 11 W. R. Cr. 20*. *Abbu Sal lar v. Empress 11 C. 64*.

The difference between the trial of a civil and a criminal case is that in the former it is the duty of the parties to place their case before the Court as they think best, whereas in the latter it is the duty of the Court to bring all relevant evidence on the record and to see that justice is done. *Emperor v. Jani 1 d. 1 283=60 Ind. Cas. 322*

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Protap v. Rex 11 C. L. R. 25. *Laljee v. Gudar 43 C. 838*. *Shumnugara v. Manikka 32 M. 400*. *Imdad v. Pateshri 32 A. 391*. The Pathans of the Peshwar district being always disposed to exaggerate and add two charges against the guilty and totally false one against the innocent Peshwar murder cases invariably introduced into the evidence an element of doubt of a very intangible character. But an acquittal cannot be based on this kind of doubt. Section 3 of the Evidence Act, lays down what degree of certainty is sufficient to hold that a fact is proved. *Abdul Karim v. Crown 39 P. R. 1873 Cr.*

In all criminal cases, it is necessary that there should be a charge and a conviction as a foundation for the sentence everything should be strictly

conjecture, the accused should not be called upon to make his defence. *Cr. C. 772=Cr. Reg. 36 of 1893*

Corpus delicti, proof of—in delicti is a collective name for the

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includes the facts that an injury has been inflicted and in circumstances showing that it was criminally inflicted, the enquiry who inflicted it begins only when the corpus delicti has been established. *Hills Cr. Ev. 324*, *Evans v. R. v. Ah ned* *oorusoolah*, *table from* *tree of this*

kind may present themselves in practice, so many cases have occurred of conviction S.

Cu Li p 325, *Abu Sikdar v Queen Empress*, 11 C 642, *R v Bepari Singh*, 7 W R Cr 34

In cases of homicide three propositions must be made out in order to establish the *corpus delicti* (1) That a death has taken place (2) That the deceased is identified with the person alleged to have been killed (3) That the death was due to unlawful violence or criminal negligence and it is not till these propositions have been proved that the question—not included in the inquiry as to *corpus delicti*—Is the accused or suspected person the culprit, arises *Wills' Cu Li* 333 "I will never convict any person" said *Sir Mathew Hale* "of murder or man slaughter, unless the fact were proved to be done, or at least the body found" 2 P C Ch 39, see also *R v Bepari*, 7 W R Cr 34 But the above rule may in certain cases lead to absurdity and injustice and a murderer can escape conviction by successfully preventing discovery of dead body So now it is clearly established that the fact of the death may be legally inferred from such circumstances of presumption as render it morally certain, and leave no ground for reasonable doubt *Wills' Cu Li* 335

The terms "evidence" and "proof" These terms are often used in such a manner as to include at one time the *media* by which the facts are established, and at other the effect or conclusions produced by the testimony It is true the attempt has frequently been made, but without great success to distinguish between the terms "evidence" and "proof" The latter term in its popular meaning more

full conviction

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character as to convince the intellect and conscience of men of a fact then that fact is proved Proof is that degree and quantity of evidence that produces conviction" *Neving v Commonwealth*, 93 Pa 322, 328 "Proof is that quantity of appropriate evidence which produces assurance and certainty Evidence, therefore, differs from proof as cause from effect" *Wills' Cu Li* 2, 3, *Greenl. Ev* § 1

4. Whenever it is provided by this Act that the Court may

May presume " presume a fact, it may either regard such fact as proved, unless and until it is disproved, or

may call for proof of it

Whenever it is directed by this Act that the Court shall

"Shall presume presume a fact, it shall regard such fact as proved, unless and until it is disproved

When one fact is declared by this Act to be conclusive proof

"Conclusive proof" of another, the Court shall, on proof of the one fact, regard the other as proved, and shall

not allow evidence to be given for the purpose of disproving it

Presumption, meaning of The word "presumption" in its legal significance, is used in English Law to describe either an inference or a rule of law Where the word is used synonymously with "inference" it deserves no special

are many and various As a matter of fact it sometimes designates a rule of substantive law, and sometimes a rule of procedure, or other branch of adjective law. *McKelvey's Evidence* p 79 So in English Law, following the Civil Law,

4. presumptions are divided into three kinds: (1) presumptions of fact (*presumptiones facti vel naturae*), (2) rebuttable presumptions of law (*presumptiones juris*), and (3) conclusive presumptions of law (*presumptiones juris et de jure*). There is another class recognized in English text-books, viz, mixed presumptions, or presumptions of mixed law and fact. *Nort Fz* 97. The effect of this section is to do away with the distinction known to the English Law between presumptions of fact and presumptions of law, all the presumptions are made to fall under one or other of the three classes mentioned in the present section. *Cut* 84

Origin of Rules In the rules it is likely, all had their beginnings in logical inference, however independent of it they may have become in their final shape. Now the basis of inference is experience. The Judge and the jury go into Court with the experience of ordinary human beings, and, in the process of drawing inferences constantly call upon such experience. Coupled with the facts introduced as evidence at the trial it forms the basis of the inferences necessary to arrive at a determination of the facts in issue. It happens that, in the almost innumerable cases that are tried certain facts or groups of fact have been repeatedly presented to Courts as foundations for inferences, and the inferences being reasonable ones, judged by the experience of the Court and jury have been repeatedly drawn until a rule has crystallized. It is not difficult to see why these rules developed so early and where so readily adopted by the Courts. Judges have always been suspicious of juries and have seized every opportunity to establish a rule for their guidance and to control their conclusions from the evidence introduced. The mind of the Judge was supposedly nothing if not logical, while the untrained minds of the jury were open to the influences of prejudice, sympathy, and a thousand other things. Logical inference was therefore made the basis of a vast number of such rules which the Judges established and which they called presumptions,—rules relating to the manner of proving cases, and in this sense having to do with the law of evidence; fixing for example, when sufficient evidence was introduced or when a party must introduce further evidence if he would win his case. *McKelvey's Ev* 80. As to the effect of a presumption. *Prof Thayer* 513. "They have the same effect (and no other) which they have in all the other reasons of legal reasonings. Their effect results necessarily from their characteristic quality,—the quality viz, which impute to certain facts or groups of fact a *prima facie* significance or operation. In the conduct then, of an argument or of evidence, they throw upon him against whom they operate the duty of meeting this imputation. Should nothing further be adduced they settle the question involved in them in a certain way. He therefore who would not have it settled so must show cause." *Thayer Cas Ev 2nd Ed* p 41

Presumption of facts Presumption of fact, according to English Jurists, consist of those inferences which have never hardened into rules of law and as to which therefore the Judge is not entitled to direct the jury that they are bound as a matter of law to draw them, in other words they are common probabilities of fact which the jury may draw or not, as in their judgment the circumstances of the case may appear to warrant. *Wills' Ev 2nd Ed* 43. So a presumption of fact, is nothing more than an argument more or less cogent, it is an inference of one fact drawn from other facts. It is for the jury to draw that inference or not as they think fit, they are not bound as a matter of law to draw it. It is the duty of the Judge, when there is no evidence from which a reasonable man would honestly draw the inference, to withdraw that question from the jury, but if there is any evidence upon the matter, he must leave it to be disturbed, but equally it will not be disturbed if they decline to draw it. *Pouell Ev* 396. So there are no special rules which govern the subject of logical inferences, and presumptions which are merely inferences relate to all classes of things and cases. *McKelvey's Ev* § 37. The cases which are so often cited as illustrating the proposition that there is a presumption against the party who suppresses or destroys evidence or fails to call a witness within his control are all cases where what is talked of is inference. *Carpenter v. Penn. Ry. Co.* 13 App Div 328=43 N. Y. Supp 203. The first clause says Mr Norton, appears to point at presumptions of fact, or natural presumptions, or as the civilian termed them, *hominis tantum*" *Nort. Ev* 96. Inferences or presumptions

are always necessarily drawn whenever the testimony is circumstantial, but presumptions, specially so-called, are based upon that wide experience of a connection existing between the *facta probantia* and the *factum probandum*, which warrants a presumption from the one to the other, whenever the two are brought into contiguity. Presumptions are drawn from the course of nature; for instance, that night will follow day, the seasons follow each other, death ensue from a mortal wound, and the like, or from the course of human affairs, from a family society, domestic illustrations and a

of law, but by spontaneous operation of the reasoning faculty, all that the law does for them is to recognize the propriety of — think fit. The Court may presume them, which the fact suggests at once, and call or may refuse to draw the inference and call facts by which the inference was suggested. Thus, in the case of a man found in possession of stolen goods shortly after the theft and unable to account for his possession, the Court may either presume the guilt of the accused and throw upon him the onus of proving his innocence; or it may refuse to presume his guilt and may throw upon the prosecution the burden of proving it. Besides these natural presumptions there are several instances of presumptions as to documents dealt with in sections 86—88, and 90, in which the Court is, in like manner, empowered to throw the burden of proof on which party it pleases, to presume a fact or to call for proof of it, as it thinks best. *Cun Ev* 85. "A presumption of any fact" says *Abbott C J* in *R v Durdett*, 4 B & Ad 161, "is properly an inferring of that fact from other facts that are known; it is an act of reasoning

Presumptions of law Presumptions of law are of two kinds. First, conclusive or imperative presumptions, that is, legal rules not to be overcome by any evidence that the fact is otherwise. Thus by the Statute of Limitation, a simple contract debt, not kept up in certain specified manners, is extinguished after a lapse of certain number of years, nor can it be recovered by proving that the sum due has plate the probable conclusive, nor m "It is an universal charged with doing injurious, the intention is an inference *Re v Dixon*, 3 M & S 15

estoppel against himself. An estoppel is when a man has done some act which affords a conclusive presumption against himself in respect of the matter at issue. Formerly in England all children born in lawful wedlock, if the husband was not impotent, or beyond the four seas during a period exceeding that of gestation, were legitimate, nor could evidence to the contrary be received in a court of law. *Co Litt* 241 C. The presumption of law was then imperative, whatever might have been the real facts of paternity, and however clearly they might be proved still the husband was considered as the father of his wife's children. Since that time, however the rule has been changed in England, and probable evidence of the child, is admissible. *Banbury Marchant*, 432. The presumption, therefore second or more comprehensive kind, of presumptions of law — Presumptions of L

- 4 effect of such presumptions is to shift the burthen of proof, and to throw the *onus probandi* on him who has to displace a presumption when once it has arisen. *Lord E.* 9 A well known instance of an irrebuttable presumption of law can be found in section 82 of the Indian Penal Code, where it is laid down that nothing is an offence which is done by a child under seven years of age.

Rebuttable presumption of law. The second or the more comprehensive kind of presumption of law is known by the term "rebuttable presumption of law" or the *Presumptiones juris tantum* of the civilians. This kind of presumption arises when presumptions of law are certain assumptions or legal rules defining the amount of evidence requisite to support a particular allegation which facts being proved may be either explained away or rebutted by evidence to the contrary, but are conclusive in the absence of such evidence. The distinction between the two kinds of legal presumptions is thus clearly stated by *Lord Mansfield* in *Darum v. Ijt* 175 b, note: "The enjoyment of lights with the defendant's acquiescence for twenty years is such decisive presumption of a right by grant or otherwise that unless contradicted or explained the jury ought to believe it, but it is impossible that length of time can be said to be an absolute bar, the statute of limitation, it is certainly a presumption but which ought to go to a jury." Legal presumptions of this latter kind (which may be termed disputable or rebuttable presumptions) are definitions of the quantity of evidence or the state of facts sufficient to make out a *prima facie* case, in other words of the circumstances under which the burden of proof lies on the opposite party. Of this very extensive class of presumptions a few examples will suffice. Thus a man is presumed innocent until he is proved guilty, that is if a man is charged with a crime, he is not bound to prove that he did not, but his accuser is bound to prove that he did commit it. So also if a child is born in wedlock one who questions his legitimacy must disprove it, if a child is born during a divorce it *menat et loco* one who maintains his legitimacy must prove it. Again the presumption of law is that a man is alive unless nothing has been heard of him for seven years, when the presumption is that he is dead, that is to say if it is averred that a man is dead the party must prove his assertion, but if nothing has been heard of him for seven years the opposite party must prove that he is alive. Waste lands which adjoin a road is presumed to belong to the owner of the adjoining enclosed land whose title is therefore valid, unless some one can show a paramount claim. The circumstances which will raise such a legal presumption or in other words, will impose on the other party the necessity of proving that the fact is not so, sometimes differ with regard to the same fact in different issues, that is, evidence which in one issue is sufficient to establish a certain fact in another is not sufficient. Thus in settlement cases proof of a long cohabitation of two persons who passed as man and wife is sufficient to raise a presumption of marriage, or to compel the other party to prove that there was no marriage. But in trials for bigamy and actions for criminal conversation proof of an actual marriage is requisite. *Presumptions of Law* 11 *Elements of Evidence*, 6 *Law Magazine* 348.

Mixed Presumptions. Mixed presumptions of law and fact are chiefly confined to the English law of real property. The Indian practitioner need not give them much study, nor is it necessary to pursue the subject further here. The Code provides only that a few of the ordinary presumptions recognised by law may or shall be drawn. *Lord E.* 1

May presume. This is a presumption of fact of the English jurists. Presumption of fact has a totally different meaning from presumption of law, and refers not to propositions, but to arguments—not to assuming but inferring. When evidence is offered which can only be brought to bear on the matter at issue by a process of reasoning the inference is termed a presumption of fact. In *Rex v. Burdett* 4 B. & A. 161 *Lord Tenterden* said: "A presumption of any fact is properly an inferring of that fact from other facts that are known, it is an act of reasoning, and much human knowledge on all subjects is derived from this source. A fact must not be inferred without premises to warrant the inference, but if no fact could thus be ascertained by inference in a Court of law very few offenders could be brought to punishment." The statement on which this inference is founded is termed presumptive evidence. Our experience of the world, for instance, leads us to infer that a man who is in possession of stolen goods shortly after the theft and can give no account of them is either

the thief or has received the goods knowing them to be stolen. Our knowledge of human nature leads us to infer that a man, who does answer a question, could not but answer it in a manner favourable to himself. Such inferences are formed, not by virtue of any law, but by the spontaneous operation of the reasoning faculty, all that the law does for them is to recognize the propriety

Besides these natural presumptions there are several instances of presumptions as to documents dealt with in sections 86, 88, and 90, in which the Court is in like manner, empowered to throw the burden of proof on which party it pleases to presume a fact. *in Fv 85, see*
also Shafiqunnissa O C 290=6
 Bom L R 750 A be discretion to
 presume it as prov as the circum
 stances require. *Raghu Nath v Roti Lal* 1 A L J 121 (123). The presumption mentioned in this clause is not a hard and fast presumption incapable of rebuttal, a *presumptio juris et de jure*. *Emperor v Sinwas* 7 Bom L R 969 (974)=8
 Cr L J 82. The be construed
 in more rigorous of *Muhammad,*
 110 P L R 1902, 290; (P C)
Ramien v Verappa 11 M L 1 69

Shall presume In cases in which a Court shall presume a fact the presumption is not conclusive, but rebuttable. A W N (1906) 316 (317). Of course there is no option until evidence is given to must produce such evidence follows: (1) Where from in a high degree probable as for instance, the genuineness of a document purporting to be the Gazette of India or of a duly signed record of evidence, or else (2) when it is as for instance that a document, called for and not produced was duly stamped, attested, and executed (section 89), or that circumstances bringing an offence within the exceptions to the Indian Penal Code do not exist. Section 100 sections 79-85 make mention of such presumptions. *Cun Fv 85*. The definition of the word shall presume given in the section cannot be less legislation to that effect. *Per Knox* 33 A 799 (803) F B. In the Indian indicate that the presumption mentioned see also *Haris Ali v Parsotam Narain,*

30 years old and purports to come from proper custody. *Shafiqunnissa v Shaban Ali* 7 O C 290, see *Ramien v Verappa* 11 M L 1 69 (1912), 1 M W N 117. The words shall presume in section 201 of Agra Tenancy Act have no higher force than similar words contained in the Evidence Act. *Dikhar v Uday Ram*, 29 A 148.

Conclusive proof The third clause of those cases in which one fact is conclusive proof of another. An artificial probative effect is given by the law to certain facts, and no evidence is allowed to be produced with a view to the combating of that effect. These cases generally occur where it is against the policy of Government open to dispute matters stated in a decision of British place (section 113). So also formerly, all children born to a husband was not impotent, or beyond the four years during a period exceeding

4 that of gestation were legitimate nor could evidence to the contrary be received in a Court of law. *Co Litt* 211 A see also section 112 of the Evidence Act. But that presumption strictly speaking is no longer considered as conclusive presumption in England. *11 Ir Rep 1* and *Lord Redesdale in the Danbury Peerage* (a Gariner Peerage by *The Merchant* 432, 'the law to be that the birth of a child during a black run is a presumption (of law) that such child is legitimate, that this presumption may be rebutted both by direct and presumptive evidence, that unless the first birth may be classed impotency and non access that is impossibility of issue, and under the second all those circumstances which can have the effect of raising a presumption that the child is not the issue of the husband. *Var v. Var* (a) in *lucy* proof *111 Manick Chand v. Corporation of Calcutta* (11) (1) (1) 49 (49). The definition of "conclusive proof" given in this section though referred only to the Evidence Act yet it may properly be applied to the expression "conclusive proof" in the Oaths Act (X of 1873) *111 Ir Rep 1* and *111 Bom L R 19 (22)*.

Presumptions as rules of law. Process of Development. Rules of law of this sort were undoubtedly by themselves. They were not always rules. The first stage was that of a mere inference permissum illi to Judge or jury, the second was a mere disposition on the part of the Judge to advise the jury as to the desirability of a certain inference, the third an instruction that such an inference ought to be drawn, and the fourth a rule that the inference was a necessary one, which the jury were bound to draw. Take the case of the seven years absence rule. It is that a person is not heard from for a space of seven years by those who would be likely to hear from him if alive is a fact from which the inference may reasonably be drawn that he is dead. An absence of six years under the same circumstances would not be just as strong but an absence of eight years would be stronger. The space of seven years however, became fixed in the law as the last period from which death might be inferred. Having once fixed the period from which the inference was permissible the Judges were not long in instructing the jury that the inference ought to be drawn, and finally he drawn. Such a rule has got nothing to do with the logical inference. It is a matter not whether such inference exists. The rule has become one of equivalent to that even years absence under the circumstances mentioned is since evidence may be introduced to show that the inference which the rule requires is not in accordance with the facts. It fixes the point at which a *prima facie* case is established and hence directly affects the burden of proceeding. *McKelvey v. Fr* 43. The conclusive presumption was the result of further development of the same rule of evidence. In the process of development, Judges in some cases went on step further and said that fact No 1 should be equivalent to fact No 2 at all events and no evidence would be permitted to show that is was not. *Ibid* p 84.

Relation of Presumption to the Law of Evidence. What is the relation of presumptions to what we call the law of evidence. They are ordinarily regarded as belonging peculiarly to that part of law. This appears to be an error, they belong rather to a much larger topic already briefly considered, that of legal reasoning, in its application to particular subjects. Presumptions are aids to reasoning and argumentation which assume the truth of certain matters for the purpose of some given inquiry. They may be grounded on the general experience, or probability of any kind or merely on policy and convenience. On whatever basis they rest they operate in advance of argument or evidence, or irrespective of it, by taking something for granted by assuming its existence. When the term is legitimately applied it designates a rule or a proposition which still leaves open to further enquiry the matter thus assumed. The exact scope and operation of these *prima facie* assumptions are to cast upon the party against whom they operate, the duty of going forward, in argument or evidence on the particular point to which they relate. They are thus closely related to the subject of judicial notice, for they furnish the basis of many of those spontaneous recognitions of particular facts or conditions which make up that doctrine. Presumptions are not in themselves either argument or evidence although for the time being they accomplish the result of both. Presumption assumption, taking for granted are simply so many names for an act or process

which will shorten inquiry and argument. These terms relate to the whole field of argument whenever and by whomsoever conducted and also to the whole field of the law in so far as it has been shaped or is being shaped by the process of reasoning. real
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 Judge and attaching to one evidentiary fact certain procedural consequences as to the duty of production of other evidence by the opponent. It is based in policy, upon the probative strength as a matter of reasoning and inference, of the evidentiary fact but the presumption is not the fact itself, nor the inference itself but the legal consequence attached to it. But, the legal consequence being removed the inference as a matter of reasoning may still remain and a 'presumption of fact' in the loose sense is merely an improper term for the rational potency, or probative value of the evidentiary fact regarded as not having this necessary legal consequence. They have no significance so far as affects the duty of one or the other party to produce evidence because there is no rule of law attached to them and the jury may give to them whatever force or evidence. So long as the law may of a duty upon the opponent there is no propriety in to such facts however great their probative

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seven years unheard from. It is not weighed down with any artificial additional probative effect they may estimate it for just such intrinsic effect as it seems to have under all the circumstances. In strictness there cannot be such a thing as a conclusive presumption. Wherever from one fact another is conclusively presumed in the sense that the opponent is absolutely precluded from showing by a evidence that the second fact does not exist the rule really provides that where the first fact is shown to exist the second fact's existence is wholly immaterial for the purpose of the proponent's case and to provide this is to

CHAPTER II. OF THE RELEVANCY OF FACTS.

Relevancy of Facts—meaning of—The words “relevancy of facts” have been used in two distinct senses in this Act. In the title of Part I the word relevancy is used in the sense of admissibility. In the heading of Chapter II of this part relevancy means that having some probative force. *Stokes* 819. When a fact is offered as evidence the very offering of it is an implication that it has some bearing on the proposition at issue—that it tends naturally to produce a conviction about that proposition. The situation is thus in its elements the same as when the persons engaged are not occupied in a legal controversy. One might suppose that the question would be essentially one of the ordinary law of reasoning whether it were to be decided as here, by a Judge or a jury, or by the audience of a lecturer, or by a policeman notified of an alleged misdemeanour in his district, or by a class in rhetoric. But the application of the laws of reasoning is here attended with peculiar consideration not existing for any investigation but a judicial one. *11 Jur 6* § 7. Stephen defines the word “relevant” as meaning that any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present or future existence or non-existence of the other. *Steph Dig Ev* 1st 1. He also repeats the same thing in substance in his Introduction to the Evidence Act where he states: “The rule therefore that acts may be regarded as relevant which can be shown to stand either in the relation of cause or in the relation of effect to the fact to which they are used to be relevant may be accepted as true subject to the caution that when inference is to be founded upon the existence of such a connection every step by which the connection is made out must either be proved or be so probable under the circumstances of the case that it may be presumed without proof. Though this mode of describing relevancy might be correct it would not be readily understood. It is for this reason that relevancy was very fully defined in the Evidence Act (ss 611 both inclusive). These sections enumerate specifically the different instances of the connection between cause and effect which occur most frequently in judicial proceedings.” *Introduction* pp 70-72. This is a definition of logical relevancy. Logical relevancy plays a certain part in the law of evidence in that no evidence is admissible unless it is logically relevant. It does not follow that all evidence which is logically relevant is admissible and in fact much that is logically relevant is excluded. Certain rules are laid down founded on various considerations by which many matters which are logically relevant are declared inadmissible. *McKelvey’s Ev* 166. So also in the Indian Evidence Act the word “relevant” means admissible. *Lala Lakmi v Nayad Haider* 3 C W N 404viii. This distinction is made between logical and legal relevancy, because logical reasoning and legal reasoning are not the same.

The modern system of Evidence as *Prof Wigmore* “rests upon two axioms. These underlie its whole structure. Implicitly but nevertheless actually and positively, recognised in the practice of the Courts and in the utterances of the Judges they were first distinctly formulated by the great master and expounder of the history of our law of Evidence. The first is this. None but facts having rational probative value are admissible. This principle is indeed axiomatic for any system of Evidence purporting to be rational. It assumes no particular doctrine as to the kind of ratiocination implied—whether practical or scientific, coarse and ready or refined and systematic. It prescribes merely that whatever is presented as evidence shall be presented on the hypothesis, that it is calculated according to the prevailing standards of reasoning to effect rational persuasion. The second axiom on which our law of Evidence rests is this. All facts having rational probative value are admissible, unless some specific rule forbids. *Wigmore* §§ 9-10.

There is another precept says *Professor James Bradley Thayer* “which it is convenient to lay down as a preliminary one in stating the law of evidence viz, that unless excluded by some rule or principle of law, all that is logically probative is admissible. This general admissibility of what is logically probative is not, like the former precept, a necessary presupposition in a rational system

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of these rules may be extensive in scope—the hearsay rule, for example; or their applicability may in a particular case be so plain, on the face of the offer of evidence that the objector has no burden of proving that this rule of exclusion is applicable. Nevertheless, when the rules of Evidence are taken in view as a

mining everything that will contribute to bring the mind to the determination required. If we refuse to hear what will in any degree produce this effect, we must determine on imperfect evidence; and in proportion to the importance of the matter thus refused to be heard, must evidently be the chance of making an incorrect, rather than a just determination. But as in morals, we are forbidden to do evil in legislation, we should refrain from doing evil by the admission of every species of evidence may be more than counterbalanced in some instances by the evil attending it, sometimes, in the shape of inconvenience and expense inseparable from its procurement, sometimes, from the danger of error arising from the deceptive nature of the evidence itself. The great art is to weigh these difficulties, and in those cases where they are most likely to preponderate, but in no others to exclude the evidence." So "the law (of evidence) with a few exceptions on the ground of public policy now is that all which can be admitted,—not of course matters of mere moral or sensible objection, but all which are not repugnant to the law as such." *Per Coleridge C J in Blake v. Callender* a single condition on which alone the admission of evidence depends, and which, in general is that the fact to be proved should be one in

the *res gestae* or relevant in some degree, to the existence of a *res gestae* fact

Modern Law of Evidence § 1711

Relevancy—Stephen's Theory—Criticism "Sir James Fitz James Stephen, justly to be regarded as the protagonist of the modern law of evidence, bases the system on a particular theory of relevancy. To him, relevancy furnishes a complete and universal formulæ for the determination of all questions as to the admissibility of evidence. Wherever a fact is relevant to the issue it is, or should be admissible. If a fact tendered be not relevant it is, or should be, inadmissible. He goes still further. Evidence logically probative which Courts reject is said to be 'declared' irrelevant. Facts of no logical probative force which Courts never previous good character can hardly be said reputation does not have committed a crime he did so. Still it is worth. In other words, the fact that a man has a good character is treated by the law as a matter which either has or may have something to do with the

4 question of guilt or innocence. In other words, it is deemed to be relevant, though it may not actually be relevant. On the other hand, a dying confession of murder made by a third person is deemed to be irrelevant though it is actually relevant. Such a confession can hardly be false except under extraordinary circumstances. It can hardly be caused by anything except a consciousness of guilt and it is impossible to doubt that any one who was guided by common sense alone would wish to know the fact that it had been made when he had to determine upon the guilt of another. Rightly or wrongly, however, evidence of such a confession is by our law excluded. The fact that it was so kept from the Judge and jury, it is thus treated as being, or is deemed to be irrelevant. *Steph Dig Ev Preface to Art I p 21*. These simple instances, though limiting the fact not probatively relevant and the other excluding a fact which is clearly so, illustrate certain difficulties involved in applying Stephen's theory of probative relevancy as a sole test and a warranty of admissibility. The former fact, that of good character is deliberately rather than probatively relevant. The dying declaration, though highly probative is an unsworn statement by one who is not a party. As such it is excluded by a highly characteristic rule of procedure or substantive law and is the rule again in this. So one may seem warranted in doubting as to whether logical relevancy is capable of satisfactorily sustaining so heavy a burden as is here imposed upon it. More than this, the conviction is forced upon the mind that the law of evidence has by no means reached the state of its evolution at which the rational element can truly be said so far to dominate the procedural and the truth of such a theory as that of Stephen would denote. *Chamberlaine, Mode of Law of Evidence § 1717*. In thus neglecting to give what seems to be a satisfactory weight to the influence of substantive law, is a serious difficulty which seems to warrant some consideration. The only mode of reasoning which is recognized by him is apparently that of inference, proving the unknown from the known. *Ibid § 1717*.

Stephen's Definition considered. The definition of relevancy is an excellent statement of that relation between facts which has hereinbefore been spoken of as probative seems unquestionable. Equally obvious is it that the definition of relevancy in general is insufficient. It takes no account of those important relations of facts to the proper conduct of judicial processes of reasoning which have been denominated constituent or deliberative relevancy. In other words, in connection with the processes of proving the *res gestae* Stephen's definition of relevancy seems fairly adequate. It may hereafter develop that other features of inference than those outlined by him are permissible and beneficial. But for practical objects the definition suffices. For all purposes, it is a splendid advance upon the formularies of the law of evidence as Stephen found them. When however the *res gestae* and constituent facts are established and judicial reasoning takes its next step that from the constituent facts to an assertion as to the existence of a right or liability, Stephen's definition at once ceases to apply. For example let it be assumed that an alleged *res gestae* fact which Stephen calls, at times a fact in issue, be offered and objectionably be that it is irrelevant to any proposition in issue. The previously satisfactory test of relevancy at once breaks down. What relevancy, if any, exists between the fact offered and a particular legal proposition in issue is not a question which can be answered by applying the definition of relevancy in either of the forms given us by Stephen. The reason for this is plain. No relation of logic or human experience "the common course of events" exists between a right or liability and a *res gestae* fact which is said to assist in constituting it. An entirely different element has entered into the situation. The relation between the fact and the proposition is one

*Obvious differences exist between the relevant relation of a *factum probans* in any degree of remoteness in point of causation or other relation to the existence of a *res gestae* fact, on the one hand, and the constituent relevancy between a *res gestae* or constituent fact and the right or liability to which it separately or in conjunction with others give rise. Probative relevancy deals with existences physical or psychological. Constituent relevancy is concerned with the application of intellectual proposition to these existences. To put the same idea in slightly different words, constituent relevancy deals with the construction of an intellectual proposition, rule of law or the like in the terms of fact.

of law. It follows that the experience of the community, this common course of events, has no direct operation in such a connection. The relevancy involved in the question is in the question of order. The *res gestae* in Scots law, that is prescribed by statute has not come into force.

Facts in issue—Stephen's definition considered. The same confusion between the relevancy of facts in proving the *res gestae* and the relevancy of the *res gestae* themselves to the proposition in issue appears in a statement very fundamental in Stephen's treatment of the subject of evidence. As defined in the Act, the phrase "facts in issue" would seem to indicate the constituent facts of an inquiry, the *res gestae* or more nearly ultimate facts inferred from the latter by the tribunal. Assuming this to be the case, it is suggested by Stephen in this connection that an "inference" may be drawn from proof of relevant, or, as we have preferred to call them, probative facts to the existence of the *res gestae* or constituent ones. It is at the same time stated by him that a "legal inference" (*vide p. 43 supra*) may be drawn from the *res gestae* or constituent facts, what Stephen desires to call "facts in issue" to a right or liability. How are these phrases "inference" and "legal inference" to be distinguished? If the law would be. If

Evidence § 1718 (2)

law is at all times writing upon or sub-servient to the substantive. Adjective law may prescribe what steps may be taken, it is for the substantive to decide in what direction these steps shall tend. In other words, the ultimate objective towards which logical proof must go is which logic has no concern. However

above that all relevant facts are admissible and no others are to be received is undoubtedly true, correctly understood "Relevant" as used in the rule just

* To the relation between a particular fact and one in the *res gestae* which enables the former, as a matter of human experience, to sustain or advance in some degree a contention that the *res gestae* fact exists, has existed or will exist, the test is whether the fact is so connected with the *res gestae* that it may be considered as part of the same. The

right or liability ~~issues~~ may fairly be designated legal or constituent. Until it is clearly understood in which sense the term "relevant" is being used on any particular occasion, it may fairly be said that the danger of ambiguity is fairly obvious.

4 question of guilt or innocence. In other words, it is deemed to be relevant though it may not actually be relevant. On the other hand a dying confession of murder made by a third person is deemed to be irrelevant though it is actually relevant. Such a confession can hardly be false except under extraordinary circumstances. It can hardly be caused by anything except a consciousness of guilt and it is impossible to doubt that an one who was tried by common sense alone would wish to know the fact that it had been made when he had to determine upon the guilt of another. Rightly or wrongly, however, evidence of such a confession is by our law excluded. The fact that it was made is kept from the Judge and jury. It is thus treated as being or is deemed to be irrelevant. *Steph Long's Preface to 3rd Ed p 21*. These simple instances show that in admitting the fact not probative relevant and the other excluding a fact which is clearly so, illustrate certainly the difficulties involved in applying *Stephen's* theory of probative relevancy as a sole test and a warranty of truthfulness. The former fact, that of good character is deliberatively rather than probatively relevant. The dying declaration though highly probative is an informal statement by one who is not a party. As such it is excluded by a highly characteristic rule of procedure or substantive law. It is the rule against hearsay. So it may seem warranted in doubting as to whether logical relevancy is capable of satisfactorily sustaining so heavy a burden as is here imposed upon it. More than this, the conviction is forced upon the mind that the law of evidence has by no means reached the stage of its evolution at which the rational element can fairly be said so far to dominate the procedural as the truth of such a theory as that of *Stephen* would demand. *Chamberlayne's Modern Law of Evidence* § 1716. "In thus neglecting to give what seems to be a satisfactory weight to the influence of substantive law, the form of rules of procedure upon the law of evidence *Stephen* has created a serious difficulty which seems to warrant some consideration. The only method of reasoning which is recognized by him is apparently that of inference, proceeding from the unknown from the known. *Ibid* § 1717.

Stephen's Definition considered. The definition of relevancy as an excellent statement of that relation between facts which has heretofore been spoken of as probative seems unquestionable. Equally obvious is it that as a definition of relevancy in general it is insufficient. It takes no account of the important relations of facts to the proper conduct of judicial processes of reasoning which have been denominated constituent or deliberative relevancy. In other words, in connection with the processes of proving the *res gestae* *Stephen's* definition of relevancy seems fairly adequate. It may hereafter develop that other features of inference than those outlined by him are permissible and beneficial. But for practical objects the definition suffices. For all purposes, it is a splendid advance upon the formulæ of the law of evidence as *Stephen* found them. When, however, the *res gestae* and constituent facts are established and judicial reasoning takes its next step, that from the constituent facts to an assertion as to the existence of a right or liability *Stephen's* definition at once ceases to apply. For example let it be assumed that an alleged *res gestae* fact what *Stephen* calls, at times a fact in issue be offered, and objectionably be that it is irrelevant to any proposition in issue. The previously satisfactory test of relevancy at once breaks down. What relevancy, if any, exists between the fact offered and a particular legal proposition in issue is not a question which can be answered by applying the definition of relevancy in either of the forms given us by *Stephen*. The reason for this is plain. No relation of logic or human experience 'the common course of events' exists between a right or liability and a *res gestae* fact which is said to assist in constituting it. An entirely different element has entered into the situation. The relation between the fact and the proposition is one

*Obvious differences exist between the relevant relation of a *factum probans* in any degree of remoteness in point of causation or other relation to the existence of a *res gestae* fact, on the one hand, and the constituent relevancy between a *res gestae* or constituent fact and the right or liability to which it, separately or in conjunction with others give rise. Probative relevancy deals with existences physical or psychological. Constituent relevancy is concerned with the application of intellectual proposition to these existences. To put the same idea in slightly different words, constituent relevancy deals with the construction of an intellectual proposition, rule of law or the like in the terms of fact.

the work of the law of evidence should be determined by the necessity that the positive or substantive law should be eliminated from within its domain. In the proposition that the definition of the law of evidence fulfils its duty clearly and in complete accordance with the then accepted definition of "relevance" meet this test.

In the course of time it will be observed that the substantive law controlled the adjective in respect to the law of evidence. (1) Positive law may be taken as the law of evidence controlling and regulating its content as established by it as part of the time and of government. It may be present inasmuch that certain classes of proof may or may not be received that fact shall pass only by registered law. The evidence law must be evidenced by the law which the law (2) Substantive law may constitute an important element in the definition. Procedural rules may be established by positive law. Substantive law may be used by the law of evidence under a more general law and so forth. Finally (3) most of the time among the functions of positive law is that which runs through the law of evidence by presenting the evidence to which the law of evidence is applied. The most serious criticism of Stephen's definition and definition of "relevance" will be that in the ruling to diminish the law of evidence and to control the law of evidence and to control the law of evidence of the law of evidence will remain about it though and though and though in the positive law.

Every procedure of the law is in order to be a more or less a double test of a fact. The law requires that it should be in the law of evidence logically or positively relevant in some degree of remoteness to the law of evidence if a fact in the law of evidence should it have any evidence to be relevant to such a fact nothing remains but to say it is not relevant to the fact.

constitutively relevant to the fact or law as stated in the law. To reject a proof, however, of the existence of a fact which could not itself, for any reason, be used as relevant to the proposition in issue would merely be a waste of time. To reject, for this reason, the initial fact when offered is simply justified. What is not warranted is the inclusion of such a ruling within the field of evidence. Evidence has no concern whatever with it. When the law tendered was found to be positively relevant to the law of evidence was justified. That judicial administration will not receive it is due to reasons of public policy embodied in the substantive law of the right or liability itself. Undoubtedly the rule, characteristic of the branch of a positive law that only such facts will be admitted as the substantive law can use, may be part of the law of evidence. Clearly, however, evidence is entitled to be relieved of any responsibility for what the substantive law may see fit to admit in particular instances. All this is matter of positive law and apparently no substantial interest is to be advanced by the confusion which arises from treating it as part of the adjective. As has been said the most serious criticism of Stephen's definition is that by embracing rules of law and propositions of experience within the meaning of a single term his own admirable effort at segregating the field of evidence may not have been completely successful.

In the attempt to use the terms probative relevancy and constituent relevancy in connection with the law of evidence, it becomes at once plain that only with the former—probative relevancy—has this branch of the adjective law any concern whatever. Whether a particular fact is or is not a constituent

particular proceeding. Constituent relevancy is a matter entirely of substantive law, properly presenting a question for the judge. Proof is up to the jury for the judicial function of the jury; it is a matter dominated by the law of men and the logical deductions which reason draws from it. The establishment of the *res gestae* or constituent facts, a matter of nearly ultimate facts as the jury may infer from the evidence, is the province of the jury, and the legitimate scope of the law of evidence. Anything further is a question of law to be decided by the judge.

branch of the mixed tribunal may, under the law of the forum have the function of law to the *res gestae*, i.e. construing the facts *Chamberlayne's Modern Law of*

Distinction between Relevancy and Admissibility Strictly speaking admissibility is a quality standing between relevancy, or probative value, on

not signify that the particular fact has demonstrated or proved the proposition to be proved but merely that it is received by the tribunal for the purpose of being weighed with other evidence. *Hignore* § 12 But in the Indian Evidence Act the word relevancy is sometimes used in the sense of logical relevancy and sometimes in the sense of admissibility. (*Vide Stephen's Introduction* 65 *Whitely Stokes Vol. 1* p. 849, *Lal Jakhni v. Sayed Harder* 3 C. W. N. colxviii) From section 5—50 of the Indian Evidence Act the word 'relevancy' is used in the sense of admissibility.

Rules of Relevancy and

The study of the principles of falls into two distinct parts:—

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(particularly the jury) against erroneous persuasion. Hitherto the latter has loomed largest in our formal studies—has in fact monopolized them while the former virtually ignored has been left to the chances of later acquisition casual and empiric in the course of practice.

Here we have been wrong and in two ways.

For one thing there is and there must be a probative science—the principles of proof—independent of the artificial rules of procedure hence it can be and should be studied. This science to be sure may as yet be imperfectly formulated.

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tribunals mind to a correct conclusion by safe materials. This main process is that for which the jury are there and on which the counsel's duty is focused. *Principles of Judicial Proof* § 1

5 Evidence may be given in any suit or proceeding of

Evidence may be given of facts in issue and relevant fact the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant and of no others.

Explanation—This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to Civil Procedure.

Illustrations

(a) A is tried for the murder of B by beating him with a club with the intention of causing his death.

(b) A suitor does not bring with him and have in readiness for production at the first hearing of the case, a bond on which he relies. This section does not

enable him to produce the bond or prove its contents at a subsequent stage of the proceedings otherwise than in accordance with the conditions prescribed by the Code of Civil Procedure

Principle "Of all rules of evidence the most universal and the most obvious is this,—that evidence adduced should be alike directed and confined to matters which are in dispute or which form the subject of investigation. The theoretical propriety of this rule never can be a matter of doubt, whatever difficulties may arise in its application. The tribunal is created to determine matters which either are in dispute between contending parties or otherwise require proof, and anything which is neither directly or indirectly relevant to

Scope of the Section Evidence may be given of two sets of facts (1) of facts in issue (2) of facts relevant to the issue. Evidence of (1) is generally governed by the law answered. There are some provisions of Civil Procedure Code is not admitted in evidence even if it be relevant. This restriction is put by the explanation at the end of the section.

Evidence may be given Evidence may be given of any fact which is relevant under the Act. But there are certain limitations to this rule. This section should be read subject to Parts II and III of this Act and subject to the hearsay, character and opinion rules of evidence. *Vide Step Dig Et Intro p 12*. This section does not also make evidence admissible which is not admissible under some special Criminal Procedure Code etc. is that the claimed conclusion probable hypothesis with re

Wigmore § 38 "It is sufficient if the circumstantial evidence be such as may afford a fair and reasonable presumption of the facts to be tried, and if the evidence has that tendency it ought to be received and left to the consideration of the jury to whom alone it belongs to determine upon the precise force and effect of the circumstances proved and whether they are sufficiently satisfactory and convincing to warrant them in finding the fact in issue." *Gibson v Hunter* 2 H Bl 998

Facts in issue The facts in issue are those which are alleged by one party and denied by the other on the pleadings, and denied by the plea of "not guilty" either case are facts in a question necessarily

to the determination of the suit. Facts must be either relevant or irrelevant and there is no separate third class of facts in issue. *Raghubhusana v Vidatardhi*, 34 Ind Cas 875. Evidence can be given of a fact in issue or a fact which by that Act is declared to be relevant. *Hanash v Parash*, 9 C W N 402 (406)

Facts declared to be relevant The relevant facts are all those facts which are facts in issue that weight upon them connection a word of course both words restricted Common relevancy. A Judge might, in ordinary transactions, take one fact as evidence of another, and act

5. branch of the mixed tribunal may, under the law of the forum, have the function of applying the appropriate rule of law to the *res gestæ*, i.e. construing the rule of law in terms of these particular facts *Chamberlayne's Modern Law of Evidence* §§ 1718 (b) 1718 (i)

Distinction between Relevancy and Admissibility Strictly speaking admissibility is a quality standing between relevancy, or probative value on the one hand, and proof or weight of evidence on the other hand. Admissibility signifies that the particular fact is logically relevant and something more,—that it is also satisfied all the auxiliary, i.e. legal and extrinsic policies. Yet it does not signify that the particular fact has demonstrated or proved the proposition to be proved but merely that it is received by the tribunal for the purpose of being weighed with other evidence. *Wigmore* § 12. But in the Indian Evidence Act the word relevancy is sometimes used in the sense of logical relevancy and sometimes in the sense of admissibility. (*Vide Stephen's Introduction* p 65 *Whitely Stotes* Vol. 11 p 849, *Lalji Lakshmi v. Sayaj Harier*, 3 C. W. N. ccxviii.) From section 5—55 of the Indian Evidence Act the word 'relevancy' is used in the sense of admissibility.

Rules of Relevancy and Admissibility—Undue importance given to it "The study of the principles of evidence" says *Prof. Wigmore* "for a lawyer, falls into two distinct parts. One is Proof in the general sense,—the part concerned with the ratiocinative process of contentious persuasion—mind to mind counsel to Judge or juror each partisan seeking to move the mind of the tribunal. The other part is Admissibility,—the procedural rules devised by the law, and based on litigious experience and tradition to guard the tribunal (particularly the jury) against erroneous persuasion. Hitherto, the latter has loomed largest in our formal studies,—has in fact monopolized them, while the former, virtually ignored, has been left to the chances of later acquisition casual and haphazard in the course of practice."

Here we have been wrong and in two ways.

For one thing, there is and there must be, a probative science—the principles of proof—independent of the artificial rules of procedure, hence, it can be and should be studied. This science, to be sure, may as yet be imperfectly formulated. But all the more need is there to begin in earnest to investigate and develop it. Further more this process of Proof represents the objective in every judicial investigation. The procedural rules for Admissibility are merely a preliminary aid to the main activity, i.e. the persuasion of the tribunal's mind to a correct conclusion by safe materials. This main process is that for which the jury are there and on which the counsel's duty is focused. *Principles of Judicial Proof* § 1.

5 Evidence may be given in any suit or proceeding of

L evidence may be given of facts in issue and of such other facts as are and relevant facts hereinafter declared to be relevant, and of no others

Explanation—This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to Civil Procedure

Illustrations

(a) A is tried for the murder of B by beating him with a club with the intention of causing his death

At A's trial the following facts are in issue —

A's beating B with the club

A's causing B's death by such beating,

A's intention to cause B's death

(b) A suitor does not bring with him, and have in readiness for production at the first hearing of the case, a bond on which he relies. This section does not

enable him to produce the bond or prove its contents at a subsequent stage of the proceedings otherwise than in accordance with the conditions prescribed by the Code of Civil Procedure

Principle 'Of all rules of evidence the most universal and the most obvious is this,—that evidence adduced should be alike directed and confined to matters which are in dispute, or which form the subject of investigation. The theoretical propriety of this rule never can be a matter of doubt, whatever difficulties may arise in its application. The tribunal is created to determine matters which either are in dispute between contending parties or otherwise require proof, and anything which is neither directly or indirectly relevant to those

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Scope of the Section Evidence may be given of two sets of facts (1) of facts in issue, (2) of facts relevant to the issue. Evidence of (1) is generally known as direct evidence, that of (2) as circumstantial evidence. *Cochle Cas 26* What are facts in issue are ascertained by the substantive law and the law of procedure. What facts are relevant or admissible in evidence is answered by the law of evidence. This chapter contains the law of relevancy. There is still a further restriction. Evidence the production of which is barred by some provisions of Civil Procedure Code is not admitted in evidence even if it be relevant. This restriction is put by the explanation at the end of the section.

Evidence may be given Evidence may be given of any fact which is relevant under the Act. But there are certain limitations to this rule. This section should be read subject to Parts II and III of this Act and subject to the hearsay, character and opinion rules of evidence. *Vide Step Dig Ev Intro p 12* This section does not also make evidence admissible which is not

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tion of the jury to whom alone it belongs to determine upon the precise force and effect of the circumstances proved and whether they are sufficiently satisfactory and convincing to warrant them in finding the fact in issue. *Gibson v Hunter, 2 H Bl 998*

Facts in issue The facts in issue are those which are alleged by one party and denied by the other on the pleadings, in a civil case or alleged in the indictment and denied by the plea of "not guilty" in a criminal case so far as they are in either case.

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Facts declared to be relevant The relevant facts are all the facts which are facts in issue that bear light upon them in connection with the facts in issue. Common sense, or logical relevancy is, as a rule, wider than legal relevancy. A judge might, in ordinary transactions take one fact as evidence of another, and act

upon it himself, when in Court he may exclude facts, although really material to the issue.

of Evidence is that all facts which are relevant to the issue may be proved
Wright v Tatham 7 A & F 313 351 The Courts, so far as they can are
 disposed to receive in evidence whatever can throw any light on the matter in issue
 Per Pillcock C B in *Milne v Lester*, 7 H

Per Pollack C B in Milne & Lester, 11
nature of relevancy under the English law of
Insurance Co, L R 4 C P D at p 94 and

that all which can throw light on the disputed transaction is admitted—not of course matters of mere prejudice nor any thing open to real moral or sensible objection but all things which fairly throw light on the case. Sir James Stephen in the Introduction to his Digest of Evidence said: 'The great bulk of the law of Evidence consists of negative rules declaring what, as the expression runs is not evidence. The doctrine that all facts in issue and relevant to the issue and no others may be proved is the unexpressed principle which forms the centre of and gives unity to all these express negative rules.'

But the framers of the Indian Evidence Act have departed from the above mode of treatment of the law of relevancy. Facts which are relevant are fully defined in ss 6—11 of the Indian Evidence Act. These sections enumerate specifically the different instances of the connection between cause and effect which occur most frequently in judicial proceedings. They are designedly ^{not} for overlap each other. Thus a motive

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as the inquiry proceeded that such an extensive meaning was not in the mind of the Legislature seems to be shown by several indications in the Act itself.

ing and examining evidence that is to say, hearing and examining everything that will contribute to bring the mind to the determination required. If we refuse to hear what will in any degree produce this effect we must determine on imperfect evidence, and in proportion to the importance of the matter thus refused to be heard, must evidently be the chance of making an incorrect rather

The great art is to weigh these difficulties, and in these cases where they are most likely to preponderate, but in no others, to exclude the evidence. "So generally speaking, whatever has a tendency to prove a material part of the issue is admissible." *People v Arnold*, 15 Cal 481. "People were formerly frightened out of about the

In *Johnson v State*, 14 Cal 61 and in *Haynes v State*, 14 Cal 404, *Lumpkin* 1st 173 and 184. In *People v State*, 14 Cal 404, *Lumpkin* 1st 173 and 184. In *People v State*, 14 Cal 404, *Lumpkin* 1st 173 and 184.

shut out any fact from the jury, however remotely relevant or from whatever source. This is its purpose. They are called upon to pass."

And of no others. This is not covered by *The Collector* of *Hearsay v Iva*, *Empress v Abdullah*, 7 A 386. In conclusion, I feel that although by the Evidence Act,—1—ded which the Act does not extend to the admissibility of evidence, matters which may be essential for expression once used by Mr Justice

Now, I think that the law of evidence would not be worthy of its name if it made possible any such result." See also *Emperor v Panchu Das*, 24 C W N.

50 So one who is admissible under *Chandra v Paresh N*.

The words "and of evidence of irrelevant facts, irrespective of objection by the parties" *Whitley Stokes v* the second proviso Court is bound to *People v Jarrel*.

31 Cal (Am) 594. Even when there is a moral conviction of guilt the rules of evidence can not be separated from *Birindra v R*, 37 C 91 *R v Brojo*, 25 W R Cr 43 *R v Sorob Roy* 5 W R Cr 28, *R v Oddy*, 5 Cox C C 210 (213). Though a document may not be legal evidence of a fact—within the provisions of the Evidence Act yet it may be a document which is to prove that fact by consent of parties. *Oriental Government Security v Sarat Chandra*, 20 B 99 (103).

Admissibility Relevancy, Auxiliary probative. The rules of admissibility may be classified along with the probative value of specific facts which do not profess to define probative value but yet aim at increasing or safeguarding it and the third covering all those rules which rest on extrinsic probabilities irrespective of probative value.

The first group of rules attempts to define for legal purposes the probative value which suffices to entitle a fact to be regarded as relevant. Here the law is concerned with the rules of law and not with the application in practical

5. 5 experience i.e. with relevancy. Circumstantial testimonial, and real evidence are the three great classes, and each has its special problems. The second group of rules lays down auxiliary test and safeguards usually for particular kinds of facts, over and above the ~~major~~ minimum probative value. The hearsay rule, the rules of quantity, the rule of the oath, and a dozen others belong here. These two groups together are rules of Probative Policy. The third group of rules invokes for the exclusion of certain kinds of fact extrinsic policies which override the policy of ascertaining the truth by all available means. These rules concede that the evidence in question has all the probative value that can be required and yet exclude it because its admission would injure some other cause more than it would help the cause of truth and because the avoidance of that injury is considered of more consequence than the possible harm to the cause of truth. Most of these rules consist in giving certain kinds of persons an option—i.e. a Privilege—to withhold the evidential fact. This third group as contrasted with the first and second, represents rules of Extrinsic Policy. *Ignore § 11*

Multiple Admissibility—Evidence applicable to more than one purpose. It constantly happens that a fact which is inadmissible for one purpose is admissible for other purposes, while on the other hand, a fact which is entirely inadmissible so far as some rules are concerned is excluded because it fails to satisfy some other rule. An evidentiary fact in order to become admissible must not only be relevant but also satisfy the Auxiliary rules and the rules of Privilege. Now the peculiarity of the Auxiliary rules and the rules of Extrinsic policy which mainly consist in rules of Privilege is that almost all of them are in their application, for example

a testimonial statement, and so on (i.e. s. 10), who ought to have been called to the stand, is inadmissible under the hearsay rule and it must remain excluded, even though he has passed the hearsay rule and could have satisfied the rule for producing the original and the rule of authentication. In other words, so far as an evidentiary fact is offered for a particular purpose, as being material to a certain issue and relevant to a certain proposition it must satisfy all the rules applicable to it in that capacity. But if the latter above referred to, be offered as an admission of the defendant, because shown to him and assented to, it may be admitted without calling for the writer of it because it is no longer offered as the writer's testimony but as the defendant's admission. In other words when an evidentiary fact is offered for one purpose and becomes admissible by satisfying all the rules applicable to it in that capacity it is not inadmissible because it does not satisfy the rules applicable to it in some other capacity and because it is in the latter capacity. *Ignore § 13*. So certain evidence be admissible or not it is for which it is produced, and the point it is intended to establish for it may be admissible for one purpose and not for another. *Taylor v Williams* 2 B & Ad 845 (855) *Per Lord Tenterden C J*. Evidence properly admitted for one purpose must be admissible for all purposes. *Bank of Bombay v Dandial* 17 C W N 358 (368)—37 B 122 P C. The rule is thus lucidly explained by *Park J* in *Wills v Bernard* 8 Bng 378, at p 383 where he said "I agree that it is more desirable that such part of the evidence as does not apply to the point to be proved should be withdrawn altogether from the consideration of the jury. But in many cases that is impossible." *Manning v Clement* where the plaintiff alleged that the carried on the trade of a manufacturer of butters and that the butters were ; it was held, that trade was illegal situation. *See that the plaintiff's case of prisoners whose confessions are given in evidence which unavoidably involve the mention of others besides the party confessing. But the jury are always cautioned to exclude the statement as against any but the party confessing. They also received a proper caution in this case, and, subject to that the letter was properly admitted.*

Admissibility of evidence The Judge in each case is to decide the admissibility of evidence (*vide* v 136). Questions as to the admissibility of evidence should be decided as they arise and should not be reserved until judgment in the case is given. *Abdul Raach, v Ma U*, U B R (1897—1901) Vol II, 376; *Basir v Girija Nath*, 13 C L J 18; *Layan v E*, 86 Ind Cas 817; *Kapru v Emperor*, 50 Ind Cas 481, *Abdul v Ginnendra*, 82 Ind Cas 974 J Diary, 224; *Gora Chand v Ram Narain*, 9 W R 587, *Rama Karam Singh v Mangal Das*, 1 A L J Diary, 224. In *Ramjiban v Oghur*, 2 C W N 188, at p 190, *Sale J* said "It was suggested on the part of the defendant that the more convenient, if not the right course would be to admit the evidence in the first instance reserving the question of law as to its admissibility until the final judgment is given. I have no objection but had advantage and having regard to the o

Bhubotaran Nundy, 11 C L J 115. I do not think that course is open to me in the present instance, but see *Ramanuj v Dalhousie*, 30 C W N 239 (262). The principle of the Evidence Act differs from the English Law in that it defines the evidence which may be given, so that in order to produce any particular evidence it must be shown to be admissible under some particular section of this Act, whereas the principle of the English Law is to assume that everything is admissible subject to certain exceptions. *Field* 6 Ed p 69. But where a Judge is in doubt as to the admissibility of a particular piece of evidence he should declare in favour of admissibility rather than of non admissibility. The *Collector of Gorakhpur v Paladhar*, 12 A 1, *Madhab v Denak*, 21 B 698, *Moriarty v London C & D Ry Co* L R 5 Q B, 314. In the last mentioned case *Lush J* said at p 333, "I also think on further consideration that the evidence was receivable. I had formed no definite opinion on the subject at the trial. It was a new point and I adopted what I considered to be the usual and the safer course, where evidence is, pressed by one party, and objected to by the other, receiving the evidence at the peril of the party presenting it." Under the Evidence Act admissibility is the rule and exclusion the exception. *R v Monapuna*, 16 B 661, 668, see also *R v Uttam Chand*, 11 B H C R 121, *Gopce Nath v Mund Moyee*, 8 W R 169; *Mason v Golam* 15 W R 490; but see *R v Porthudas*, 11 B H C R 93, *R v Rani Chandra Gound*, 19 B 755, *Gujju Lal v Faltish Lal*, 6 C at p 193, *Hareekur v Charu Majhee*, 22 W R 355, 356 357. The admission of hearsay evidence is prohibited. *Queen v Kali*, 7 W R Cr 2. *R v Puttambur*, 7 W R Cr 25, *Aman Ali v A E*, 18 C 109—8 Ind Cas 379. *Lulceemonee v Shunkuree*, 2 W R 252, *Queen v Sheikh Moqon* 5 W R Cr, *Queen v Ramgopal* 10 W R Cr 75, *Queen v Chandai Koomar*, 21 W R Cr 77, *Atkia Beggam Muhammad*, 21 C W N 815 (P C).

Objection In England the initiative in excluding evidence is left entirely to the opponent—so far at least as concerns his right to appeal on that ground to another tribunal. The Judge may, of his own motion deal with offered evidence, but for all subsequent purposes it must appear that the opponent invoked some rule of Evidence. A rule of Evidence which is not invoked is waived. *Diaz v L S*, 223 U S 450, *Smyer v French* 230 S W 126. But in India it has already been stated that the Court is bound to exclude evidence of irrelevant facts irrespective of objection by the parties. *Whitely Stokes* Vol II p 854 see also *Amlar Ali v Lutfi Ali* 21 C W N 996. *Narahari v Ambabai* 44 B 192. *Sumitra v Bimkhar*, 57 Ind Cas 561. *Damodar v Jadunath*, 91 Ind Cas 449, *Luchram v Radhakrishnan* 31 C L J 107. It is perfectly true said Mr Justice Mookerjee, in *Amlar Ali v Lutfi Ali*, 21 C W N 996 at p 1001 "as pointed out by Sir Richard Couch in *Miller v Madho Das*, L R 23 I A 106 that an erroneous omission to object to evidence which is irrelevant and consequently inadmissible under any circumstances, does not make it admissible. See also *Hara v Bishu*, 8 C W N 101. The moment a witness commences giving evidence which is inadmissible, he should be stopped by the Court. *R v Puttambur* 7 W R Cr 25, see also *R v Chandar Kumar*, 24 W R Cr 77. *Lulhee v Shunkuree*, 2 W R 252, *R v Kallychurn* 7 W R Cr 2, *R v Kedar Nath* 18 W R Cr 16, *R v Ramgopal* 10 W R Cr 75, *Petumbar v. Ratten*, W R (1864) 213. It seems that this rule is applicable to civil cases as well.

Time of objection The general principle governing the time of the objection is that it must be made as soon as the applicability of it is known to the opponent. *Wignore* § 19, *Hissen Kamini v Ram Chandra* 12 W P 13, *Sheetal Pershad v Summejay*, 12 W R 211. For evidence contained in a specific question the objection must ordinarily be made as soon as the question is stated, and before the answer is given, unless the admissibility was due, not to the subject of the question but to some feature of the answer. *Wignore* § 14. In *Buttley v Butler*, 2 B & C 431 443, *Holtroyd*, 1 and "If the objection was known *a priori* it should have been made before the evidence was given. When in irrelevant document is tendered, an objection should be made at that time. Objection as to the mode of proof of a particular document should be taken when it is tendered in evidence." *Abdul Saeed v Gunendra* 82 Ind C 974 (976) see also *Sundari v Gaganendra*, 9 C W N 111. So when such objection is not taken in time it is considered to be waived. *Kulhananda v Shivanand* 63 Ind C 625. So when rent receipts were admitted in evidence without objection in the Court of first instance no objection could be taken in the Appellate Court that they were not properly proved. *Rajeswari v Palni Behary* 25 C W N 881 = 62 Ind C 547, see also *Gunnara v Rajen* 1 C W N 530, *Pranath v Dingatarani*, 14 C L J 578. In fact this proposition rest upon a well known principle with regard to the mode of proof of a particular document, such objection must be taken at the time when the document is tendered for admission, for any lacunae in the mode of proof may then be at once supplied by the party who produces the document and wants to have it proved. *Per Moolcrjee J in Abdul Saeed v Gunendra* 82 Ind C 974 at p 976 see also *Chooni v Nilmadhub* 41 C L J 374. *Manmatha v Protoll* 43 C L J 274 = 99 Ind C 179. But irrelevant document does not become relevant for want of objection. *Sumitra v Ramkhar*, 57 Ind C 571 = 5 Pat L J 410.

Grounds of objections In *Bain v Hutehearen & I R Co*, 3 H L C 1, 16, *Lord Brougham* said "Now it is necessary that when a party excepts to the reception of evidence to the rejection of evidence or to the direction of the Judge given to the jury whatever is the subject matter of this exception, he must state the ground of his exception, otherwise he cannot except. If he objects to the reception of A's evidence he must show why it should not be received, as by stating that A is an incompetent witness. If on the other hand he objects to the rejection of A's evidence, he must show why it should not be rejected, as for instance that A is a competent witness, and that his evidence is admissible, and that the rejection of his evidence is contrary to law. In all these cases the ground of objection must be clearly stated, and beyond the ground of objection thus stated the court is not at all bound to look."

Waiver of objection An objection may of course be expressly waived. Of implied waivers, the usual instance is that of failure to make objection at the proper time. The question whether a party is bound by his consent that the examination of witnesses before a Judge should be dispensed with and another method substituted for the Judge's taking cognizance of oral testimony is regulated partly by the Evidence Act and partly by the law and practice relating to the Civil and Criminal Procedures and in the absence of any such law by the discretion of the Court. What is regarded by such procedure is not the law relating to the relevancy of evidence but the law under which the evidence shall be taken as contained in O XVIII, r 4 of the Civil Procedure Code. The parties have a right to waive such rules of procedure as are intended to protect a personal interest and are not based on public policy. So where the lower Court admitted in evidence on the consent of parties evidence as to the death of a person which could not be admitted in evidence under s 23 it is nonetheless binding upon the parties. *Arjuna Reddy v Sundara Reddy*, (1914) M. W. N 931.

When the opponent fails to object to the admission of the document, this is, of course, on general principles a waiver as to the need of any evidence authenticating its genuineness, and this waiver is commonly held to extend to the fact of authority of an agent purporting to sign the document for a principal but not as the legal sufficiency of the instrument for any purpose. *Wignore* § 2132. It is a familiar principle that, if testimony is offered which is relevant

but repugnant to some rule of evidence, it must be objected to at once; otherwise the objection will be considered waived *Barton Coal Co v Cox*, 39 M. 1; 14 M I 192-4; *R v ...* ... to the admission of testimony
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have so consented they cannot afterwards object *Gonnabathula v G. Chermaya*, 22 L. W. 756 The question of the mode of proof is a question of procedure and is capable of being waived by a party *Ali Bibi Kaniz Zainab v. Syed Mobarak*, 72 Ind Cas 748

Where the genuineness of a document relied on by a party was not disputed by the opposite party, and the only question was as to its binding character, the opposite party must be deemed to have tacitly waived its proof by consenting to its admission in the trial Court to object to an admission which was irrelevant did not make it relevant and admissible in evidence; still as explained in *Girindra Chandra v. Ryendra Nath*, 1 C W N 530, an objection that a document, which *per se* is not admissible in evidence, has been improperly admitted in evidence, cannot be entertained in the Court of Appeal, when, if the objection had been taken in the trial Court it might have been met and the proceeding regularised" See also *Manmatha v Probodh*, 43 C L J 274 When a document was produced and marked in the presence of the opposite party who took no objection there but an objection was taken in appeal Held that under those circumstances the Court, may take it until the contrary is shown that the formal proof of the document was waived by consent of parties *Collector of Gunjam v. Bhimayya*, 24 L W 677

not competent to the admissibility. *Ichint* *ddin*, 72 Ind Cas 985-
d; "We may here point *Muller, Official Assignee* *aneous omission in the*

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The absence of an objection *per se* irrelevant or inadmissible taken as to the mode of proof. 1929 Pat 739; *Kumaon Ry Co v* 03 Ind Cas 625; *Sumitra v I* advocate cannot so alter the character of the testimony as to convert into corroborative evidence that which the law regards as merely fit for rejection as hearsay *Lunyam Hong v Lal Choom & Co*, 47 C L J 288-30 Bom L R 757-A I R 1928 P C 127; *Jagadish v Harhar*, 40 C L J 39-78 Ind Cas 219

When documents are admitted in evidence with or without formal proof in the first Court it is

was raised does not make it 449; *Ma Sit v. Annamalai* 881; *Behrai v Amir Chant*,

6. 6 Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places

Relevancy of facts forming part of same transaction

Illustrations

(a) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the bystanders at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.

(b) A is accused of waging war against the Queen by taking part in an armed insurrection in which property is destroyed, troops are attacked, and jails are broken open. The occurrence of these facts is relevant as forming part of the general transaction, though A may not have been present at all of them.

(c) A sues B for a libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained are

relevant if they were delivered by persons successively

Scope of sections 6 to 55. The Evidence Act lays down in ss 11 to 50 the rules in which the Court is empowered to base its decision on the facts proved or admitted. The rules laid down how the materials on which the Court is empowered to base its decision are to be used.

The first clause of rules refers to the use to be made of the materials, that is, the inference to be drawn from the hypothesis. But in relevant facts parties have unrestricted power to make admissions. But in regard to the logical conclusions to be deduced from the existence of the facts proved or admitted, the parties have no power to alter the directions given to the Courts by the legislature or to empower the Courts to act in a manner declared by the legislature to be illogical. *Krishna Reddy v Sundar Reddy* (1914) M W N 931.

Scope of the section. Acts, declarations, and circumstances which constitute, or accompany and explain, the fact or transaction in issue, are admissible, for or against either party, as forming parts of *res gestae*. *Phil Ex* 54 13 *Halsbury* § 585. All facts which are parts of the same transaction are relevant to each other so that, when one of such facts is in issue, the others are admissible. Such facts which are thus parts of the transaction in issue are generally known as *res gestae*. *R v Ellis* 6 B & C 154, *Carmarthen and Cardigan Rail Co v Manchester Rail Co*, (1873) L R 8 C P 685. But in admitting facts as part of *res gestae* care should be taken that facts which are *res inter alios actae*, are not proved. *Hyde v Palmer*, 32 L J Q B 176. *Wright v Tatham*, 5 Cl & Fin 760 H L, *Agassiz v London Tramway Co*, 21 W II 179 (Eng). Relevant facts are usually those which are either the cause or the effect of a relevant fact or a fact in issue (*vide s 7*). But where the inference is wider it may also be drawn from facts which either accompany or explain the transaction in issue. *Rough v Great Western Rail Co*, (1841) 1 Q B 51.

Ordinarily the facts of strangers to a transaction, — *res inter alios actae*, — as they are called, that is things transacted by others, are excluded from admission. Thus what others did or said about a particular matter would not be admissible. *prima facie* be- lieved to be true. It is not admissible to prove it with whole itself incipit

whatever surrounding circumstances may be necessary to explain the nature of the prominent or principal fact in a case, are received as original evidence. *Goode v. Ev* 427 These facts when the nature and quality of the fact are in question, are either to be regarded as part of the act itself, or as the best and most approximate evidence of the nature and quality of the act, their connection with the act either sanctions them as direct evidence, or constitutes them indirect evidence, from which the real motive of the actor may be duly estimated *Starkie on Evidence*, ¶ 87.

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plural of the English equivalent—facts, transactions—as the details or particulars of which a single fact or transaction might be composed. It would seem that either form was quite legitimately used as meaning what we should express by the singular form,—an occurrence, a transaction." *Prof Bradley Thayer—in 15 American Law Review* 5, 81 The term was used for the first time in 1637, in

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restricts the term *res gestae* to the scope of the world's happenings out of which the right or liability in question arises. The American rule so extends the term as to cover all the probative facts by which the *res gestae* are reproduced to the tribunal where the direct evidence of witnesses or perception by the Court is unattainable—*Chamberlayne's Modern Law of Evidence* § 2581. In its English or restricted meaning *res gestae* imports the conception of action, by some person producing the effects for which liability

6. **6 Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places**
- Relevancy of facts forming part of same transaction

Illustrations

(a) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the bystanders at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.

(b) A is accused of waging war against the Queen by taking part in an armed insurrection in which property is destroyed, troops are attacked, and goods are broken open. The occurrence of these facts is relevant as forming part of the transaction.

(c) A is accused of libelling B. Any statement which is proved to have been made by B, and forming part of the correspondence in which it is contained, is a relevant fact, though they do not contain the libel itself.

(d) The question is, whether certain goods ordered from B were delivered to A. The goods were delivered to several intermediate persons successively. Each delivery is a relevant fact.

Scope of sections 6 to 55. The Evidence Act lays down in ss 6 to 55 certain rules which the Court is to follow in determining the relevancy or irrelevancy of facts. The rules are logical bearing on the relevancy of facts. The rules laying down the scope of the evidence are logical bearing on the relevancy of facts. The rules laying down the scope of the evidence are logical bearing on the relevancy of facts.

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Scope of the section. Acts, declarations, and circumstances which constitute the transaction in issue, are admissible. *Phip Ev 54 13*. Facts which are relevant to the transaction are relevant. The others are admissible in issue are generally relevant. *Armstrong and Cardigan*.

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6. subject of enquiry" *Hyde v Palmer, supra* While the language of the decisions is by no means uniform, constant advantage being taken of the convenient obscurity of the phrase to cover loose thinking, a tendency is distinctly visible

942. In a marked degree, this is true of the criminal liability of an accused into being, if at to place before the their occurrence which circumstances *res gestae* themselves provided that an act takes place within the time, space and causal limits allotted to the *res gestae*, the person by whom a particular act was done is not regarded as a material circumstance. The thought of *actio* something done or carried on implied in the phrase is not, however by any means confined to action by any special one of the parties or by either of them. So far as anything in the *res gestae* is done, it may be done by any one. How far, in time, space or causation the *res gestae* in any given case may properly extend is evidently a question of administration. No arbitrary line can be drawn on the subject. Each case is to be decided upon its own circumstances. *Chamberlayne's Modern Law of Evidence* § 2582. Lord Cockburn in *R v Bedingfield*, 14 Cox Cr C 341, said "Looking to the law as it exists applied to a criminal case? To act, or series of acts, constitute, terminate in, the principal act charged as an offence against the accused, from its inception to its consummation or final compilation, or its prevention or abandonment,—whether on the part of the agent or wrong doer, in order to its performance, or on that of the patient or party wronged, in order to its prevention—and whatever may be the continuance of the transaction suffering the action applications for assistance,—form part of the *res gestae* and may be given in evidence as part other hand, statements made part of the wrong doer, *actus* of the principal act or other ment by the wrongdoer—such as, e.g. statements made with a view to the apprehension of the offender,—do not form part of the *res gestae*, and should be excluded."

The term *res gestae* though generally applied to the fact or transaction in issue may, as will be seen, be used in the present sense of any relevant act, i.e. to indicate the admissibility of such act, and as a part of it, its accompanying declarations. This does not, of course, mean that such subordinate acts and declarations are to be regarded as forming part of any main act or *res gestae*.
Phip Ev 55

Transaction, meaning of the word "transaction" is not defined in the Act. But a definition of the author says "A referred to by a single subject of enquiry which transaction as the facts in issue are deemed to be relevant to the facts in issue, although not part of the same particular fact is or is not a question of law upon which no principle has been stated by authority and on which single Judges have not agreed." *Simla District Judge, Art 3* This definition has been followed in *Imperial, 11 C W. N. 266* and *Cas. 664 = 16 Cr L J 184*. *Stoke's Criminal Code*, not impossible, to attempt any definition of

attempting to lay down general principles as a rule discuss each case on its merits." *Report of the Select Committee (1922)* In this connection it may also be stated that before accepting any definition not given in the Act, the Court should remember the following warning given in the *Solicitors' Journal* (Vol 20, great Jurist as *Prof James Bradley* Evidence at p 190. 'A definition is the greater probability of a correct use of

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Transaction, meaning of the word "What does or is considered to be question laid down in various cases by which it may be determined whether certain acts do or do not form part of the same transaction. In some cases it has been held that acts may be considered to form part of the same transaction if there are between these acts proximity of action." *Per Cumming J in Pt Banga Chandra v Arando, 35 C 957, Emperor v. Madhab Laxmi Mallick v Emperor, 50 C 100 Lukman, 21 S L R 107* So no comprehensive formula of universal application can be stated to determine whether two or more acts constitute the same transaction. *Amrita Lal v King Emperor, 42 C 957* In *Reg v Sherifalli, 27 B 131* at p 138 *Chandravarkar J* observed "Here, again, the occasions when the two offences were committed were different, but there was continuity and community of purpose. The real and substantial test, then, for determining whether general offences are connected together so as to form the same transaction depends upon whether they are so related to one another in point of purpose, or as cause and effect or as principal and subsidiary acts, as to constitute one continuous action. A mere interval of time between the commission of one offence and another does not itself necessarily import want of continuity, though the length of the interval may be an important element in determining the question of connection between the two. For instance, in *Queen Empress v Tajiram* (16 B. 411) proximity of time, combined with the case as in intention and

more can be said for it than that it has been much used in the course of the development of some important aspects of two of these doctrines" *Wigmore Ev.* § 1767. In the first edition of *Phillip's Evidence*, the phrase occurs but in his fourth edition, he substituted for it the English word *transaction*.

Transaction, meaning of The word "transaction" is not defined in this Act. But a definition of the word is given in *Stephen's Digest of Evidence*. There the author says "A transaction is a group of facts connected together to be referred to by a single legal name, as a crime, a contract, a wrong or any other subject of enquiry which may be in issue. Every fact which is part of the same transaction as the facts in issue is deemed to be relevant to the facts in issue, although it may not be actually in issue and although if it were not part of the same transaction it might be excluded as hearsay. Whether any particular fact is or is not part of the same transaction as the facts in issue is a question of law or —" *ity and on which single*

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use; etc" The word transaction is used in a limited sense in illustration (a) of

this section and in more general sense in the remaining illustrations of the

section *Queen Empress v Fakirappa*, 15 B 491 (496)

Transaction, meaning of the word in ss 235 and 239 of Criminal Procedure

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the *res gestae* must be such as are so connected with the very transaction or fact under investigation as to constitute a part of it" *Haynes v Com*, 28 Gratt. (Va) 942 In a marked degree, this is true of the criminal liability of an accused. The obligation of the criminal to respond in society must come into being, if at all by virtue of certain *res gestae* which the prosecution seeks to place before the

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of the transaction, suffering party, though in the absence of the accused, during the continuance of the action of the latter, actual or constructive,—as e g, in the case of fights or applications for assistance,—form part of the principal transaction, and may be given in evidence as part of the *res gestae*, or particulars of it; while, on the other hand, statements made by the complaining party, after all action on the part of the wrong doer, actual or constructive, has ceased, through the completion of the principal act or other determination of it by its prevention or its abandonment by the wrongdoer—such as, e g statements made with a view to the apprehension of the offender,—do not form part of the *res gestae*, and should be excluded"

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declarations This does not, of course, mean that such subordinate acts and declarations are to be regarded as forming part of any main act or *res gestae*

Philp Ev 55

Phrase inexact and indefinite "This phrase, as conceded on all hands, is inexact and indefinite in its scope, and is ambiguous in its suggestion of reasons for the doctrine If it were possible to say that it is properly applicable in etymology or in usage, to any particular doctrine, it would be simple enough to ascertain the doctrine"

Evidence, attributable to preserve phrase hasious u ea to which cognized race No

more can be said for it than that it is a statement of some important aspects of law. In the first edition of *Phillips* edition, he substituted for it the English word *transaction*

Transaction — — — — — "the — — — — —" is not a fact in issue, but a question of fact. It is not part of the same transaction as the facts in issue. It is a question of law upon which no principle has been stated by authority and on which single Judges have given different answers. *Art 3* This definition of *Emperor* 11 C W N 266 and Caa 664-16 Cr L is a curious definition. It is a correct use of the word. In connection with s 235 of Cr Pro Code the Joint Committee of 1922 said "We think it would be dangerous, if not impossible, to attempt any definition of the phrase 'in the course of the same transaction'. An exhaustive definition is not feasible and if the phraseology is altered, the Courts would be deprived of the guidance which they now have from a long series of rulings on the point. We do not find that there has been any pronounced conflict of opinion the reason being that the Courts, instead of attempting to lay down general principles, as a rule discuss each case on its merits." *Report of the Select Committee* (1922). In this connection it may also be stated that before accepting any definition not given in the Act, the Court should remember the following warning given in the *Solicitors Journal* (Vol 20, 1900) of *James Bradley* "A definition is the correct use of the word."

it is also dangerous to use, etc." The meaning of this section and section *Queen Em*

Transaction, meaning of the word in ss 235 and 239 of Criminal Procedure Code. "What does or does not form part of the same transaction may be considered to be question of fact in each particular case. Certain tests have been laid down in various cases by which it may be determined whether certain acts do or do not form part of the same transaction. In some cases it has been held that acts may be considered to form part of the same transaction if there are between these acts proximity of time, community of purpose, and continuity of action." *Per Cumming J in Famer Khan v Banga Chandra v Anando* 35 C L J 327, 1907, *Emperor v Madhab Laxman* 43 II 14, 1907, *Malik v Emperor*, 50 C 1004 *Groun v Ghulam* 1 S L R 73 *Emperor v Lukman* 21 S L R 107. So no comprehensive formula of universal application can be stated to determine whether two or more acts constitute the same transaction. *Amrita Lal v King Emperor*, 42 C 957. In *Reg v Sherifalli*, 27 II 131 at p 138 *Chandraraj v J* observed "Here again, the occasions when the acts are done, but there was continuity and community of purpose, and so as to form the same transaction. It is not of purpose or continuity of one offence, but continuity though the length of the interval may be an important element in determining the question of connection between the two. For instance, in *Queen Empress v Jayiram* (16 B 411) proximity of time, combined with the case as to intention and

length of the interval may be an important element in determining the question of connection between the two. For instance, in *Queen Empress v Jayiram* (16 B 411) proximity of time, combined with the case as to intention and

S. 6. subject of enquiry" *Hyde v Palmer, supra*. While the language of the deed is by no means uniform, constant advantage being taken of the convenience and obscurity of the phrase to cover loose thinking, a tendency is distinctly visible

with the very transmission of the phrase. *Haynes v. Com*, 28 Gratt (V) criminal liability of an accused must come into being, if all by virtue of certain *res gestae* which the prosecution seeks to place before the jury either by the testimony of the eye witnesses who observed their occurrence or of the *res gestae* themselves, space and causal limits allotted to the *res gestae*, the person by whom a particular act was done is not regarded as a material circumstance. The thought of action something done or carried out implied in the phrase is not, however by any means confined to action by any special one of the parties or by either of them. So far as anything in the *res gestae* is done, it may be done by any one. How far, in time, space or causal connection the *res gestae* in any given case may properly extend is evidently a question of administration. No arbitrary line can be drawn on the subject. Each Case is to be decided upon its own circumstances. *Chamberlayne's Modern Law of Evidence* § 2582. Lord Cockburn in *R v Bedingfield*, 14 Cox Cr C 341, said "Looking to the law as it exists" applied to a criminal case? To the act, or series of acts, constitute, or terminate in, the principal act charged as an offence against the accused, its inception to its consummation or final compilation, or its prevention or abandonment,—whether on the part of the accused or on the part of the suffering party, though the action of the principal transaction, and may be on particulars of it; while, on the part, after all action on the part of the accused, through the completion or its abandonment, made with a view to the *res gestae*, and should be

The term *res gestae*, though generally applied to the fact or transaction in its relevant act, its accompanying subordinate acts and declarations are to be regarded as forming part of any main act or *res gestae*. *Phip Ev* 55

Phrase inexact and indefinite in its application. It is all hands, is inexact and indefinite in its application for the doctrine. If it were etymology or in usage, it is not a phrase to preserve the phrase has various uses to which it is recognized phrase. No

Phrase inexact and indefinite in its application. It is all hands, is inexact and indefinite in its application for the doctrine. If it were etymology or in usage, it is not a phrase to preserve the phrase has various uses to which it is recognized phrase. No

6. similarity of action and result, was held to bring several offences as to several fraudulent transfers of property within the meaning of the words 'same transaction' in section 235 of the Code of Criminal Procedure" The word "transaction" suggests

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No. 18 S L R 199-27 Cr
-27 Cr L J 456: Emperor

Krishna, 40 C 318 (criminal misappropriation and falsification of accounts in

transaction. *In re Ramaraju Thevan*, 53 M 937=32 Cr L J. 30=A I, II 1930 Mad 857=59 M L J 945 But a transaction of abduction for which two persons have been convicted cannot be said to be part of the same transaction when a third person not alleged to have taken part in the abduction proceeds to buy the stolen property and receiving the same. *Mongha Sultan v Emperor*, 29 Cr L J 1030 The expression "in the course of the same transaction" must be understood as including both the immediate cause and effect of an act or omission, and the other necessary consequences of time, place, unity or proximity of place, continuity of action and community of purpose or design. *Amrit Lal Hazra v Emperor*, 42 C 957, see also *Superintendent v Monmohan*, 19 C W N 672, *Emperor v Jethalal*, 29 B 449, *Emperor v Datta*, 30 B 49

Transaction—what facts form parts of A transaction consists both of the physical acts, whether spoken or any other parts of transaction

Amirson v Irer
v Kinnaird, 6 Cr

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evidence against him in an action against the adulterer In answer to the question

L C J said "It is not so clear that her declarations made at the time would not be evidence in her favour in circumstances If she declared at the time that she fled

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admissible in evidence I am clear

of itself an equivocal act, and

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as evidence of a continuing act, and therefore

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the realm is a continuing act, and therefore

In the same case *Park J* observed. "I am satisfied that declarations made during

departure and absence are admissible in evidence to show the motive of the

departure. It is impossible to tie down to time the rule as to the declarations we must judge from all the circumstances of the case, we need not go the length of saying that a declaration made a month after the act would of itself be

letters. So where the questions were whether a person who had remained abroad for some years had acquiesced in the crime, or whether the crime had been committed by him during such permanent or otherwise residence. *Doucet v. Geoghegan* 11 Ch D 455. But declarations and statements are admitted in evidence as parts of *res gestae* or transaction under two distinct principles. Or Rule and exception. The rule but defines those classes to which the rule is in its nature not applicable. *Vide Vigmore* § 1745. One depends for its admission on the principle of spontaneous declaration and the other as part of the *res gestae* on the principle of verbal act doctrine. But acts are not parts of the same transaction unless they were done substantially at the same time although they are similar in other respects. *R v. Bridgese* 4 C & P 336. In that case the prisoner was charged with stealing pickled pork a bowl some knives and a loaf of bread. He went to

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Mad 579=48 M L J 195. In an abduction case where the abduction took place not be treated as a part of the transaction. *Cas 433=26 C L J 504*. *Imperial 42 C L J 504*. 674=A I R 1905.

Lsh 578

Scope and limit of facts forming the *res gestae*. The act or transaction may be admitted if it may be shown that the transaction was continuous or that the facts were so connected in point of time or place, or other parts of the transaction. *Phip Ev 47*, see also *C A cited in Ibid, Apothecaries v. Jones* 17 B 458, *Clark v. R* 14 Q B D 97 cited in *P*.

streets there is an unexpected collision between two men—entire strangers to each other, then the *res gestae* of the collision is confined within the few moments it occupies. When again there is a social fuel in which two religious factions, as in the case of the *Lord George Gordon* disturbances of the Philadelphia riots of 1844, are arrayed against each other for weeks, and are so much absorbed in the collision as to be conscious of little else, then all that such parties do or say under such circumstances is as much part of the *res gestae* as the blows given in a riot, also for which particular provocations may be brought. *11 West. L. & 255; Lockett v. Horn*, 43 Ohio St. 25; *Lank. Evidence*, 104 Mass. App. 364 (two years); *Smith v. Williams*, 57 Ga. 641.

In *Powers v. Hays*, 2 Bing. 104, *Lord Mansfield*, said: "It is impossible to tie down to time the rules as to the declarations." It must be always borne in mind, however, that it is the connection with, or illustration of, the main fact which constitutes the admissibility of this species of evidence." The point is also well illustrated by *Mr. Justice* when he says: "If, for the sake of illustration, the question for what time the act was done is material to the issue, what A may be conclusive." and the fact of payment were not material to the issue, then although A at the time of

not aware of any error, where the act done is, in its own nature, irrelevant to the issue, and where the declaration *per se* is inadmissible, in which it has been held that the union of the two has rendered them admissible."

The expression "the complete criminal transaction" means the complete criminal transaction, and the act of the accused until the end of the *res gestae* under which it is.

wholly on the character of the crime as *Foley*, 113 La. 52=101 Am. St. 493

circumstances must be resorted to for the purpose of proving the commission of the particular offence charged, the proof of those circumstances involves the proof of other acts, either criminal or apparently innocent. In such cases it is proper that the chain of evidence should be unbroken. If one or more links of the chain are broken, the evidence is inadmissible. The Court has held that the evidence is inadmissible if the Court is not satisfied that the evidence is relevant and that the evidence is not hearsay. The Court has also held that the evidence is inadmissible if the Court is not satisfied that the evidence is not hearsay.

ment belonged to another man; that it was taken from the house the night preceding the murder; that the prisoner was there on that night and that the pistol was seen in his possession on the day of the murder, just before the fatal act, is evidence to prove the prisoner a part of the transaction, or involve guilt, makes

Time, space and causation. No uniformity exists in the length of time over which the *res gestae* shall properly be held to extend. For example, in case

3. years the time covered by the most direct proof of the *res gestae* will be extended to the same limits *Chamberlayne's Evidence* § 2592 Note 2

Territorial limits No limitation has been imposed as to the territorial boundaries within which the *res gestae* facts must occur. Those of a sudden quarrel, a shooting and immediate surrender to justice may, for example, occur in the limited space of a hotel bar. They may on the other hand cover the breadth of a continent, or even extend from one hemisphere to the other. *R v Ellis* (1899) 1 Q B 230; *R v Oliphant*, (1905) 2 K B. 67; *R v Mackenzie*, 6 Cr App R 64. The relative complexity of cases may well reveal marked differences in the *res gestae* may be clear. They may be a problem, when conduct seems almost without springs of action. *Chamberlayne's Evidence* § 2592 Notes

Written declarations as part of *res gestae* In *Tustin v Arnold*, 81 L J 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Basis of the theory The affairs of men consist of a complication of circumstances so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstance, and in its turn becomes the prolific parent of others; and each during its existence has its inseparable attributes and its kindred facts materially affecting its character and essential to be known in order to a right understanding of its nature. *1 Greenl Ev* § 108

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not only as living threatening language. Upon questions of bankruptcy, where the intentions of the alleged bankrupt are often material to be enquired into, it is usual to give evidence of declarations, as furnishing an explanation of transactions in their nature and effect. Thus it has been held, that a declaration accompanying a purchase of goods is a limited evidence, to show whether a person bought as living by living, and a living *Giles v. Holford*, 1 Stark C. 68.

"In a case in which murder and robbery have been shown to form parts of one transaction, it has been held that recent and unexplained possession of the stolen property while it would be presumptive evidence against a prisoner on a charge of robbery would similarly be evidence against him on a charge of murder." *Queen v. Rogers*, 13 M. 426 (132)

(a) Incidents other than declarations. Questions of evidence in this connection usually arise with regard to declarations, since with other incidents there is less danger of the jury being misled, and the present principle consequently is less often invoked. *Id.* 175.

(b) **Declarations accompanying acts.** Declarations which accompany a fact in issue or relevant fact become admissible under this section, if they form part of the same transaction. *Hart v. Hart*, 5 Cl & F 670, R. v. *Bliss*, 5 Cl & F 245, *Hale v. Palmer*, 32 L. J. Q. B. 126, *Greaves v. Manning* 11 R. 1 Cl 125. "When an act done is evidence of a fact, a declaration accompanying that act may well be evidence if it reflects light upon or qualifies that act." *Cottman J.* in *Hart v. Hart*, 5 Cl & F 670-71, 19 Law Quar. Rep. 492. In the same case at page (2) of 6 Cl & F, *Cottman J.* observed: "The act itself being admissible, whatever accompanies it and serves to explain its character is relevant and admissible also." So when the act of a party may be given in evidence, his declaration made at the time, and calculated to elucidate and explain

through a police cordon is evidence of *recapture* and is admissible to prove their intention *Yung Tol v Emperor*, 3 Rang 352=90 Ind Cas 918=A I. R. 1915 Rang 351

The act must be in issue or relevant and the declarations must relate thereto. The declarations are not admissible simply because they accompany an act, the act must be in issue or relevant. *Bright v Latham*, 5 C & L 670 (659), *Hyle v Palmer*, 12 L. 1 Q B 126. So a statement made by a woman immediately after the act is not admissible. *1931 Mal 233*. Judgment obiter.

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grievous hurt was a statement, made in the presence of a prisoner, by the person injured to a third person, immediately after the commission of the offence. The prisoner did not when the statement was made, deny that she had done the act complained of.

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submitted by the Sessions Judge that the statement made by the girl was made in the presence of the prisoner and almost immediately after the infliction of the injuries by the tongue. I think, therefore, that it falls within the purview of § 6 [see illustration (a)] of the Evidence Act."

In *Chain Mahto and ors v Emperor*, 11 C W N 266, the Chowkidar deposed that one Gopal ran up to him and stated that he had seen the accused persons murder his mistress whom he had met by assignation and that he had run away from the place.

What interval of time passed between the statement and the declaration of this evidence was not stated. In *Miller JJ* said "We are also of opinion that the statements of Gopal are not admissible against the accused. Hearsay evidence is ordinarily inadmissible and the exceptions are to be found in the Indian Evidence Act. Other exceptions could not and should not be added. The learned Sessions Judge has relied on section 8 of the Evidence Act and illustration (a) to it and also *Surat Dhoobi's Case*, 10 C 302. The facts of the case of *Surat Dhoobi* are very clearly distinguishable. There the person who made the statement was dead, and she was the victim.

The statement is on the facts. In order to be admissible it must be made by a bystander, it must have been made, as contemplated by section 6 and illustration (a) to it, at the time the transaction was taking place or so shortly before or after it as to form part of the transaction. If the transaction has terminated and the statement is made, the statement is irrelevant. The admissibility is dependant on continuity. The statement to be relevant must be made when the transaction is in progress. When the transaction is concluded, the statement of a bystander is clearly inadmissible under the section. In the present case Gopal, if he made any statement, made it after the transaction was over. We

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that immediately after, on hearing the deceased groan, he went up to him and asked him what was the matter. It was objected that what the deceased said in

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murder, a girl heard a cry and then found the deceased weak and injured, and

he made a statement immediately on her coming up to him Chief Justice
 Mohan admitted it as a part of the *res gestae*. In *Hutchins v Railroad Co*, 128
 Iowa, 279 the plaintiff fell from a street car, by reason of negligence in failure
 to let down step. As she fell she exclaimed, "yes, let down the step after I fall."
 The declaration was admitted as part of *res gestae*. In *R v North Coll*, (1916)
 1 K B 347, which
 to an imperative ques-
 stone testimony of
 pointing to the prior
 who threw the stone
 18 Q B D 537. see also *Reg v Wainwright*, 13 Cox C C. 171; *R v Pook*,
 13 Cox C C 172n

On a charge of treasonable conspiracy, declarations made out of Court by
 the prisoner that "when he planned a certain convention, he had not intended
 to destroy the King and the Government" are inadmissible. *R v Hardy*, 24
 How St Tr 1991. The reason for rejection is thus stated by *Lyre C J*
 "Since, if it were otherwise, every man, if he were in difficulty, or in view of
 one, might make declarations to suit his own case." *Phip Ex Jrid Fil* 67.
 Where a person was charged with having received illegal gratification under s
 161 of the Pennl Code, on three specific occasions, in a certain year, from a firm,

Conduct:
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 I am not aware of any case where the act done is in its own nature irrelevant
 to the issue and where the declaration *per se* is inadmissible, in which it has been
 held that the union of the two has rendered them admissible." *Per Colman J*
 in *Wright v. Tatham*, 7 A & E 361; see also *Patten v Terquon*, 18 N H. 528;
Pinney v Jones, 64 Conn 545

Conduct must be equivocal. The utterances are admitted merely to assist
 in completing or giving legal significance to the conduct. Hence the conduct
 must be equivocal or incomplete as a legal act, before the utterances can be
 admissible. *Wigmore* § 1774; *R v Bliss*, 5 Cl & F. 550; *R v Wainwright*, 13
 Cox 171. "Many acts are in themselves of an equivocal nature, and the effect
 of them depends upon the intention or disposition from which they proceed
 which is in general best determined by the expression accompanying them.
 Wherever, therefore, the demeanour of a person at a given time becomes the
 object of inquiry, expressions, as constituting a part of that demeanour, and
 as indicating his present intent and disposition, cannot properly be rejected in

It is not the law that any and all conversation which
 happened to be going on at the time of an act can be proved if the act can be
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Wright v.

Tatham, 7 A & E 361; *Lend v Tyngsborough*, 9 Cush 42. But declarations
 are not admitted to explain previous or subsequent facts. *Agassiz v London*
Tram Co, 21 W R (Eng) 199; *Hyde v Palmer*, 32 L J Q B 126

Words must merely aid in completing the conduct.—It follows also as a
 necessary deduction, that the utterances must be such as to serve the assumed

purpose, namely, give more definite significance to the equivocal or indeterminate conduct, by adding a missing part. They must be such as do merely this, and not more. *Wigmore* § 1771. "The common phraseology," said the learned author "however is, here so loose and inclusive that utterances may be held admissible which do not merely complete and define the very act by serving as a part of it but make assertions about its preceding facts, and are in effect given credit as hearsay testimony of any other matter that may happen to be connected with the act in time and place. *Ibid*. So in *Lund v Tynesborough* 9 Cush 42, *Fletcher J* said. If declaration has its force by itself, as an abstract statement detached from any particular fact in question, depending for its effect on the credit of the person making it, it is not admissible in evidence. But when the act of a party may be given in evidence, his declarations made at time, and calculated to elucidate and explain the character and quality of the act so connected with it as to constitute one transaction, and so as to derive credit from the act itself, are admissible in evidence. Such declarations derive credit and importance as forming part of the transaction itself. Similarly in *Enos v Tuttle*, 3 Conn 260 the reason for the admission of such declaration is thus stated. "[They were] well calculated to unfold the nature and quality of the facts they were intended to explain, and so to harmonize with them as obviously to constitute one transaction." See also *Insurance Co v Mosely*, 8 Wall 411.

These phrases about 'unfolding', 'elucidating', and 'explaining' the nature of the act, says *Prof Wigmore* "while not inaccurate in themselves, have served, in the hand of many later Judges, as an open sesame for utterances used purely in an assertive or testimonial way. 'Elucidation' and 'explanation', taken literally, are broad enough to include mere narrations of preceding matters, and such has been the service to which these classical terms have frequently been put. It must be noted that this application of them is unsound on principle." *Wigmore* § 1775.

Words must accompany the conduct in time. The declarations must be substantially contemporaneous with the fact—i.e., made either during, or immediately before or after, its occurrence—but not at such an interval from it as to allow of fabrication, or to reduce them to the narrative of a past event. *Phip Ev* 49 citing *Thompson v Trevanion* 402. "The question of contemporaneousness says *Mr Phipson* has given rise to much discussion. In *R v Beddingfield*, 14 Cox Cr 341, it has generally been thought that *Conburn C J* applied the rule too strictly, that case, however was quoted without disapproval in *R v Christie*, (1914) A C 545. On the other hand the dictum of *Denham C J* in *Rouch v G W* R 1 Q B 60, a bankruptcy case adopted by *Mr Taylor* (s 588), that 'concurrence of time, though material is not essential seems to err in the opposite direction, substantial though not literal, a concurrence being indispensable (*Lees v Morion*, 1 M & R 210, *Agassiz v Lond Tram Co*, 21 W R 199, *R v Goddard*, 15 Cox 77) *Phip Ev* 57. 'It was at one time thought necessary' says *Mr Taylor* 'that they should be contemporaneous with it; but this doctrine has of late years been rejected, and it seems now to be decided, that, although concurrence of time must always be considered as material evidence to show the connection, it is by no means essential.' But in America the old doctrine still obtains. Thus in *Enos v Tuttle*, 3 Conn R 250, *Hosmer C J* observed, that declarations, to become part of the *res gestae* "must have been made at the time of the act done, which they are supposed to characterize and have been well calculated to unfold the nature and quality of the facts they are intended to explain, and so harmonize with them as obviously to constitute one transaction. In *R v Beddingfield*, 14 Cox Cr 341, in which the rule was

... the fact was as follows. The prisoner had relations with the ...
... to kill her by cutting her throat. She ...
... with two women as assistants, the prisoner ...
... living a little distance. They were together in a room in her house sometime. He went out, and she was found by one of the assistants lying senseless on the floor, her head resting on a foot stool. He went to a spirit shop and bought some spirits, which he took to the house, and went again into the room where she was, both the assistants being at that time in the yard. In a minute or two the deceased came suddenly out of the house towards the women with her throat cut, and on meeting one of them she said something

pointing backwards towards the house. In a few minutes she was dead. In the course of the opening speech on the part of the prosecution it was proposed to state what she said. It was objected to on the part of the prisoner that it was not admissible, and Cockburn C J said: "He had carefully considered the question and was clear that it could not be admitted. . . . Could it be admissible, having been made in the absence of the prisoner, as part of *res gestae*?" But it was not so admissible, for it was not part of something was being done, but something not as if, while being in the room,

and something which was heard. When two witnesses was called She was first asked as to the circumstances, and stated that the deceased came out of the house bleeding very much at the throat, and seeming very much frightened and then said something, and died in ten minutes. It was then proposed to prove what she said, but Cockburn C J said it was not admissible. Anything he said, uttered by the deceased at the time the act was being done would be admissible, as for instance if she had been heard to say something, as 'Don't, Harry'. But here it was something stated by her after it was all over, whatever it was, and after the act was completed. The propriety of this decision was the subject of two pamphlets, one, by W^m Pitt Taylor, who denied, the other by the Lord Chief Justice who maintained, it. *Steph Dig Ev* p 5. This decision is thus explained by Prof Wigmore:—Of this ruling it may be said: (1) From the Verbal act point of view, the declarations did not accompany the fatal deed, was not contemporaneous and therefore was rightly excluded, from the same point of view, moreover, a declaration by one person about the deed of another could not possibly be received; (2) as involving a question under the exceptions for Spontaneous Exclamations (*vide infra*) the ruling in *Beddingfield's Case* is plainly erroneous, and would almost certainly not be followed in this country, the facts of the case, in respect to the controlling influence of the woman's situation and the recency of the shock, make it one of the strongest in judicial annals. The arguments on the ensuing controversy between Chief Justice Cockburn and Mr Taylor dealt indiscriminately with the Verbal Act precedents, as well as with others more germane to the question. merits of these arguments it is England up to that time—the

Maito v Emperor, 11 C W N 266) and under section 32, clause (a) as well as under clause (3) of section 21.

Whether declarations and act must be by the same person. In *Home v Malkin*, 27 W R 340 (Eng), it was ruled that where acts and declarations were by different persons it could not be admitted. But though such declarations are often the only ones natural, the rule is by no means so strictly confined. It is an every day question as to what a witness can say about the acts of the victim, or the like, defendants, B & Ald unless some

nor agents should be rejected (*R v Pet* cannot be taken as invariable, for the sometimes be both relevant and admissible. *Steph Dig art 3, illus(a)*; *Milne v Leistler*, 1 H & N 100, 12 C W N 100; *Cartwright*, 5 B & S 1, *Stanley v White*, 14 East 339; *The Schwalbe*, Swab 521; *Phip Ev* 53, *Whart. Crim Ev*, 259.

Application of Verbal Act doctrine in cases of sale. "The declarations of a party when they tend to explain the fact and are necessary for that purpose

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might be given in evidence. As in the case of tender, the declaration of the party of the purpose for which the money is offered is a part of the *res gestae* and must be proved otherwise the transaction cannot be understood." *Suff's Ev* 130. So a declaration accompanying a delivery of money becomes admissible where it shows the nature of the transaction because it helps "to ascertain with what motive an act was done." *Cleuser v Samuel*, 15 N Br 58, *Strange v Donohue* 4 Ind 328. To identify land sold declarations by a deceased vendor at the time of the sale, pointing out the parcels, are admissible as part of *res gestae*, i.e., the delivery of the deed. *Parrott v Watts*, 37 L T 755, see also *Jarvey v Spring* 29 L T 847. Extrajudicial statements, being part of the true *res gestae* may constitute or assist to constitute, a sale. *Clamberlayne*, *Ev* § 262d.

Possessor's declaration in cases of adverse possession. The declarations of persons in possession of personal property are often received as verbal acts characterizing and explaining the nature of such possession, that is, as part of the *res gestae*. Possession is explained as *prima facie* evidence of ownership in the possessor. But such possession is entirely consistent with ownership in another and therefore, the conduct and declarations of the possessor may be material to show the nature of his possession whether as owner, part owner or agent. *Burr Jones* § 351. So also in cases of adverse possession by a person all declarations by the occupant importing a claim of title in himself, are admissible as verbal parts of his act of occupation, serving to give it an adverse colour. *Higmore* § 1778. In *de Bide v Thompson*, 8 Ala 650 653, *Collier v J* said: "It is not to be understood that such declarations are admissible to every conceivable extent. True, the affirmation of the party in possession that he held it in his own right or under another is proper evidence as part of *res gestae* which *res gestae* is his continuous possession. But his declarations beyond this are no part of the subject matter or thing done and cannot be received as such. While it is allowable to prove statements of one in possession as explanatory thereof, it is not permissible to show everything that may have been said by him in respect to the title, as, that it was acquired by him *bona fide* and for a valuable consideration was paid for by the money of a third person or his own etc. This, beyond and independent of it." But declarations to show the adverse character of the possession are quite as much in the nature of facts as in the nature of a medium of proof. *Hobb v Richardson* 4 Vt 465 (472). It is the intent to possess, with which the acts are done that gives them their character. So declarations which are made at the time of the act done and which are calculated to unfold its nature and quality are admissible in evidence. *Stephen v McKay* 36 I A 661. "The limitation of this doctrine must, however, be observed. It assumes that adverse possession is in some way material under the issues of the case (forcible entry, prescriptive title, or otherwise) and that the declarations were made when in possession and that they were not offered except as colouring the occupation. Subject to these limitations the use of such declarations for this purpose is never disputed." *Higmore* § 1718. Where the occupier is the lessee of the person claiming adversely his declarations to the effect that he holds the land as a tenant of the person who holds the land in adverse possession are also admissible. *Holloway v Hales*, cited in 21 R 55. The reason for such admission is that the possession of the tenant was connected with that of the landlord, which was adverse. *Doe v Williams*, *Lamp* 21, see also *Darby v Pierce*, 21 R 53, *Peaceable v Watson* 4 Laun 16. *Doe v Green Gow* 228, *Carne v Nicoll*, 1 Bing N C 430. The relevancy of such declarations may often be regarded as constituent of the right alleged to exist and they may be received in evidence in behalf of the party asserting. As evidence of the fact that extrajudicial statements of adverse claim are objectionable as *Clamberlayne's Ev* § 2600.

in the light of the circumstances with which it may have been made. It is no revocation." *Per Wilde J. in Parnell v*

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declarations of the testator in such cases are evidence where they show the *quo animo*. *Dun v. Brown*, 1 Cow. 190. Such declarations tend to establish the existence of a psychological fact, i. e., the *animus revocandi*. *Chamberlayne's* Fr 2622.

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Statement by agents. Under the rule of substantive law enabling one with delegated authority to bind his principal, the extra-judicial statements which are part of the *res gestae* of a contract may be those of an agent. In other words, his unsworn declaration in and of itself may constitute and establish rather than prove the result at which it arrives. *Chamberlayne's* Et 2616.

Demand. A demand may be constituted by an extra-judicial statement. That the statement is in part at least self-serving, is not necessarily fatal to admissibility especially where the declarant's position has been fully covered by a reply made by the adverse interest. In like manner, a refusal may be so constituted. *Chamberlayne's* Et § 2618.

Label and Slander. One whose purpose is to prove that certain statements of a defamatory nature were made, is clearly entitled to show as part of the true *res gestae* the making of such extra-judicial declarations. These statements are constitutively relevant independent of their truth or falsity. Should the statement be one for which the defendant under the rules of substantive law, is in no way responsible, constitutive relevancy is not shown and the declaration is rejected, not being as is said, any part of the *res gestae*. Extra-judicial statements of a third person made to defendant that facts published were true, when not hearsay. A previous libellous

Declarations of a bankrupt. On this principle the declarations of bankrupts on going from and returning home have been received for the purpose of showing the motive and cause of absence, although a considerable time had elapsed. *Bateman v. Buley*, 5 Term Rep 512. In *Ransom v. Haigh*, 2 Bing 99 the question was whether a man had absented himself from the realm "with the intent to lun

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The declarations, in order to be admissible, must be made, or letters written, at the time of the act in question, but it is sufficient if

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was given by way of fraudulent preference, the declarations of the bankrupt must be admitted, not so much as declarations but as part of his conduct from which inference is to be drawn that the security was given without pressure. *Per Bosanquet J in Ridley v Gyle* 9 Bing 349.

Since the declaration 'is received as a verbal part of the act, it must of course be contemporaneous with the alleged act of bankruptcy. Any thing said before or after that conduct could have a purely assertive force only and could not be receivable on the present principle. This limitation has caused some apparent judicial uncertainty—for example, in cases where the declaration was made after the debtor has absconded and while he was staying in a foreign country. There is however, no difficulty of principle in receiving such declarations, the difficulty is merely one of fact in determining the duration of the conduct constituting the alleged act of bankruptcy. The limitation is strict and inflexible, that the declaration must be contemporaneous with the alleged act. But as the conduct constituting the alleged act of bankruptcy may extend over a considerable period of time—as where a debtor absconds and stays abroad and then returns—there may be a considerable interval between the mere beginning of the conduct, i.e. the original departure or closing of the house and the actual time of the declaration. Thus, though the declaration, as always under the present principle must be contemporaneous with the alleged act of bankruptcy, the conduct constituting that act may allow for them a wide range of time. *Wigmore* § 1783, see also *Thayer's Cases on Evidence* (2nd Ed.) 646, 649, *Philp Ev* 75. Commenting on *Bateman v Bailey* 5 F R 512, *Mr Christian* said 'If the Court intended to say that what he declared after his return was complete, and when he was doing no act connected with it (is admissible) it is presumed the decision cannot be supported. Whilst he is preparing to go, or in the act of going, and during his absence from home, and whilst he is returning or unpacking his portmanteau, etc. what he says is part of the act of bankruptcy but when he is only meditating a future act, or speaking of a past one completely finished, his words surely can have no legal operation than those of any other man. See also *Lees v Marston* 1 M & R 210, *Peacock v Harris* 5 A & E 449, *Brickhouse v Jones* 6 Bing N. C. 65.

Declarations as to Domicile. If the questions were, whether a person who had remained abroad for some years had acquired a domicile in the country of his residence, letters written by him during such residence showing his intention to remain there permanently or otherwise, would doubtless be admissible, as part of the transaction. *Doucet v Geoghegan*, 9 Ch D 455, *Cockle Cas* 69, *Cruckenden v Fuller* 1 Sw & Tr 411; *Platt v Att Gen* 3 App Cas 896 *Ry Gros*, 40 Ch D 229 237, *Bordie v B* 4 L T N S 307, *Spurway v S*, (1894) 1 Ir R 385 397. That such declarations 'says *Prof Wigmore*, 'in the ordinary case that is when made not prior to removal, but during removal or settling, cannot conceivably be governed by the Verbal Act doctrine is more than ought to be asserted. But having regard to the element of intent as treated in the law of domicile, it may better be regarded as a separate and independent element material for its own sake and not merely as appurtenant to an act, and therefore may be shown by declarations admissible under the exception for statements of a mental condition. *Wigmore* § 1784.

Knowledge, belief, good faith etc. A person's knowledge of a given fact may be shown either by his own declarations or those of others conveying notice or information to him provided that the existence of the fact be first proved aliunde. *Thomas v Connel & M* & W 267 *Pacher v Cocks* M & W 553 *Philp Ev* 63 see also *Fabrigas v Mostin* 20 How St Tr 137. Such statements need not, of course be made contemporaneously with the happening of the fact, nor even at the precise time when the existence of the knowledge is in issue, since previous knowledge may be evidence of subsequent knowledge though not vice versa. *R v Gunnell* 16 Cox 154 *R v Kaye*, 16 Cox 292, 293 N., *Philp Ev* 63.

"Where the question is whether a party has acted prudently, wisely, or in good faith, the information on which he acted, whether true or false is original and material evidence, and not hearsay. *Friest v Hamill*, 31 Md 293.

Statements as regards state of health and bodily feelings. In *Aceton v Kinnaird* 6 East, 188 the action was upon a policy of insurance on the life of the wife of the plaintiff. The only question to be decided in that case was

whether the statement of the insured's good health, given at the time of effecting the policy was false. The Court in that case admitted evidence of a friend to whom the deceased stated that she was in a bad state of health. Lord Ellenborough in delivering the judgment observed: "The question being, what was the state of her own health at a certain period, a witness has been received to relate that which has always been received from patients to explain, her own account of the cause of her being found in bed at an unreasonable hour with the appearance of being ill. She was questioned as to her bodily infirmity. She said it was of some duration, several days. What were the complaints, what the symptoms, what the conduct of the parties themselves at the time, are to from

by the surgeon and certified to be in good health, down to the day when the conversation took place, and the witness, and in that view I think see also *R v Nicholas*, 3 C & K 216, where declarations are evidence of contemporaneous conduct. *Le March*, 169-179, *Gilbey v G H* (1912) 1 K B 40 C A. It is usually said that such declarations are receivable though they form the only proof of the given condition (*Tay* § 580), but this has been doubted and it has been suggested that the manifested condition and not the sickness itself, is the true *res gestae* to be explained (*Thayer*, 15 Am L R 98 101). So, when the terms upon which husband and wife have lived are material, their letters to each other (*Frelauney v Coleman*, 1 B & Ald 90), or to third persons (*Wills v Bernard*, 8 Bing 376), are admissible evidence of that fact, though not of the truth of all the matters stated. *Phil Ev* p 61. Where the attempt is made to use the independently relevant statement in a probative capacity e.g., as showing some relevant mental condition or state, it cannot properly be classified as part of the *res gestae*. The existence of mental condition or state and may as such, be properly deduced from the *res gestae*. Being however, psychological fact, the extra judicial declarations or cannot well be part, of the *res gestae* prop.

Declaration by accused found with stolen goods. On a charge of larceny, when the accused is found in possession of the stolen goods, and this circumstance is offered against him, the accused's use of his own declaration in exonerating, may be treated from the point of view of several principles. *Wigmore* § 1781. In *R v Abraham*, 3 Cox Cr 430, which was a case of burglary, the defendant had said, before suspicion existed, that he found them in a field. *Alderson* B. possession of the stolen property which made, he had not the *roughurst*, 1 C & K 370, 170; *R v Wilson*, 2 F & F

Other declarations. Statements made by the guardian of a minor, when borrowing money on behalf of the minor are admissible as *res gestae*. *Hanooman v Musst Babooee*, 13 M I A 393 at p 419. Where a person's opinions at a given time are material, *per se* and irrespective of any act, expressions thereof, made at such time, are receivable. *R v Hardy*, 24 How St Tr 1066. These expressions of recognition by the spectators were admitted, to prove that a caricature resembled the object has been co-explain, so explanatory of act.

Declarations under this section, whether an exception to the Hearsay Rule. The theory of the Hearsay rule is that, when a human utterance is offered as evidence of the truth of the fact asserted in it the credit of the assertor becomes the basis of our inference, and therefore the assertion can be received only when made upon the stand, subject to the test of cross-examination. If, therefore, an extra judicial utterance is offered, not as an assertion to evidence the matter asserted, but without reference to the truth of the matter asserted,

3. the Hearsay rule does not apply. The utterance is then merely not obnoxious to that rule. It may or may not be received according as it has any relevancy in the case, but if it is not received, this is no way due to the Hearsay rule. For example in a prosecution against a defuncting embezzler *Doe*, it is desired to show that after leaving his employment, he concealed himself and passed under a false name here his statement "My name is *Roe*" is not offered to evidence that his name was in truth *Roe*, on the contrary, it will be shown that his name was *Doe*, and the statement is not used as hearsay. Or, on an issue of insanity, it is offered to show that the party said, "I am the Emperor of Africa" here the utterance is not offered as evidence that he was in truth the Emperor but, on the contrary, is circumstantially indicating his mental aberration. Again, in an action upon a warranty of a horse, it is offered to show that the defendant at the time of the bargain asserted that the horse was only four years old here the plain prove that the horse is nevertheless twelve defendant's statement with any view to using with just the contrary

desires the jury to take this utterance as evidence of the truth of the fact asserted he would be much disappointed if they should accept it in that aspect, his purpose is merely by this utterance to evidence the anger which he naturally felt upon hearing it. The prohibition of the Hearsay rule, then, does not apply to all words or utterances merely as such. The Hearsay rule excludes extrajudicial utterances only when offered for a special purpose, namely, as assertions to evidence the truth of the matter asserted. *Wigmore* § 1766, *File* also § 60 of the Evidence Act.

When a declaration accompanies an act or conduct it is admissible under this section if it explains the act or conduct. *Hyde v Palmer* 30 L J Q B 126 *Graham Hotel v Manning* 1 R 1 C L 125, *Agassiz v London Tram Co*, 21 W R 193 *Phup Ex Sid Ed* 48. Such declarations attach to the act or conduct some legal effect. The conduct or act standing alone has no definite significance or at best is equivocal, and its whole legal purport or tenor is to be ascertained precisely by considering the words accompanying it. These declarations are not assertions to evidence the truth of the matters asserted. So they do not fall within the rule of Hearsay evidence. These utterances are admitted in evidence not in violation of section 69 of the Evidence Act but as verbal part of the Act or in the common phrase as verbal acts. *Vide Wigmore* § 1772. Declarations of a party said *Clifford J in Insurance Co v Mosley* 8 Wall 411, to a transaction though he was not under oath, if they were made at the time any act was done which is material as evidence in any issue before the Court, and if they were made to explain the act or to unfold its nature and quality, and were of a character to have that effect, are treated, in the law of evidence, as verbal acts and, as such, are not hearsay but may be introduced with the principal act which they accompany and to which they relate as original evidence because they are regarded as a part of the principal act, and their introduction in evidence is deemed necessary to define that act and unfold its nature

it is a statement. That a given declaration was made is simply a fact which should be allowed to give rise to any relevant inference which may properly be drawn from its existence. the range of the *res gestae* may be admitted in evidence. statements may constitute the principal facts to be

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ie, unconditional by evidence of any other fact, and are covered by the paramount right of every litigant to establish the *res gestae* of his case by the best evidence which it is practically in his power to produce. It will not be forgotten, however, that the relevancy of such statements when thus employed is, like that of other *res gestae* facts, constituent rather than probative. *Chamberlayne* § 2593, *Whart Cr Ev* § 266.

proved when they are constituent question can well be raised. In

re se The relation which such

facts sustain to the existence of the right or liability asserted in the action has been denominated as constituent facts. The effect of unsworn statements when thus used on an issue of right or liability present to the tribunal a question of substantive law. Thus, on an indictment for perjury the fact that the defendant spoke the words now said to be false has no proper connection with the rule against hearsay. It is simply a verbal act which assists, with other facts, to constitute the liability with which the accused is charged. As such, evidence of this character is admissible as a matter of course, a *res gestae* or constituent fact. So in a trial of a civil action on an oral contract any material extra-judicial statement made by either of the parties during the period of negotiation in which an agreement is said to have been reached is merely a *res gestae* or constituent

of practical consequence except for purposes of clearance. The fact to be proved may in any case be established equally well circumstantially or directly. It is for example, in the case assumed of an oral contract, by no means essential to admissibility that the unsworn statements of the parties should embody or constitute in and of themselves by a formal offer and acceptance, the precise and entire agreement. Much may be left to the interpretation of circumstances surrounding the transaction. Statements of the parties, however, still perform

The evidence furnished by the independently relevant *res gestae* declaration is primary. Where the extra-judicial unsworn statement is used as evidence of the facts asserted, a superior grade of evidence is possible, i. e., the testimony of the original declarant on the subject. No better or more convincing evidence of the existence of a statement can be given than the testimony of the reporting witness who says that he heard it made. In other words, while the reporting witness, in both cases, testifies directly to the declaration itself, he states a fact when the unsworn statement is to be used as hearsay which tends to establish the truth of the facts asserted only in a circumstantial way. Superior to this, is the direct testimony of the original observer whose statement is reported to the tribunal. The fact, however, that the statement was made is provable by the primary evidence of any person who heard it. A statement which is irrelevant is to be excluded, not because it is a statement, but for the reason that under the fundamental rule it is not evidence, because not relevant. Should such relevancy appear, on the other hand, it is not objectionable that the declaration is self-serving. Nor need the relevancy, provided it exists, rest upon any particular ground, such as contemporaneous incorporation with a principal fact. On an enquiry as to what was actually said, however, the subjective mental condition of the declarant, the extent of his knowledge or his motive to misrepresent, are naturally immaterial. So long, therefore, as relevancy is preserved the unsworn declaration may precede or follow, even by considerable interval, a principal fact with which it is logically connected.

The making of the independently unsworn statements must be proved by proper evidence. Hearsay, for example extra-judicial statements used in their assertive capacity, will be rejected when offered for the purpose. Instances of the independently relevant use of unsworn statements as constitutively relevant

6. are very numerous. On close parallel lines with this employment are found examples of the probative use of such declarations. A particular statement may be regarded as employed in either capacity, according as the specific words themselves effect the legal result which they contemplate, in which case the relevancy is constituent, or, on the other hand, tend to prove the existence of a relevant mental state, in which event their relevancy is probative. *Chamberlayne's Ev* § 2596

Should the unsworn statement in and of itself, logically tend to establish the veracity of the fact in support of which it is adduced, judicial administration is satisfied. Nothing further need be shown. We are not asked to believe that the declaration states the truth. We are merely made to know that it exists. How much the maker of the unsworn statement knew about the matter or what was his motive, if any, to misstate the truth need not be inquired. It is not surprising to find that self-serving declarations are perfectly admissible, although statements in derogation of title are equally competent under proper circumstances. *Chamberlayne's Ev* § 2605

Declarations by bystanders. The independently relevant statement may be that of a bystander. "Courts, so far as they can, are disposed to receive in evidence whatever can throw any light on the matter in issue, and advance the search after truth. No doubt, for that reason, in the case of an exclamation by any one in a crowd when an accident occurs, and the conduct of a particular person is in question, it may be asked whether some one did not call out 'shame', for it is part of the *res gestae*." *Per Pollock C B in Milne v Leister*, 7 H & N 786. Wherever it can fairly be inferred that the declarations of such a person affected the action of the participants themselves in some essential particular, or promoted the doing of some important act, the evidence will be received. The facts that the declaration offered was made while the *res gestae* was going on is not sufficient ground for admitting the statement. So the relation of causation is deemed essential. According to judicial custom in the United States, evidence of the extra-judicial statement of any legitimate purpose connected with part of the *res gestae*. *Chamberlayne's Ev* x 79, where it was held that unless some

common object be proved the declarations of the participants if neither parties nor agents, should be rejected. "But this limitation," says Phipson "cannot be taken as invariable, for the exclusion is not applicable to evidence which is relevant and admissible." *R v B & H 1, Stanley v White*, 11 Cr 111.

The same administrative course is adopted where the exclamation of one standing near is felt to be necessary or expedient for connecting other facts into the narrative of significant events. These declarations of bystanders are not offered in their assertive capacity, i. e. as evidence of the facts stated. *Chamberlayne's Ev* § 2597

Proof of such declarations not subject to limitations of Hearsay Rule. These declarations can be proved whether the declarant be called as a witness or not (*Dysart Peerage*, 6 App Cas 516); or even though he would be incompetent if so called (*Boteman v Bailey*, 5 T R 512; *Aveson v Kinnaird*, 6 East 168, *Aylesford Peerage*, 1 App Cas 1). Nor is it material whether the declarant be alive or dead at the date of the trial. (*Dysart Peerage*, *supra*) *Phipson's Ev* p 59.

Verbal Act doctrine—Strict interpretation of—much valuable evidence is left out. From the illustrative cases given above it is clear that much valuable evidence cannot be admitted if the Verbal act doctrine be too strictly followed as in *R v Beddingfield*, 14 Cox 311. This case was the subject matter

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of the transaction, is a relevant fact. In *Chambers v. Lempert*, 11 C. W. N. 266 at p. 270 the Court said: "We are also of opinion that the statements of Gopal are not admissible against the accused. They are hearsay and proved only by those who heard them. They were not made in the presence of the accused. Hearsay evidence is ordinarily inadmissible and the exceptions are to be found in the Indian Evidence Act. Other exceptions cannot and should not be added." Then it adds at p. 271: "In order to make the statement of a bystander admissible, and Gopal must be supposed to be a bystander, it must have been made, as contemplated by section 11 and illustration (a) to it, at the time the transaction was taking place or so shortly before or after it as to form part of it, and then the statement is the first part of their same judgment. It violates the Rule against But in the latter part it is hinted that had the statement been made during the continuance of the transaction it would have been admissible under this section. So illustration admit declarations which do not violate the

§ 1772

Declarations falling under Verbal Act doctrine must not be confused with Spontaneous Exclamations. Certain kinds of statements are admissible, by universal concession, but which do not fall within the Verbal Act doctrine. The typical case presented is a statement or exclamation, by a participant, immediately after or at the time of the transaction of which it is a part.

v. State, 83 Ala. 230. These exclamations differ from declarations falling under

they clearly do involve the testimonial use of the assertion to prove the truth of the fact asserted,—for example, when the injured person declares who assaulted him. In such cases the statement is either the first part of the transaction or it is a part of the transaction. Some of these are admissible under the Indian Evidence Act. See *Terrence v. Skinner*, 10 C. W. N. 261. In the last mentioned case the facts of which are stated at p. 102 the Court observed: "In the present case

Gopal if he had made any statement, made it after the transaction was over. We do not exactly know what the interval between the murder of Laly and Gopal's statement to the Chowkidar was. Gopal was not then in such condition as to be fabricating evidence or his being out of his state of mind to be such as the law requires. He was perfectly in his senses at the time.

the above observations. The assertions and admissions in evidence had the other requirements been fulfilled. But those

relationship is in the Act. The provisions by the Act to construe the important this inclusion of it is not done. He cloak of

res gestae or as being made in the same transaction. Similarly it has been held that section 11 is controlled by section 32 of the Act. *Bela Rani v Mohabir*, 34 A 341-9 A L J 351-14 Ind Cas 116, see also *P D Sethna v Mir a Mahomed*, 9 Bom L R 1047 dealt elaborately under section 11.

that under excitement and control so response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled

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assault and battery upon the wife of the plaintiff, Lord Holt J "allowed that what the wife said immediately upon the hurt received, and before she had time to devise or contrive anything for her own advantage, might be given in evidence." In *Aleson v Hinnard*, 6 East 193, counsel for the plaintiff contended that

g. Made at the same time. The explanation of the mind and purpose of the actor as it is involved in that fact, they are presumed to be as veritable, as reliable, as the fact is itself, and would

guarded "in its practical application, there is no principle in the law of evidence more safe in its results. In the ordinary concerns of life, no one would doubt the truth of these declarations, or hesitate to regard them, when uncontradicted, as conclusive. Their probative force would not be questioned" *Insurance Co. v Mosley*, 11 Wall 397; *Brownell v R Co*, 47 Mo 246; *Harriman v. Stoe*, 57 Mo 93

The reason for their reception is thus forcefully stated by *Brown J* in *State v Brown* 51 Mo 107.

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giving any weight to such statements made by a declarant, the Court must be
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Reason for accepting such statements In order to admit evidence of such statements, death, absence, etc, need not be shown. This kind of statement ■

"When a person receives a sudden injury, it is natural for him, if in the possession of his faculties, to state at once how it happened. Metaphorically, it may be said, the act speaks through him and discloses its character." *Murray v Boston & M. B Co*, 72 N. H. 32, 37.

6. not admitted, as an exception to the

be obtained from the same person
for resorting to it" *Wymore* § 17
out the party's only defence"

Because "it is impossible for a witness to convey such scenes to the mind and
their effect and influence upon it," so this kind of evidence is more convincing
than the testimony of the persons themselves sometime after the occurrence
Mobile & M. R. Co v. Wright, 49 Ala. 31. "We merely say that, whatever force
is given to dying declarations as the utterances of those who on account of the
peculiar situation may be relied on to tell the exact truth as it appears to them
must needs be accorded also to the exclamations of mental terror caused by a
deadly assault. To reject the evidence afforded by the agonized entreaties
of one standing face to face with death in the person of a murderer with an
uplaid manner, who is a witness by the person of a murderer with an
by
by

had example of the perfection of human reason *Per Barons & M. L.*
Wagner, 61 Me 195

Requisites for admitting such evidence (1) *Nature of the occasion*—There
must be some shock startling one who is not a party to a quarrel and

Thompson v. Lickerton 402

(2) *Time of the utterance* The utterance must have been before there has
been time to contrive and misrepresent, i.e. while the nervous excitement may be
supposed still to dominate and the reflective powers to be yet in abeyance. It is
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Court has said, that the
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said that the declarations must be contemporaneous with the main fact, no
rule can be formulated by which to determine how near, in point of time they

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element for consideration; that being close in point of time ■ not, however, all S. (the basis for receiving such evidence, and that the ultimate test is spontaneity or instructiveness and logical relation to the main event, that the tendency of the declaration was to "reception of such testimony." In a the defendant steamer was backing steamer, who was on the bridge, helm is still a starboard" The

Schualbe, Swab 521 In *R v Lundy*, 6 Cox Cr 477 the deceased's statements on the arrival of on the 21st Ma herself was exclu was whether A c B when running out of the room in which h it had been, was not allowed to be proved by field, 14 Cox Cr 341

In *Hutchins v Railroad Co*, 138 Iowa, 279 the plaintiff fell from a street car, by reason of negligence in failure to let down a folding step As she fell she exclaimed, "Yes, let down the step after I fall" The declaration was a typical instance of re and having the plaintiff with the ever so near in point of time to the fact which is the subject of proof In *Rothrock v City Cedar Rapids*, 128 Iowa, 257, the declarations which referred to the manner and place in which plaintiff had sustained injuries, but were made on the arrival home, that s where hour a that H

end, rather than to er the grounds which Jack v Life Asso-

statements are spontaneous, whether there was an opportunity for fabrication or a likelihood of it; the lapse of time between the act and the declaration relating to it, the attendant excitement; the mental and physical condition of the declarant worthiness jury I

(3) of the o logically person ■ him, the any other to some there is not the same necessity for employing them It seems clear on precedents, that utterances thus relating to some distinct prior circumstance would not be received *Wigmore* § 1750, see *Khyruddin v Emperor*, 92 Ind Cas 442-43 C 372

Know of testime that the de which he speaker.

neither infamy by conviction of crime *Nech v State*, 56 S W 625 the disqualification of insanity should probably be treated for the present purpose like that of infancy *Wilson State*, 49 Tex Cr 50, *Wigmore* § 1751

contemporaneous with the act Now all four c
peculiar to the Verbal Act doctrine, have be
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of expression is frequent enough But such a limitation has no place in this
Exception What is required here is merely that there shall be some startling
occurrence calculated to produce nervous excitement and spontaneous utterance
Wigmore § 1753

As regards the second limitation, ordinarily declarations which do not in
some way or other elucidate or explain the occurrence, are not given in evidence
So from this
6 East 193, in
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should not admit it, if it were a collateral declaration of some matter
happened at another time' So also in *Jassir v Framway Co*, 21 W R 100

the driver "has been off the
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referred to the conduct of the

the beating or so shortly before or after it as to form part of the transaction, is a
relevant fact *Vide illustration (a)* So also in *Milne v Letsler*, 7 H N 786
796, *Pollock O B* said: 'Courts so far as they can are disposed to receive in
evidence whatever can throw light on the matter in issue and advance the search
after truth No doubt, for that reason, in the case of an exclamation by any one
in a crowd, when an accu
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assertion of a past act But under the present exception an utterance is, by

Wigmore § 1756 The case of *R v Bedingfield*, 14 Cox Cr 341 fully reported at p 104 is an example of evidence which is clearly erroneous. The facts of the woman's situation and the recency of the shock, make it one of the strongest in judicial annals. Of course from the Verbal Act point of view, as the declaration did not accompany the fatal deed, it was not contemporaneous, and therefore was rightly excluded. *Vide Wigmore* § 1756

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police that M was not present at the riot and that he had made no charge against him. He stated that the report was written by one J. Subsequently M prosecuted J and P for an offence under section 211 of the Penal Code. Held that the statement made by P to the police as part of a confession or as part of the section 6. *Jalpa v Emperor*, 50 Ind Cas

7. Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.

Illustrations.

(a) The question is, whether A robbed B

The facts that, shortly before the robbery, B went to a fair with money in his possession, and that he showed it or mentioned the fact that he had it, to third persons, are relevant.

(b) The question is, whether A murdered B

Marks on the ground, produced by a struggle at or near the place where the murder was committed, are relevant facts

(c) The question is, whether A poisoned B

The state of B's health before the symptoms ascribed to poison, and habits of B, known to A, which afforded an opportunity for the administration of poison, are relevant facts

objective inference as to the existence of a fact still more complex in its nature,

of men consist, it owes its origin to those which have preceded it, it is intimately connected with all others which concur at the same time and place, and often with those of remote regions, and, in its turn, it gives birth to a thousand others which succeed. *Stark Fr. Vol 1, 496* Such relations make it possible, when the existence of one fact in the chain of causation is asserted, to test the truth of the assertion by an inquiry as to the existence of those facts with which, had

ns to Hearsay Rule, the declarant
 qualifications that would be required
 1751 But infancy is not such a
 , *Beal Doyle v Carr*, 85 Ark 479),
 neither infamy by conviction of crime *Neely v State*, 36 S W 625 The dis-
 qualification of insanity should probably be treated for the present purpose like
 that of infancy. *Wilson State*, 49 Tex Cr 50, *Wigmore* § 1751.

Certain Spurious Limitations borrowed from the Verbal Act doctrine
 Under certain conditions only verbal parts of acts are admissible in evidence
 They are as follows (1) There must be a main or principal act, relevant under
 ade definite; (2) The words
 (3) The words must be by
 the words must be precisely
 contemporaneous with the act Now all four of these limitations, though entirely
 peculiar to the Verbal Act doctrine, have been misapplied in some cases to the
 present exception for spontaneous exception That it is a case of misapplication
 is clear; for here the concern is with a hearsay or testimonial use of words, while
 there no such function is attributed to them *Wigmore* § 1752 So in *Gresham*
v. Manning, 1r R 1 C L 125, *O'Brien J*, said "The act which they (declara-
 tions) accompany should be one that would be evidence in the cause without
 any such declarations" But see *R v Edwards*, 12 Cox Cr 230 This form
 of expression is frequent enough But such a limitation has no place in this
 Exception What is required here is merely that there shall be some startling
 occurrence calculated to produce nervous excitement and spontaneous utterance
Wigmore § 1753

As regards the second limitation, ordinarily declarations which do not in
 some way or other elucidate or explain the occurrence, are not given in evidence
 So from this aspect the limitation becomes a real one In *Aieson v Kinnaird*
 6 East 193, in which declarations of wife upon elopement, charging the husband
 with misconduct causing it, were admitted Lord Ellenborough observed, "I
 should not admit it, if it were a collateral declaration of some matter which

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Wigmore § 1756 The case of *R v Beddingfield*, 14 Cox Cr 341 fully reported at p 104 is an example of this. As an exception to Spontaneous Exclamation the evidence is clearly admissible and the ruling of *Cockburn C J* is plainly erroneous. The facts of the case, in a woman's situation and the recency of the judicial annals. Of course from the fact that the statement did not accompany the fatal deed, it was not contemporaneous and therefore was rightly excluded. *Vide Wigmore § 1756*

Statement made to the police by one of the persons who had committed the offence and handed in a written report.

M. The report was read out to the police that M was not present at the riot and that he had made no charge against him. He stated that the report was written by one J. Subsequently M prosecuted J and P for an offence under section 211 of the Penal Code. Held that the statement made by P to the police was not admissible against J either as part of a confession or as part of the transaction under investigation under section 6. *Jalpa v Emperor*, 50 Ind Crs 487 = 17 A L J 760

7 Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.

Illustrations

(a) The question is whether A robbed B.

The facts that, shortly before the robbery, B went to a fair with money in his possession, and that he showed it or mentioned the fact that he had it, to third persons are relevant.

(b) The question is whether A murdered B.

Marks on the ground produced by a struggle at or near the place where the murder was committed, are relevant facts.

(c) The question is, whether A poisoned B.

The state of B's health before the symptoms ascribed to poison and habits of B, known to A, which afforded an opportunity for the administration of poison are relevant facts.

Principle The principle contained in this section has a logical foundation.

objective inference as to the existence of a fact still more complex in its nature and so on in many degrees of involution. The necessary method of drawing

of men consist, it owes its origin to those which have preceded it, it is intimately connected with all others which concur at the same time and place, and often with those of remote regions and in its turn, it gives birth to a thousand others which succeed. *Stark F. 101 J. 196* Such relations make it possible when the existence of one fact in the chain of causation is ascertained, to test the truth of the assertion by an inquiry as to the existence of those facts with which, had

it existed it would
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and the order of the universe, namely, that there
parallel cases that what happened once, will under
of circumstances, happen again, and not only
again but as often as the same circumstances recur This, I say, is an
assumption involved in every case of induction And if we consult the
actual course of nature, we find that the assumption is warranted The universe
so far as known to us is so constituted, that whatever is true in any one case
is true of all cases of certain description the only difficulty is to find out at descrip
tion' *Mills's System of Logic* Book III Chap III § 1 *Chamberlaine's* L
§ 3150

In order that an alleged actor should have been capable of doing a specific act
which requires his bodily presence at the locus of its being done, it is necessary
where the evidence is circumstantial to establish that he was present at the time
at that place This may be shown by his actions on a previous occasion His
other acts at about the same time as the act in question and near the scene of the
act go to show the same

chief value is that it prevents the accused from denying his presence But the
frequent difficulty here is that the evidentiary fact is not that the accused was
present at the exact time and place of the act, but that he was near enough to have
been able to be there at the exact time and place *Ibid*

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things in which it occurred For all
Cunningham, p 91

Causation *As it is*

Logic p 199

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what acceptance of the words is his expression a cause or effect of the act of stab
bing? Or consider the case of the White Chapel murder in London Upon the

issue, Did Wainwright murder Harriet Lane? It is offered in evidence that the body before the Court is that of a woman who never bore children. How is this a cause or effect of the fact in issue? The widest acceptance of the words 'cause' and 'effect' will not include such facts as these. And if we give them the meaning necessary to make true the statement that relevancy means the statement it self becomes of

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language

"The definition that relevancy means the connection of events as cause and effect, leaves us then, in this difficulty that if we take the words in any, even the widest con-
which we know from
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gone together to make up the state of things existing at any time, and that no fact could ever have existed without the co existence of every other fact that did exist at the same time, then the definition includes everything, and so ceases to be a definition

"Thus the statement that relevancy means the connection of events as cause and effect, requires some addition, if the words are used in any ordinary sense, and some limitation, if they are given a transcendent sense" *Woodhoffs*
p 80

Limit of the rule The rule, therefore, that facts may be regarded as relevant which can be shown to stand either in the relation of cause or in relation of effect to the fact to which they are said to be relevant, may be accepted as true, subject to the caution that, when an inference is to be founded upon the existence of such a connection, every step by which the connection is made out must either be proved, or be so probable under the circumstances of the case that it may be presumed without proof. *Stephens's Introduction* p 70

Occasion, Cause and Effect An event may be evidenced circumstantially by a cause or by an effect. This mode of inference is available in three forms, namely prospectant, retrospectant, and concomitant. For example, the sinking
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ferences, however, rarely raise evidential questions in practice. Thus, in the illustration above used, the destruction of the herbage is evidently relevant, without question, as indicating the same destructive influence of atmosphere, soil, or the like, but in the further process of fixing on the flames in question is the precise cause of the process to effect it. Such a fact is not through an expert witness

of fact. Thus, in general, the inference from an effect to the existence or operation of a cause is usually so proper as to be unquestionable, or else leads to a new controversy as to whether the supposed cause has any causing tendency of the alleged sort, and this new controversy involves a different sort of inference—*Wigmore § 436*

Concomitant Events as the basis of inference An event cannot be inferred from its concomitant event except on the assumption that they have a common cause, or unless the inference is really not one of concomitancy but of cause and effect. An example of the latter sort is the inference of fire from smoke &c., it is really the inference of fire as a cause from smoke as the effect. An example of the former sort is the inference of revolving wheels from the motion of the car &c. there is really an inference, first from the motion to the motive power as a cause and next from the motive power to the revolution of the wheels as a common effect of the same cause. In some instances, however, for practical purposes this latter analysis may be neglected and the inference treated as a single one. *Wigmore § 436*

Real meaning of cause or effect It must be noted from the remarks stated above that, that which is the main or first apparent inference offered is upon analysis to be resolved into an proposition to be evidenced is a ten- inference is from specific instances to the supposed tendency, inference from effects to capacity or tendency to produce those effects illustrates the general form to which all such inferences are reduced. The question at issue may be a conceded injury in a former is the cause

the argument is obviously confined to those things which have a tendency or capacity to produce such effects. Thus while one of the ultimate issues for the Court still remains the question whether the factory caused the injury, yet the subsidiary proposition to which the evidence has to be directed is whether the factory has such a tendency or capacity. In short when it is desired to show broadly the or usually resolve something to and, secondly that something else is evidence of such a capacity or tendency, and it is the second of these inferences which in practice raises evidential questions. *Wigmore § 441*

Principle of probative value—General Rule There is presented as the effect B is introductory or capacity in X is not an abstract and absolute one but a limited and specific one, namely a capacity under the circumstances in which B occurred, to be followed by B. What X's capacity or tendency under other circumstances might be is immaterial, the single question is whether under the circumstances in hand I this specific capacity or tendency by c tendency evidence here, the the case in anying X, unless another

is have a tendency to injure other adjacent houses B, an old house and B" were a wooden house, which was a new brick house, the case B would at most indicate a tendency in X to injure an old house not a new house B, and the case B would at most indicate a tendency in X to injure a wooden house, not a brick house B. The general logical requirement is then that when a thing has capacity or tendency to produce an effect of a given sort is to be evidenced by instances

of the same effect found attending the same thing elsewhere these other instances have probative value—they are relevant—to show such a tendency or capacity only if the conditions or circumstances in the other instances are similar to those in the case in hand. But this similarity need not be precise in every detail. It need include only those circumstances or conditions which might conceivably have some influence in affecting the result in question. *Wignore* § 44⁷. So in evidencing a quality tendency capacity etc. by instances of its effects or exhibitions or operations on other occasions the natural and logical limitation is that the evidential instances should have occurred under substantially the same circumstances or conditions as at the time in question because otherwise they might well be attributed to the influence of some other element introduced by the differing circumstances. *Greenl. Ev.* § 14 (v).

Illustrative cases—Admissible evidence. In *Hunt v. Louell Gaslight Co.* 3 All 169 171, the question was whether the illness of the plaintiffs was caused by gas leaking from the defendant's pipes. In that case the plaintiffs were permitted to offer evidence that A. H. and his family had been in perfect health up to the time when the gas began to escape into their house and that immediately or soon after every member of the family became seriously ill. The sickness of the persons is admissible merely for the purpose of showing the nature of the gas which came into the house to the influence of which all the inmates were subjected alike. Evidence that inmates of another house were held to be inadmissible upon those who
Per Chapman J.

board the defendant's vessel
scurbutic food and medicine

sioned by want of anti-scurbutics

Illustrative cases—Inadmissible evidence. In *Emerson v. Louell Gaslight Co.* 3 All 410 417 the question was whether the illness of the plaintiff was caused by gas leaking from the defendant's pipe. Evidence was offered by the plaintiff that whenever the gas which escaped from the fracture in the defen-

in the occupants of another

When it is asked for example whether certain factory vapours were the cause of a destructive analysis broadest

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of fact Thus, in general, the inference from an effect to the existence or operation of a cause is usually so proper as to be unquestionable, or else leads to a new inference—

Concomitant Events, as the basis of inference An event cannot be inferred from its concomitant event except on a common cause, or unless the inference is based on a common effect. An example of the latter is, it is really the inference of fire as a cause from smoke as the effect. An example of the former sort is the inference of revolving wheels from the motion of the car, &c., there is really an inference, first from the motion to the motive power as a cause, and next, from the motive power to the revolution of the wheels as a common effect of the same cause. In some instances, however, for practical purposes, this latter analysis may be neglected and the inference treated as a single one. *Wigmore § 436*

Real meaning of cause or effect It is above that, that which is the main analysis to be resolved into an inference. Illustrations, to the inference from effects to capacity or tendency to produce those effects furnishes the general form to which all such processes are reducible. For example, the question at issue may be whether the vibrations of factory-machinery have caused a conceded injury in an adjacent house. The main controversy is whether the former is the cause of the latter but, in searching among the probable causes, the argument is obviously confined to those things which have a tendency or capacity to produce such effects. Thus while one of the ultimate issues for the Court still remains the question whether the factory caused the injury, yet the subsidiary proposition to which the evidence has to be directed is whether the factory has such a tendency or capacity. In short, when it is desired to show broadly the occurrence of something to which usually resolves something to which and, secondly that something else is evidence of such a capacity or tendency; and it is the second of these inferences which in practice raises evidential questions. *Wigmore § 441*

Principle of probative value—General Rule There is presented, as the effect B, the introduction of a limited and specific one, occurred, to be followed by circumstances might be immaterial, the single question is whether there was such a capacity or tendency under the circumstances in hand. In looking elsewhere, therefore, to evidence this specific capacity or tendency by observing the same effect elsewhere, the case in any X, X, unless cause other of

Thus, if the proposition is that A factory's vibrations have a tendency to injure an adjacent building B, the falling of timbers in other adjacent houses B, and B might not evidence such a tendency if B were an old house and B' were a wooden house, while B was a new brick house, the case B' would at most indicate a tendency in X to injure an old house, not a new house B; and the case B would at most indicate a tendency in X to injure a wooden house, not a brick house B. The general logical requirement is, then, that when a thing's capacity or tendency to produce an effect of a given sort is to be evidenced by instances

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90, *Ashburner J* in excluding such evidence observed "This class of testimony was incompetent because calculated to surprise and take undue advantage of defendant at the trial. Ordinarily he could not be prepared to meet and contest the merits of each particular case of loss from unknown cause introduced. To deprive him of this privilege would be the denial of the legal right, and to admit them would overwhelm the case with collateral issues of fact and distract judicial investigation, solution of the line of exclusion."
in *v. Westmor*

Classification of such facts. The arrangement of the various precedents in a matter of much difficulty, but having regard to the kind of fact offered in

illness produced by a poisonous substance, injury caused by a defect in a highway etc), and (3) psychological or moral effects, i.e. effects on human conduct (e.g. efforts to escape danger, time required for work, cautions taken out of a dangerous place etc). *Greenleaf Ev* § 147; *Wigmore* § 450

Material effects. Under this head may be noted the use of similar instances as evidence of the character of a place, building, factory, alleged to be a nuisance, in particular a railroad, of the injurious effect of water by flowage, etc., of the injurious qualities of gases on trees, paint, etc., of the tendency of the machines to operate defectively or otherwise, as shown by the other instances of the action of the same machine or of a similar machine; and of sundry other things. *Greenleaf Ev* § 147.

Illustrative cases—admissible evidence. In *Tenant v Hamilton*, 5 Cl & F. 122, the question was whether A's land was injured by noxious discharge from B's works. Lord Cottenham admitted evidence on both sides as to the condition of land similarly circumstanced to those of the party complaining "for ascertaining what the effect was of the smoke and vapour emitted by this manufactory." See also *R v Neville*, 1 Pea N P C 91, *R v Faurie*, 8 E & B 480, 486, 488.

In *Border v Sailard*, 2 Ch D 692, which was an action to restrain a noise

...imately be ascertained, ...
...re case *Lord Selborne* ...
...admissible, when such ...
...tion as to the matter in ...

...Atl 997, the question ...
...was whether a factory caused nuisance. In that case effect of defendant's ...
...business ...

...limiting evi ...
...s observed ...
...complained ...
...neighbourhood ...
...ted, it would ...
...also *Bradley* ...

7. In *Daybe v R Co*, 128 N Y 488, the question was whether damage was caused to plaintiff's building by the operation of an elevated railroad. Evidence of the effect upon premises similarly situated and not too distant was received. The Court in receiving the evidence observed "The Court may undoubtedly in such cases, in the exercise of its discretion, limit the number of witnesses to be called, and may confine the examination of the witnesses to premises in the vicinity, giving a reasonable range."

The tendency or quality of tools, weapons, vehicles, acids, and other materials can be proved by their effects upon similar substances under similar conditions. *R v Heseltine*, 12 Cox Cr C 404.

The question being whether A's premises were ignited by sparks escaping from a railway engine,—proof (1) that the same engine, and other engines of similar construction belonging to the same company, have previously caused fires along the same line is admissible. *Aldridge v G W Ry*, 3 M & Gr 592, *Piggot v E C Ry*, 3 C B 229, *Philp Ev* 133. In *Piggot v E C Ry*, 3 C B 229, *Maule J* in admitting the evidence observed "The evidence objected to was that other engines used on the defendant's line, of the same description as that which was said to have caused the injury here had on various other occasions been seen to throw particles of ignited matter to a distance from the line as great or greater than the spot in question. The matter in issue was whether or not the plaintiff's property had been destroyed by fire proceeding from the defendant's engine, and involved in that issue, was the question whether or not the fire could have been so caused. The evidence was offered for the purpose of showing that it could, and for that purpose it was clearly material and admissible."

Illustrative cases—Inadmissible evidence. The question being whether an obstruction to a harbour was caused by the erection of a sea wall in its vicinity, evidence that similar obstructions occurred at some other harbours on the same coast which were in the vicinity of the sea walls, was held inadmissible, as an attempt *tuem lile resolvers*. *Philp Ev* 133. But in *Folkes v Chadd*, 3 Doug 857, *Lord Mansfield, C J* admitted evidence of the state of other harbours along the same coast where no embankment existed, to show that no such change had occurred as at the harbour in question where an embankment existed.

In *Attorney General v Nottingham Corporation* (1904) 1 Ch 673, where the question also was whether small pox hospital was a nuisance, experience of other similar hospitals as to the risk of infection, was admitted by consent following *Hill v Metropolitan Asylum* (Supra). But *Farrwell J*, in writing the opinion observed "As I understand that this case is likely to go to the House of Lords, I desire to add an observation as to the evidence in the hope of obtaining some direction from a superior tribunal. Both parties concurred in asking to accept evidence in which of what had happened with other hospitals and I acceded to the request in deference to the opinion expressed in *Hill v Metropolitan Asylum District*, and also because the same evidence of the same cases (with the same results) appears to have been admitted in the other reported cases relating to small pox hospitals. The result is that the case has taken a week to try, and I venture to suggest that the admission of such evidence in chief is wrong in principle, as raising a number of side-issues on which it is impossible for the Court to adjudicate without injury to absent parties—e.g. how can I rely on the case without injustice to them?"

In *Hukes v General Electric FL & P Co*, 107 Ky 485, which was also a case of nuisance of smoke etc., effects of smoke in other dwellings were excluded.

In *Lacoste v Alf Co* 9 All Miss 181 which was a case of destroying meadow crops by poisoning of a stream by copper acids, the evidence of similar effects produced upon other meadows along the river, was excluded for reasons of confusion of issues and of the slight probative value. So also where the question was whether the removal of certain stones from a river had caused the latter to wash away the plaintiff's land, evidence that the removal of stones from another part of the river had the same effect was rejected as tending to mislead the jury, no satisfactory proof being given that the conditions of the two occurrences were the same. *Haikes v Charlemont*, 110 Mass 110, *Comm v Piper*, 120 Mass 115 cited in *Philp Ev* 3rd Ed 133.

In *Clark v Water Power Company*, 52 Me 75, which was caused to plaintiff's mills for diverting a stream, evidence of injuries to other mill-owners was rejected.

were no elements of comparison offered which could afford any safe or reliable S. 7
data for the judgment of the jury."

Under this head may be noted
experiment) of the tendency of
of want of knowledge of the nature

of issues as explained above have been thought to have an especial bearing here
The other instances of the injuries thus offered in evidence may concern defects
in high way, or defects in railroad tracks, machines, premises, and the like
Greenl Ev § 14v

Illustrative cases—Admissible evidence In *Spencer Cowper's Trial*, 13
How St Tr 1162, which was a case for murder, the body of the deceased was
found in the river; the question was whether she had committed suicide or had
been killed and thrown into the water The prosecution advanced the proposi

The fact that two other persons had acquired the itch at the defendant's
shop, was held admissible, as showing the unclean condition of the razors
etc In *Croft v R Co L R 1 C P 300*, which was an action for injury on
a defective staircase, evidence from defendant was admitted without question
that about 43 000 persons had passed over it without injury during the previous
year, in which alone it had been used In *District of Columbia v Ames*, 107
U S 519, 524, which was an action for damage caused by a fall on a defective
side walk, evidence was admitted to show that other persons had fallen at the
same place

24 Or, 295

1 found on

In *Schlaff*

bridge were

ular falls at

the same place about the same time, e g a month before or after was admitted;
but evidence of falls at other times or at times unspecified was excluded

Effects on Human conduct—Instances of mental and moral effects, as
evidence The tendency or nature of a material object may often be ascertainable
by seems proper to place here a number
of not usual to perceive such a process
of as at once to embrace the various
kind which their admission depends It
the con

whistle, a pile of stones, a flag, a rail road car etc,—is evidence of its tendency to cause fright in horses. Closely analogous to this is the use, on an issue whether a person's fright and jumping from a train, etc., was natural of the alarmed conduct of other persons in the same situation. On the same general principle—the use of mental impressions is indicating the nature of a material object—the impressions of other persons (usually obtained by experiment) as to whether a thing could be seen in a certain light and position.

or custom under the
of evidence is consistent
propriety in litigation
of others merely,
standard or test of liability or excuse. *Greenl Ev 14v*

Illustrative cases—Admissible evidence In *Brown v R Co* 22 Q B D 391 the question was whether a heap of refuse and earth in a highway, has the dangerous tendency to frighten horses. To prove its tendency to frighten horses the fact was received of the shying of various other horses than the plaintiff's in passing the heap. The finding to B the fact that a mountain on a Saturday the same mountain in 1891. *1 F L R 153, 1*

Illustrative cases—inadmissible evidence In *Wulke v Chelalis Co L & F Co* 55 Wash 324 one instance of another horse being frightened at fresh meat, was excluded. In *Bloom v Town of Delafield* 56 Wis 228 the evidence that numerous other horses had been frightened was excluded. The question being evidence that (1) it had occurred before (2) it had occurred after. *1897* or (2) had *1896, 2 Q B 109* is irrelevant. *Phip Ev 3rd 132*

State of things under which they happened Often the physical conditions under which the main fact happened or any other matter intimately connected therewith must be placed before the jury in order to make the incident intelligible to them. Under such circumstances such facts may be relevant. *Ides R v Bond, (1909) 2 K B 309, Phip Ev 6th Ed 57*

Opportunity Proof of opportunity possessed by the accused to commit the crime may raise an inference that he is the criminal. *Lauzon v R Ev p 38* When an act is done, and a particular person is seen at the scene, it is obvious that his physical presence is one step on the way to the belief that he committed the crime.

not and exclusive the very person a number who are in a way alone, and not exclusive. *Wignore § 131, see also indicted for poisoning R and had opportunities for rr Jones Ev 75f T is using his money. The fact showing an opportunity.*

In *Reg v Graham* 11 Q B 111

the person ther the person a minister. If

he had not the poison, the having the opportunity becomes unimportant. So without opportunity of committing the imputed act, neither existence of motives nor the manifestation of criminal intention by threats or otherwise, followed even by preparations for its commission, can be of any weight. *Wills Cir. Ct. p. 52*. The opportunity is in fact the "state of things" under which an offence took place. Without an opportunity no deed can be perpetrated. Hence opportunity must be. *Wells Cir. Ct.*

On the indictment it may be shown that the accused the offence was committed by evidence that he placed other obstructions on the rails at about the same time. *State v Wentworth*, 37 N. H. 196. So, too, on the trial of a homicide case, where the accused claims that he was not in the vicinity of the place where the crime was committed at the time of its commission, the Government may show his presence shortly before the homicide near the scene of the crime, though when seen by some of the witnesses he was committing another offence. *People v Jennings*, 252 Ill. 531; *Chamberlayne's Ex* § 3250.

Opportunity—Explanation The accused may explain away his presence by any fact of his behaviour consistent with his presence other than doing the act alleged, e g he may have been a mere spectator, he may have come there to solicitate business, he may have been a friend or a relative.

Explaining away; equal opportunity for others. If a person is shown to have been in a building, at the time when a murder was committed he immediately the do that the doing possible with that charged against him. Such is the principle of explaining away opportunity. *Higmore* § 132. When it is proved that another person had a better opportunity than even the accused, the presumption is further weakened. *Lauson's Pre Ev* 387.

In the morning the wife is
was not guilty See also

Exclusive opportunity Exclusive opportunity proves conclusively, that the deed was committed by the person having such an opportunity. *People v Van Horn*, 119 Cal 323-51 Pac 533, *Miller v People*, 39 Ill 566. But it is not always safe to convict a person solely relying on exclusive opportunity of committing the crime in question. The statement will be fully illustrated by the following two cases: (1) A female servant was charged with having murdered her mistress. No persons were in the house but the deceased and the prisoner, and it was secured as usual. The prisoner was co-presumption that no one else could

by means of a
house to an
and committed

the murder, they retreated the same way, leaving no traces behind them. *Starkie*
Ev 4th Ed 865 cited in Best § 453

(2) One Sunday morning when the whole of a household except T, a female servant, was absent at Church, the house was robbed and a small cabinet

containing jewels and gold coin to a very large amount taken and carried away. T maintained that no one had entered or gone out of the house during the time of the family's absence. T was convicted of the robbery. Many years after T, having served out her sentence, was going through the market, a butcher tapped her on the shoulder and said in a half whisper and ironical tone of voice "Ah! he had made that was arrested. He was forgotten to

take some minced veal home on Saturday evening, as he should have done, he carried it in a large basket on Sunday morning. The family had gone to Church, I was upstairs, and setting out and to shut the door off his shoes crept softly

T presently came up to change her clothes, and unconscious that any human being was near her being entirely undressed and contemplating her naked figure uttered the exclamation above, which being plainly overheard by the butcher he immediately went through the house and took what he wanted, escaping by the back door before I was through her toilet. *Trantje's Case, Phil, Cnt Et, XXXVIII cited in Lausons Pre Li, p 355*

Alibi. The theory of an alibi is that the fact of presence elsewhere is essentially inconsistent with personal participation in the crime. It is universally perceived among these defences that the Government show, I present at the place where his act was done and at the time when he is said to have done it. The defendant may properly attempt to show that he was somewhere else at the time, —not for the purpose, primarily, of establishing that he was at the special place at that particular time but with the object of throwing doubt upon the truth of the Government's contention that he was present when and where the crime was committed. The nature of an argumentative traverse which the defendant has assumed the burden of proving, in jurisdictions, the correct rule is adopted, —that it is a necessary part of the Government's case to show, when disputed, that the defendant was present at the scene of the doing of the crime.

Every element of its jury as to whether crime at the time when he must have been there in order to have committed it he is entitled to an acquittal.

"Other Courts confusing the burden of proof with the burden of evidence treat alibi as if it were an affirmative defence in a civil action on which he has the burden of proof and require that, in order that the defence should succeed the defendant should establish affirmatively by a fair preponderance of the evidence, the fact that it was impossible for him to have reached the scene of the crime at the time when it must have been committed. Naturally, in any case, to the weakness of the inference drawn from the fact of the crime home to the accused."

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Cunningham Et

Motive, preparation
and previous or subsequent conduct

8 Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact

The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto

Explanation 1 — The word 'conduct' in this section does not include statements, unless those statements accompany and explain acts other than statements but this explanation is not to affect the relevancy of statements under any other section of this Act

Explanation 2 — When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant

Illustrations

(a) A is tried for the murder of B

The facts that A murdered C, that B knew that A had murdered C, and that B had tried to extort money from A by threatening to make his knowledge public, are relevant

(b) A sues B upon a bond for the payment of money. B denies the making of the bond

The fact that, at the time when the bond was alleged to be made, B required money for a particular purpose, is relevant

(c) A is tried for the murder of B by poison

The fact that, before the death of B, A procured poison similar to that which was administered to B is relevant.

into
with
be

(d) A is accused of a crime

The facts that either before or at the time of, or after the alleged crime, A provided evidence which would tend to give to the facts of the case an appearance favourable to himself, or that he destroyed or concealed evidence, or prevented the presence or procured the absence of persons who might have been witnesses or suborned persons to give false evidence respecting it, are relevant

(e) The question is whether A robbed B

The facts that, after B was robbed, C said in A's presence—"the police are coming to look for the man who robbed B," and that immediately afterwards A ran away, are relevant

(f) The question is whether A owes B rupees 10,000

The fact that, in A's presence and hearing, C said "A owes me 10,000 rupees," and that A denied it, are relevant

(g) A is accused of a crime

The facts that, after the crime, A absconded, or was injured by the crime, or used in committing it, are relevant

average hue or constitution, and it does not follow that because there is something shown which would lead to crime in one man, or many men, that it would necessarily lead to crime in the class under consideration. Many a murder has been committed for the sake of a very few pounds; and yet there are hosts of people to whom millions would not offer the slightest inducement to anything of the kind; and we must be careful not to forget that when we have found a motive which might lead to crime it by no means follows that we have found one which did lead to as well as towards the crime. *Halls' Cr. Ev. pp. 56, 58*

Motive -Judicial Proof of In judicial proof three aspects of the above motive analysis have greatest importance, the first two of which receive little emphasis from the psychologist (A) External stimulus; (B) Expression; (C) Opposition of impulses

External stimulus Whether an emotion was excited at all is the first great question. For this purpose, the facts constituting the supposed stimulus are offered, e.g. lack of money as exciting desire to obtain it.

Expression. On the same question, the existence of an emotion may be evidenced by conduct or words alleged to express it. Whether they do express it may become an important issue.

Opposition of Impulses — Assuming that the emotion is established, and that from its existence it is to be inferred a consequent act, still this evidence may be explained away by the cessation or counteraction of the emotion, e.g. by fear or by lapse of time. This is the other most frequent aspect in judicial proceedings — *Hignire's Principles of Judicial Proof* § 70

Principle admitting motive as evidence. The laws regulating the action of the human mind, in its more obvious manifestations, are known to the Court. The common operations of the mind in men or animals are as fully within the knowledge of the jury as that of a skilled witness. The orderly processes of reason-

What motives influence
instinct for self preservation
gain something when a
Judge's experience and the common knowledge of the community It is known
that persons do not borrow property of no value It will be known that the
desire for gain is so general that men do not gamble except in the hope of gaining
property of some value, and do not hunt for an object which is worthless
Chamberlaine's Ev § 769

Motive is relevant. In *Palmer's Case*, 1856, *Wills* 931, *Lord Campbell C J* said "It is of great importance to see whether there was a motive for committing such a crime, or whether there was not." *Lord Alton of Liverpool C J* also took the same view in *Bennell's Case* reported in *Times* (1901) Feb 25, *Wills* 167, see also *R v Dill* 12 Cox 202. *Cresswell v Cox* 509 (510); *R v Westcot*, 25 T L R 1. *Cleaves*, 4 C & P 231, *Y 245, 251*, *Hoodroff*. *J* said "It is always a just argument on behalf of the accused that there is no apparent motive to the perpetration of the crime. Men do not act wholly without motive. On the other hand, proof of motive tends in some degree to render the act so far evidence of guilt." But when the evidence is circumstantial only, and the guilt of the prisoner is only inferential and is not proved as a matter of fact by the evidence of witnesses, the question of motive becomes of vital importance, or even made reasonably certain. *lex v Monson* (Not Trial) 1 Park C C 32, where a murder is charged and the evidence is wholly circumstantial then it is peculiarly proper to look at the motive. And in all cases you will naturally seek for the motive. And where the proof is circumstantial, and there be doubt about the circumstances, then it becomes

8 important to examine into the motive. If how ever, the evidence of murder by design be direct and positive, then the guilt is established without looking further. And in all these cases a question as to the adequacy of motive almost always arises. It is commonly generally that the motive was inadequate, that it is not sufficient to induce the commission of murder. But all this must depend on the peculiar circumstances of the case and the peculiar character of the accused. There is no motive which, to the mind of an honest man, can be a pretext to the commission of a crime and just in proportion as the mind is debased and immoral, to that extent the motive may be less which induces the criminal act. Hence, there can be no one rule for all cases as regards adequacy of motive it must depend on the moral character of the person accused in each case. The worse it is the less the motive which will tempt to the commission of crime."

Whether motive is a necessary element in the proof of murder is a question which has been much discussed.

Prof. H. J. Moore that show a possible motive.

118 So a motive is a point on a trial for a motive becomes relevant in very many cases.

arises at or near the time of the act. *The People, 1 Parl. C. C. 30 in Poulter v. The People, 151 U. S. 39, 413.* *Hurlan J. observed:* "The law does not require impossibilities. The law recognises that the cause of the killing is sometimes so hidden in the mind and breast of the party who killed that it cannot be ascertained by the jury. It does not require a direct item of evidence."

going to show whether a particular party may have committed an act, and sometimes going to show the characteristics of that act. It is not indispensable to conviction that the particular motive for taking the life of a human being shall be established by proof to the satisfaction of the jury. The absence of evidence suggesting a motive for the commission of the crime charged is a circumstance in favour of the accused to be given such weight as the jury claims proper, but it is not a necessary element of evidence.

crime is a thing of half frenzy and intelligible incentives to crime. But a prisoner's counsel there is no motive for no more than that the motive has not been committed there must have been a motive or incentive, and yet we may never discover what it was. The motives of human action as we know from history and experience, are often inscrutable. When any person committed a heinous crime, it is usual and natural, to look whether there existed any adequate motive.

crime is a thing of half frenzy and intelligible incentives to crime. But a prisoner's counsel there is no motive for no more than that the motive has not been committed there must have been a motive or incentive, and yet we may never discover what it was. The motives of human action as we know from history and experience, are often inscrutable. When any person committed a heinous crime, it is usual and natural, to look whether there existed any adequate motive.

Adequacy of motive. In *Reg. v. Palmer* Will's Cir. L. 63, *Collyer's Case* Lord Chief Justice Campbell observed of great importance to see whether crime, or whether there was not a motive.

Absence of proof of motive when material. "Motive to commit crime, if shown may in many cases be sufficient alone, almost to induce a belief of guilt. Upon the other hand where no motive for the commission of a crime can be shown, it is a small matter."

3. any facts or circumstances which tend, even in the slightest degree, to show motive, therefore properly excluded unless the Court can be thought of as necessary and unusual, namely, the circumstance must have excited the emotion must be shown to have probably become known to the person; because otherwise it would not have affected his emotions. *Wigmore § 59. In Son v. Terr, 5 Okl 521 Dile C 1* said "A motive cannot operate to influence motive. The facts upon which are known by the party against whom should contemplate an undertake a great wrong against another, — such a wrong as would induce in the mind of the person against whom it was directed a motive to kill, — and yet such contemplated wrong was unknown to the party, it cannot be justly said that a motive to kill could exist, because the party wronged had no knowledge of the facts which would be necessary to create the motive." But the evidence as to the motives which led a prisoner to commit a crime, must be of the strictest kind. *Queen v. Zahur, 10 W R Cr 11*

A motive is generally proved by showing the desire of gain, the gratification of passion, or the preservation of reputation accomplished or attempted or able to be accomplished by the perpetration of the crime charged. *Tolson's The Empress Ly p 177* But strictly speaking the circumstances that may serve as motives for other deeds are innumerable. In many cases several passions may lead to a desire to kill. *See The Vrs Mayrick v. Cree, Notable Trial Series*, where a lustrous intrigue with another man was held to be a sufficient motive by *Stephen J* for getting rid of her husband. So also in *Prichard v. Case (Not Tr)* the crown suggested that the prisoner's motive for poisoning his wife was to make way for a second marriage, see also *Reg v. Stauntons (1876) Notable Trials, Cryppen's Case (Not Tr)*. So a man who counts his neighbour's wife has a motive for desiring the death of his neighbour. *State v. Lee, 4 Kan 767*. Sometimes murder is committed in order to prevent the discovery of a former crime or of evading an arrest or See also illustration (a) previously employed. *Relevant R v. Clever, 4 and former parish, had appears at R's house, then to his room and cuts her t* See also *R v. Richardson, Burr Cr L v 213*

"In several ways the pecuniary circumstances, of one or another person or trying may tend to show the excitement of a motive in some person. It will be convenient to distinguish the situation according as the evidence deals with (1) the pecuniary condition of A as exciting exciting a motive to respects," *Wigmore § with B who keeps*

crime is not far to seek. The appellant was in very poor circumstances. But the practical result of much unfair suspicion and fairness this argument. The motive is in under no reasons of the graver below C J. true that in a large party accused of The reason for the certain or known conclusion which is a man is destitute

or fraud because he was in embarrassed circumstances, but for the purpose of showing the natural and necessary consequences of his act which the law presumes he intended. . . . If at the time of the transaction he was deeply insolvent, and was cognizant of his condition, the necessary consequence of his act was to deprive the vendor of his property without recompense or the chance of payment, and leads to the just and almost unavoidable inference that it was done with an intent to defraud." *Wigmore* § 392, but see *Tauell's Trial*, *Woodall's Celebrated Trials*, I, 189. On the other hand the fact that a person was in possession of money tends to negative his desire to obtain money by crime or borrowing. So in *R v Grant*, 1 F & F 322, where the indictment was for an attempt to obtain the insurance, evidence of the defendant's wealth was admitted. In that case *Pollock C B* said "the circumstances were such as not to raise any temptation to the act. . . . where the motive is a pecuniary one, the wealth of the offender is no unimportant consideration." *Peel C J* in *R v Hedger* cited in *Woodroffe Stt Et p 112*.

Motive, how to be proved
1031 *Mad* 689-61 M L.

can be proved by direct evidence

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used

was financially embarrassed and had attempted to cheat on other occasions. In *Wigmore* § 392, it is said that "the intention or design is of the essence of the crime. . . . if the defendant did other acts similar to those charged in the indictment." *Walsburg Vol IX p 380*; see also *R v* 16 *Cox* 387, *R v Flanagan*, 1 *Cox Cr* 40; *R v Debendra*, 36 *C* 573; but see *Impero v Panchudas*, 47 *C* 671-24 *C W N* 501.

Conduct proves motive. Motive in the sense of emotion is often proved by conduct of a person. In *Com v Webster*, 5 *Cush* 295 (316), *Shaw C J* said. "The ordinary feelings, passions, and propensities under which parties act, are facts known by observation and experience, and they are so uniform in their operation that a conclusion may be safely drawn that, if a party acts in a particular manner, he does so under the influence of a particular motive."

Feelings at other times. Where an emotion of hostility is to be proved the existence of the same emotion at another time is clearly admissible. *R v Law*, 10 *M* 270; *R v* 15 *C* 145; *R v* 15 *C* 145; *R v* 15 *C* 145.

tends to show . . . if it is relevant to the issue, it is admissible. *A I R* 1927, 19 *C W N*. Sind 28, *Mal* 483. It is material to the purpose.

of gain do resort to the nefarious system of entering into a transaction unauthorisedly in the expectation of its subsequent ratification, but it is a far cry that because an agent had been shown to be guilty of shady practice once, his evidence is to the circumstances under which the contract in suit was entered into should be entirely discarded. *Tyebally Abdul v Mrs James*, 1921 Sind 105=80 Ind Cr 100. So also where certain persons are charged with murder it is not open to the accused to adduce evidence to show that on two previous occasions the accused had committed the same offence but had falsely charged because the fact does not constitute under section 301 of the Act, a motive or preparation for the subsequent murder. *Gangaram v Imperial*, 62 Ind Cas 745=22 Cr L J 629. So also *Imperial v Gangaram* 22 Bom L R 1271.

Preparation Preparations on the part of the accused to accomplish the crime charged or to prevent its discovery, or to aid his escape, or to avert suspicion from himself are likewise relevant on the question of his guilt. *Lauzon's Presumptive Evidence* p 394. For preparation is a part of a design or system, vide note under s 15, under the heading "Theory of evidencing Design or System." Premeditated crime is a crime which must necessarily be preceded not only by impelling motives, but by appropriate preparations. Possession of the instruments or means of crime, under circumstances of suspicion—as of poison, coining instruments, combustible matters, picklocks, house-breaking instruments, dark lanterns, criminal or suspicious weapons, materials or instruments, are important facts in the judicial consideration. If a man had in his possession a large quantity of countess evidence that he was the murderer, it was held to raise a presumption that he had procured it with intent to slay it. *Rex v Fuller*, R & R 303. But the personal character for probity and the civil station of the party, are highly material in connection with facts of this kind. A medical man for instance, in the ordinary course of his profession, has legitimate occasion for the possession of poisons and lock smith for the use of picklocks. Facts of the kind referred to become more powerful indication of guilty purpose if false reasons are assigned to account for them as in the case of possessing poison that it was procured to destroy vermin, which is the excuse commonly resorted to in such cases. *Wills' Cr L* pp 79-80.

Preparation to accomplish the crime charged or other act Evidence tending to show that the accused was preparing to commit the crime is always admissible. The present case is one in which the accused was charged with only evidence of a design or not to do a given act has been shown. The existence of such evidence is not sufficient to prove the fact was done or not done. A plan is not planned. There is no evidence of such evidence. *Wignore* § 102. The bare possession of the means or mere acts of preparation are not in general of great weight without more conclusive evidence, because the intended guilt may not have been consummated; and until that takes place there is the *locus poenitentiae*. *Wills' Cr L* p 80.

In *State v Adams*, 20 Kan 320 which was a case for burglary, the four accused held a meeting to arrange for the crime. A bar of iron and a pair of pincers were alone necessary, and these the accused brought, the facts were admitted of the accused having taken a carpenter's brace from a store and hidden it; a third person removed it, and the defendant never used it. *Brewer* observed: "Would not the act be one tending to show preparation,—a preparation—frustrated by the unexpected act of another? Could it not be shown that the accused had immediately prior thereto was providing for the crime? If one weapon was not in order. Would the others was admitted? It is enough that the time, and then the motive

The fact of possession of a number of false coins, wrapped in separate papers, etc., was admitted to show a plan to utter them. *R v Jarvis*, 7 Cox Cr 53. A was accused of the murder of B by poison. C of the murder of D by shooting, E of committing a burglary, I of arson, G of counterfeiting. The fact that A had previously purchased some poison; that C had bought borrowed or stolen a gun or pistol that E had procured an axe a picklock or a dark lantern, that F had procured a quantity of turpentine, that G had made an instrument to manufacture coin are relevant and raise an inference of fact of guilt in each case. *Lawson* Pre F1 § 106, see also *R v Hill* 20 How St Tr 1317; *People v Carroll* 12 Cr 17. The fact that I, a few days prior, had procured a pistol and had spent sometime practising at a mark, is relevant. *R v Parbot* 18 How St Tr 1261. S was indicted for murdering R by shooting. The fact that a day or two previous S had borrowed a gun from a friend stating that he wanted it to kill deer with, is relevant. *Stranger's Case* 5 Leg Obs 91.

Preparation to prevent discovery of crime. An innkeeper and his wife are accused of a murder of a guest. It is shown that on the night the murder was committed they sent the maid servant out of the house and when she returned made her sleep in another part of the building. This is relevant. *Draine's Case* 5 Leg Obs 123, *Ferris's Case*, 19 How St Tr 904.

Preparation to aid his escape. A was charged with the murder of T. The fact that the day before the murder A had drawn a quantity of money from a bank in which he had it on deposit, is relevant as raising an inference that he was preparing to escape if necessary from the country. *Adam's Case*, 11 Leg Obs 410.

Preparation to avert suspicion from himself. B and P lived in the same house and the former, while sitting one evening in his parlour was shot by a pistol in an unseen hand. B had at home a loaded gun. B claimed at the time by him. This fact is relevant. *Pre Ev* p 581. A

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Apparitions noises voices music, reported to be heard from time to time in the deceased's house, even his days are numbered out, and his own child limits the space of his life but till the following month of October. What could be the meaning of this but to prepare the world for a death that was pre-determined? who would limit the days of a man's life but a person that knew what was intended to be done towards the shortening of it?

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of which the preparations were made may have been subsequently frustrated or voluntarily abandoned. *Lau v. Pre* 100. A is indicted for murdering B by poisoning him. It appears that shortly before A purchased a quantity of poison. This raises an inference of guilt. The poison for no other reason than to kill & of guilt. *Best* 12 § 456. A is accused of the sometime previous had spread a rumour that on account of his nervousness not be likely to live long. It turns out that A was really speaking the conviction of his own mind. This destroys any inference of guilt. *Best* 12 § 456, *Hills* 12 81, *Leg v. Blane*, 20 C. C. C. Sec 3 Pap 411 (1814), *Leg v. Hartley* Times August 18th, 1861 cited in *Hills* 12 81. A is found killed by a bullet from a gun. It is proved that B a neighbour had purchased a gun the day

Conduct of any party. The second paragraph of this section makes relevant the conduct of any person who is a party to a suit or proceeding in reference to such suit or proceeding or in reference to any fact in issue therein or relevant thereto. The conduct of a party interested in any proceeding at the time when the facts occurred, out of which the proceeding arises, is extremely relevant. *Per Patterson C. J. in Queen Empress v. Abdullah* 7 A 385 (1 B) up 391, see also *Dalambul v. Ghansham*, 22 C 391 401, 406. *R v. Isher*, 29 A 46. *R v. Heramun*, 5 W. R. Cr 5, *R v. Mahi* 37 A 895. *Dalij Singh v. Anant Kanwar* 30 A 238 (P. C.), *Fa uruddin v. King Emperor* 42 C. L. J 111-90 Ind Crs 133. The word 'party' includes not only the plaintiff and the defendant in a civil suit, but parties in a criminal prosecution, as for instance, a prisoner charged with murder. This section provides that the term is to include any one against whom an offence is the

of a party is relevant. *Anjivun v. Emperor* 53 C 312. A person and the latter tion, porin but (Eng) -

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mute at the place where a dead body was found during the police enquiry, and

subsequently in Court are not admissible against the accused as conduct under s 8 of the Evidence Act *Samaul v King Emperor*, 5 O C 216 But the signs made by the deceased, being the conduct of a person, an offence against whom is the subject of a proceeding are relevant under s 8 of the Evidence Act *Queen v Abdullah* 7 A 395 (F B) = A W N 1885, 78

Conduct, meaning of Conduct is the expression in outward behaviour, of the quality or condition operating to produce those effects These results are the traces by which we may infer the moving cause In point of time, conduct is closely associated with the internal condition giving rise to it; nevertheless the indication is strictly not a concomitant, but a retrospective one, because the argument is backwards from effect (conduct) to cause (internal condition) *Wigmore* § 199

Criminality of conduct, if material if it is otherwise relevant On principle the criminality of conduct is immaterial if it is otherwise relevant In *Blake v The Soc* 11 Cox Cr 251 *Lord Coleridge C J* said "In any but an English Court and to any but an English lawyer, the controversy whether this evidence is admissible or not, would seem, I imagine supremely ridiculous; because
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conduct as showing other things If there is any other material or evidential proposition, for which it is relevant, and if it is offered for that purpose, it is receivable and its quality as misconduct or crime does not stand in the way *R v Wyley*, 2 Leach, 11th Ed 985 986, *P v Moore*, 2 C & P 235, *R v Poole*, 7 C & P 517, *R v Tinsington* 1 Cox Cr C 12 *R v Dorset*, 3 C & K 306, 2 Cox Cr 213 *R v Bealstead*, 2 Cr & K 76, *R v Gearing* 18 I J M C 215, *R v Weeks*, Leach & C 18, 21 *R v Bearden*, 4 F & E 79, *Blake v Assur Co*, L R C P D 91, 102 In *R v Richardson*, 2 F. & F 346, *Williams* 1 said "There is no principle of law which prevents that being put in evidence which might otherwise be so merely because it discloses other indictable offence Evidence which is admissible for such other felon
520, 541, ■

antecedents as for the purpose of showing that he had opportunities of committing the offence, or that in a particular instance his act could not have been accidental But these cases only establish the principle that a relevant fact which is hereby rendered inadmissible

Walkers Case 1 Leigh

should exclude them, more than other facts apparently innocent Thus if a man

murder just before the act was committed is undoubtedly admissible although it has the tendency to prove the prisoner guilty of a larceny Such circumstances constitute a part of the transaction and whether they are perfectly innocent themselves, or involve guilt makes no difference as to their bearing on the main question which they are adduced to prove But if the circumstances have no intimate connection with the main fact if they constitute no link in the chain of evidence then, supposing them innocent

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undoubtedly

- 8 not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment. It is likely which alluded tends to show the commission of other crime & does not render it inadmissible if it is relevant to an issue before the jury. So evidence of conduct or character is inadmissible if otherwise relevant. *Injurer v Steiert* 21 S L R 65 = A I P 1927 Sind 25, see also *Heera Gajjar v Injurer*, 21 Bom L R 724 = 5. Ind C 15 601

Antecedent conduct Under this head come motives to commit the offence, including preparations for the commission of it, declarations of intention and threats (b) and (c) are instances of antecedent conduct. 'In trials for murder enmity against the dead man and previous conduct are accepted as evidence. *Per Fort* *Illin on in Director of Public Prosecution v Ball* 80 L J K B 691 at p 692 = (1911) A C 47

Previous attempts to commit it Previous attempts to commit an offence are closely allied to preparations for the commission of it, and only differ in being carried one step further and in their proximity to the criminal act of which they are like the former they fall short. *Test* § 1. *Bentley Jud Fo 69* So a former attempt by the accused to perpetrate the same crime in the same or in a different manner is relevant on the question of his guilt of the latter crime. *Lacey v Pre* 559 A 1 in dicta for poisoning his wife by giving her laudanum. The fact that A had on a former occasion given her laudanum which made her sick is relevant. *Johnson v State* 17 Ala 657. In that case the Court observed that his former attempt to poison his wife had been proved by a witness on the trial the question of the admissibility of the

guilty knowledge in the first instance house in order fire to his house *Graj* 4 F & F Z had previous 18 L J (N C) 2 C & K 300 that V, at is charged ous day th *Dorgelt* 2 C & K 306

domestic circle but in doing so if he would be very material. In such a case attempt to poison the patient might not be a felony for the purpose of showing that A is charged with setting fire to his house. A had previously attempted to do so. The fact that A had previously attempted to do so is relevant. *Per* *R v Gearin* and *R v Donnell* also *R v Donnell* 'him Proof & R 53 D on a pre-ant h v

mal or tortious § 919 the sion and the Et Fr 1371 the accused, now at sev ral d he would int [these on that of

qualification [the circumstance] that the saying that a son would cut a father's throat is but a remote circumstance. It is replied that the law and lawyers do not regard it as a remote qualification were to that it ad it is

that
he said his father these six or seven years this is relevant *State v. Landfield*,
11 How St Tr 1397. A woman and her paramour were accused of murdering
her husband.
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witness
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of J.

St Tr 841 J. is indicted for the murder of W. The fact that J sometime
previous said that he intended to "lay for W if he froze next Saturday night" is
relevant *State v. Humph* 116, *Republican v. Rob*, 1 Dall 145 If J is
charged with the murder of W. He has been heard to say of W "If he don't
do as he has agreed to do I will kill him" This is relevant *People v. Hon* 2 Wheel,
Cr Cas of her husband, she had
previous If she had a dose she would
give it to him this is relevant *State v. Wylie* 15 How St Tr 1273 S
was found dead in a well. It is proved that some time previous T had said that
he would put S "in the well for two coppers" This is relevant on the Trial of
T for the murder of S. *W. Spooner v. Case* 2 Chand Cr Tr 14 R is indicted
for murder of S. Before the murder R was heard to say of S "I will kick
hell out of her I will break her damned neck" This is relevant *State v.*
Reed, 62 M C 130 In this last mentioned case the Court observed, "Threats
are significant. Out of the abundance of the heart the mouth speaketh, Threats
unexecuted amount to nothing, but when the thing, threatened is done, and
is done as it was threatened, then the fact of the threat becomes an article
of circumstantial evidence tending to inculcate the person threatening 'I will
break her damned neck' The dislocated neck of the victim of wrath and violence,
her beaten and bruised body, show that what was threatened, was done The
content of a man's language is to be judged of by the facts, and by the manner in which

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threats indicate an intention
a probability that he has
exclusive, but it may be
determining the question of guilt *North v. K* 10 Bl, 100 110 111 112 113
Hagan, 12 Cox Cr 357, which was a case for murder of a child brought up in
the family of the accused the following statement of the accused about a fortnight
before, "the child is no good, he is eating the other children's food" was
admitted

Time of threats In *Redd v. State*, 68 Ala 492 (496) *Brickell C J* said "The
length of time elapsing between the making of the threat and the criminal act,
when the crime is to be proved only by circumstantial evidence, is of importance
inasmuch as a long period intervenes,
injury and there
it would be a slight
there would be more
thoughtless utterance,
length of time would
be the So the

probative force of the
during the whole
continued to exist;
that may have been
Wigmore § 108

8. Plans and Intentions as to wills, contracts, Deeds Where the issue is whether a will was executed, or whether a will was revoked or whether a will was made in a certain tenor or provision (as where an alteration is at issue) the plan or design or prior intention of the testator is relevant to show the doing or not doing of this alleged act, as any other act. The argument is, "because he planned to make a will or planned to revoke a will, or planned to will property to A, he executed his will, or he carried out his plan." The relevancy of such a plan is not affected by the fact that the testator died without having executed a will.

Contemporaneous Conduct This would include the pleadings of parties their behaviour as such, and their demeanour as witnesses. Do enough Cr. P. 32

Illustrative Cases. The fact that the accused pointed out the place where the weapon (with which the murder was committed) was concealed in a very agitated state and showed the spot where the weapon used in the commission of the murder was concealed are evidence of conduct under this section, which renders highly probable the oral evidence in the case.

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Falsehood, fraud, fabrication and suppression of Evidence, etc. It has always been understood—the inference, indeed, is one of the simplest in human

experience—that a party's falsehood or other fraud in the perpetration and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation, and all similar conduct, is receivable against him as an indication of his consciousness that his case is a weak or unfounded one, and from that consciousness may be inferred the fact it merit *Wymore* § 278; vide illustration (c); *Palmer, Cockle* Cr 17 58. In the last case to the jury said "Then gentlemen it is attention to the conduct of the prisoner at the bar, and there are some instances of his conduct of which you will say whether they belong to what might be expected from an innocent or a guilty man. He was eager to have the body fastened is certainly

was being conveyed, to be analysed; he obtained of his guilt. Again, and procuring from the postmaster the opening of a letter from Mr. Anjor, who had been examining the contents of a jar, to Mr. Gardiner, the attorney employed on the part of Mr. Stevens. And then, gentlemen, you have tampering with the coroner, and trying to induce him to procure a verdict from the coroner's jury which would amount to an acquittal. So a party who gives or produces false evidence may by so doing give rise to a general presumption against the truth of the case. *Gurish Chunder v. Iswar Chandra*, 3 B L R A C J 341, see also *Step Dig Fr Art* illus (c), *Annesley v. Earl of Inglesca*, 17 How St Tr 1217. In *Morarity v. R Co*, L R 5 Q B 319, *Cockburn C J* said "The conduct of a party to the cause may be of the highest importance in determining whether the cause of action in which he is plaintiff, or the ground of defence if he is defendant, is honest and just,—just as it is evidence against a prisoner that he has said one thing at falsehoods leads to an inference can issue. So, if you or and his endeavoured to have recourse to perjury, it is strong evidence that he

succeed by righteous means, has recourse to means of a different character, that that which he desires, namely, the gaining of the victory, is not his due, or that he has not good ground for believing that justice entitles him to it. but it is always evidence. In *R v. Castro* (*Pichborne Case*) *Cockburn C J* in his charge to the jury said "these falsehoods [of the defendant], however, must not operate unduly to the prejudice of the defendant beyond this, that falsehood is a badge of fraud; and a case which is sought to be supported by means of deception may 'prima facie', until the contrary be shown, be taken to be a bad and dishonest case, and further, the recourse to fraud and falsehood necessarily engenders distrust." Similarly, *Phillimore J* in *R v. Platt* 20 Cox Cr 852

R v. On D 657, 645. In the last mentioned case which he can he was

R v Donnell, Wills' Cir Ev 188 A is accused of shooting B with a pistol. A pistol is found beside B in such a position that it would appear that it is a case of suicide. But it is proved that it is A's pistol and that A placed it there. This raises a presumption of A's guilt. *R v. Green, 7 How St Tr, 159*

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if a witness has been suborned by B, a clerk in the defendant's bank, it is idle to argue that such a clerk has no implied authority to tamper with witnesses, and

the question, whether the offer of evidence by one employed as an agent to procure evidence is admissible, and "This is a lawful employment necessary in many cases, and being a lawful employment, it is to be presumed, until the contrary be shown that the employer means and intends that his agent shall execute it by lawful means. The prosecutor may, up to the very moment when the proof is offered, be wholly ignorant of the wicked act of his agent, it is

informed of it, he may have rejected it with the proffered testimony and withholden the same. If he is absent from the trial, which frequently happens, it may be impossible to prove his ignorance in the one case or the propriety of his conduct in the other. [Nevertheless] I am by no means prepared to say that in no case and under no circumstances appearing at a trial might not be fit and proper for a Judge to allow proof of this nature to be submitted.

Subsequent conduct. Subsequent conduct of a party or his agent is relevant to this class belong sudden change of life or circumstances, silence when accused false or evasive statements made by the accused, suppression or elignment of evidence, forgery of exculpatory evidence, evasion of justice, by flight or other wise, tampering with officers of justice, and fear, indicated either by previous conduct, or by a previous occasion, or by the conduct of the accused. *Ganesh*

Demeanour when charged, of accused. One of the common and established

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which consists of outward signs of conscious guilt? So far from it, any indications of it, arising from the conduct, demeanour, or expressions of the party, are legal evidence against him. The law can never limit the number or kind of such indications. In *Moore v State*, 2 Oh St 592, *Caldwell J* said: "From our knowledge of the human mind and its workings, we expect, with almost positive certainty, that when it is the sole repository of so dreadful a secret it will affect the conduct and sayings of the person; hence the mind naturally looks to these with the most anxious scrutiny, and would require for its satisfaction, if such a thing were possible, a complete transcript of the person's conduct and sayings. Sometimes a person is detected as the author of the crime by showing an unusual anxiety to discover the perpetrator, at other times the discovery is led by the person showing too much indifference. In some instances the observation that the person appears to know too much about the transaction leads to the discovery, at other times the inquiry is started by his appearing to know too little. These are generally acts that in themselves show no disposition to do mischief, but it is because they are unnatural, because they tend to show a mind conscious of guilt that they are in themselves nothing, except as evidence. So the conduct or demeanour

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Demeanour during trial The demeanour of an accused person in Court during trial is too elusive to be justifiably considered as any indication whatever. *People v People*, 140 Ill 50. But the accused is the witness stand and during the trial. *Rider*

Flight etc Flight from justice, and its analogous conduct, have always been deemed indicative of a consciousness of guilt. *R v Sorab Roy*, 5 W R Cr 23, *R v Gobardhan*, 9 A 528 (568); *Gangaram v Emperor*, 62 Ind Crs 545. The wicked flee, even when no man pursueth, but the righteous are bold as a lion. *Wigmore* § 276, *Best Ev* § 460. In primitive times, the accused who fled, whether he be found or not, was held guilty. *facinus qui jud* law will not a

are admitted. *Wigmore* § 109 b. In prosecution a prisoner has at he has ended, that unconsciousness of is very great. *Johnson* is period Under importance probably shown charged

with an offence different from that for which he was being tried, no effect should be given to his running away. *Rakhial v Queen Empress*, 2 C W N 81. In *R v Donnell*, 2 R Rep (1817) p 175 Abbot J said "A person however conscious of innocence might not have courage to stand a trial, but might although innocent think it necessary to consult his safety by flight. But see the case of *Deacon Dohe* Not Tr, *R v Crispen*, Donough Cir Ex p 40.

In *R v Hry* 2 C & P 159 which was a case of trespass, running away from the premises when let out was admitted as evidence of not being thereby permissive. The reason of this presumption is thus stated by Parker J in *Start v L* 164 U 5 (2). "The law says that a man is to be judged by his consciousness of the right or wrong of what he does, to some extent. If he flees from justice because of that act, if he goes to a distant country and is living under an assumed name because of that act the law says that is not in harmony with what innocent men do and jurors have a right to consider it as evidence of guilt, because he is in the witness to the occurrence, he knows how it felt, therefore he is presumed to have a consciousness of that act. It is a principle of human nature—every man is conscious of it, I apprehend—that if he does an act which is conscious is wrong, his conduct will be along a certain line. He will pursue a certain course not in harmony with the conduct of a man who is conscious that he has done an act which is innocent right and proper. The truth is—and it is 'an old scriptural adage'—that the wicked flee when no man pursueth but the righteous are as bold as a lion. Men who are conscious of right have nothing to fear. They do not hesitate to confront the jury of their country, because that jury will protect them."

Explanation of flight etc. When a flight has been proved as furnishing evidence of guilt it is competent for the accused to prove other circumstances which may have influenced him to fly, and leave the jury to decide whether his flight was caused by a consciousness of guilt and apprehension of conviction or by any other cause. As he may prove to his satisfaction *Kennel v Com*, 14 Bu H 316. *Rakhial v Queen Empress*, 2 C W N 81. *Gaujam v Inspector*, 62 Ind Cir Cr 14 = 14 I J 229. Evidence of fact that he had been advised to leave, to avoid vengeance by the leaders of his friends is allowed. *Ruthe v U S* 3 Ind 604. To the same end the advice of friends may be assigned as the cause of flight from the jurisdiction. In all cases the accused is entitled to prove by his own testimony the actual motive which has influenced his conduct. An absence due to insanity obviously gives rise to no inference of guilt. *Chamberlayne v Ex* § 1399 a. In a case where the only evidence against the accused was that he absconded after the murder of a person it was held that the fact of accused's absconding was not inconsistent with his innocence known, but an incorrect assumption has been brought against him. *Cron v Smith*, 1 P L R 1915 = 16 Cr L J 186 = 27 Ind Cir 219, see also *Empress v Gaugam*, 23 Bom L R 1274. Post cards mailed by the accused shortly after his departure were admitted to indicate non-concealment of his whereabouts, and thus to rebut the inference of guilt of a murder from his flight. *Gosforth v State*, 183 Al 66.

Attempt to escape. An attempt to escape stands in the same position as would escape itself. Not unnaturally, moreover, the possession of tools calculated to assist an attempt at escape is regarded as a probative fact in such a connection. Efforts to bribe a custodian of the jail in order to facilitate flight give rise to a similar inference, etc., consciousness of guilt. None of these incriminating circumstances constitute a *prima facie* case of liability to the consequences of a crime. Standing alone therefore it will not warrant a conviction. *Chamberlayne v Ex* § 1399 (a).

Actor alone affected. Naturally, flight or an attempt to flee affects only the actor—the person so conducting himself. *Chamberlayne v Ex* § 1399 (a).

Declining to flee, voluntary return etc. In such a connection, only such portions of conduct as bear against the accused are relevant. It follows that while flight is competent, as grounding an inference, that the accused knew he was guilty, declining to flee when urged to, at most, a self-serving act without probative force. Any other rule of administration, indeed, would flood the Courts with fabricated testimony. For the same reasons, one accused of crime cannot show that, having fled, he afterwards voluntarily returned. *Chamberlayne v Ex* § 1399 (a).

Complaint by prosecutor The prisoner was indicted for theft and dishonestly receiving stolen property. The prosecutor, while travelling by train to Calcutta, discovered that his courier bag, containing his watch, chain, and a sum of money, had been stolen. He reported his loss to a railway police inspector at the first station at which the train stopped after he became aware of the theft, the prisoner not then being present. Evidence of this report is held admissible under s. 8, illustration (k) *Queen v. MacDonald*, 10 B. L. R. App. 2. The first information report against the accused is admissible under this section. *Arimudha v. Emperor*, 41 C. L. J. 23-A I. R. 1927 Cal. 17; *Soosa Lal v. Emperor*, 82 Ind. C. 112; *Roman v. Emperor*, 4 Lah. L. J. 191; *Ishid Ghafu v. The Crown*, 25 P. W. R. 1910-6 Ind. C. 957-11 Cr. I. J. 125.

Silence. Silence. The ... of the accused when charged with an offence
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upon the maxim *qui tacet* this

more § 1071. A is accused of administering of killing her. A witness testifies that the wife had declared that A had attempted to poison her, in his presence, and that A was standing nearby, but made no response. This is relevant *Com v. Galarran*, 9 Allen 271. S is indicted for the murder of T. Certain observations were made by his wife in the presence of others on the subject of crime, to which S made no direct reply. These statements are relevant against S. *R v. Smithes*, 5 C. & P. 332, see also *R v. Mallory*, 15 Cox 106 (158). The conduct, demeanour

to the Police that he had purchased opium from the accused is inadmissible, unless it is made in the presence of the accused *th Shau v Emperor*, 12 Cr L J 429-12 Ind. Crs 87 In resting on silence as to a particular matter as a legitimate ground of inference regard must be had to the circumstances, it must be considered whether there was any occasion for the words, and any reasonable explanation of the silence. *Chabit Das v Dayal Mouji*, 6 Bom L R 557

Conduct as evidence of consciousness of innocence. The lack of guilty consciousness may be useful to show innocence of a crime. This lack of guilty consciousness—in other words—seems not to have been doubted by the Court. But, assuming the proposition—the fact to be feigned and Tr. 159 (207).

Failure to prosecute In general a delay in instituting a prosecution is some indication of a consciousness of the weakness of one's cause. The failure to complain speedily of a rape is universally conceded to be a damaging circumstance against the woman making the charge. *Wigmore* § 284

Failure to produce evidence The non production of evidence that would naturally have been produced by an honest and therefore fearless claimant is a maxim that is applied to the party's cause. Wig Trial 32 *Rowan's Trial*, 22 11, 603, *Boyce v Chapman*, 11 F 150, 180 189, *Vaughton v* 11 Cr 119 (132) In *Blatch* is certainly a maxim that which it was in the power of

one side to have produced and in the power of the other to have contradicted it. Similarly in *R v Burdett*, 1 B & Ald 122, *Best J* said: "If the opposite party has in its power to rebut it by evidence, and yet offers none, then we have something like an admission that the presumption is just. The law does not impose impossibilities on parties; it expects that a man who has the means of knowing who may be witnesses shall call them."

Party's failing to testify A party's failing to appear when he had a strong motive to appear, would be evidence against him. *Brown v Stock*, 77 Pa 471. So refusal to testify himself or to call available witnesses in his own behalf warrants inference unfavourable to the respondent. *All Gen v Pelletier*, 134 N E. 406.

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raise an inference that his motive was a consciousness that he had no probable

1931 Bom 97, see also *Donomalce Churn v Hafi-uddin*, 13 B L R 247 Note= 12 W R 317, *Bwola v Rughoonath*, 16 W R 295

Destruction or non production of documents, etc In *Anon* 1 Ld Raym 731, *Holt C J* said "If a man destroys a thing that is designed to be evidence against himself, a small matter will supply it" and so a copy sworn was admitted to prove a note of defendant torn by him. See also *R v Arundel*, Hob 109, *Ward v Apprice*, 6 Mod 264, *Samson v Rumsey*, 2 Vern 361; *Young v Holmes* 1 Stra, 70, *Armory v Delamirie*, 1 Stra 505. In *Cooke v Hellier*, 1 Ves Str 234, *Hardwicke L O* said "If dec" arty who would take benefits thereof a Court of further than the Court of law" See also *R* document

is not produced after proper notice, a strong presumption is raised against the party. *Roe v Harrey* 1 Burr 284; see also *Cluney v Peggy* 1 Camp 8; *James*

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based upon the maxim *omnia praesumunt* (presumed against a spoliator) against the persons keeping it. *Devonport*, 27 L J C P 54, *Cold* 1 Q R 214. This rule is

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poisoned if It appears that B has tried in every way to prevent the body of T from being exhumed and examined. *Stansfield*, 11 How St Tr 1402

being suspected of murdering him

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13 S & M 205

Fear exhibited by the accused The fact of fear exhibited by the accused

raises an inference against the accused. A being accused of the murder of B

shows a great repugnance to looking at the dead body of B. This is relevant

R v Stewart, 19 How St Tr 156, *R v Ogilvie*, 19 How St Tr 1284. T comes into a town with a horse and immediately employs an auctioneer to sell it. While the sale is going on T is observed to look excited and apprehensive, and on receiving the purchase money leaves the place at once, and on subse-

Complaint Illustrations (j) and (k) make statements of a person against whom an offence has been committed, relevant. But a mere statement is not relevant. Statement of a person of conduct is only relevant. These illustrations are :
 committed an offence has been
 conduct, accompanying such
 statement of fact of rape and r
 conduct, the former has no such it
 in discriminating between a staten
 the essential difference between
 redress or punishment, and must b
 for instance, or a parent, or some other person to whom the complainant was
 justly entitled to look for assistance and protection. The distinction is of importance, because while a complaint is always relevant, a statement not amounting to a complaint will only be relevant under the particular circumstances, e.g., if it amounts to a dying declaration or can be used as a corroborative evidence. *Norton Ex 111*

Complaint in cases of rape, criminal assault, etc. Illustration (j) is an

thus coming into issue, the circumstance that at the time of the alleged rape the
 a self contradiction
 ning the victim of
 That she did not,
 " assertion that
 , at the time of
 ice as a virtual
 arity, therefore,
 be allowed to

Neal, Utah 151 So in cases of rape, indecent assault and similar offences upon females (k) shortly after the prosecution, not to prove the truth of the matters stated, but as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the
 of which she
 905) 1 K B
 6) 60 J P.
 of conduct

If the conduct of a woman who has been ravished is such that she lodges a complaint, then that conduct is relevant and the terms in which the complaint was made are relevant as conduct but they are not relevant as direct proof of the act. The particulars of the complaint, may so far as they relate to the
 evidence of facts
 of the woman
 on her part

Cas 1018, see also *Soosalal v Emperor*, 82 Ind Cas 142, *Raman v Emperor* 4 Lah L J 491 But if she only answered questions her evidence would be hearsay. *Ibid*, see also *Nga Som v Emperor* 43 Ind Cas 113-19 Cr L J 115, *Emperor v Soori*, 31 P L R 391-120 Ind Cas 539-31 Cr L J 141 V I R 1930 Lah 81

Whether
woman's statement
2 Moo & R
126, R v O
2 F & L 575
decided in 1830 *Parke B*, excluded the statement but said, 'The sense of the thing certainly is, that the jury should in the first instance know the nature of the complaint made by the prosecutrix and all that she then said. But for reasons which I can never understand the usage has obtained that the prosecutrix's counsel should only enquire generally whether a complaint was made by the prosecution of the prisoner's conduct towards her leaving the prisoner's counsel to bring before the jury the particulars of that complaint by cross examination' See also *Steph Dig Tr Note 1*; *R v Eyre*, 2 F & L 519 *Reg v Wood* 14 Cox 16 A series of rulings beginning with *R v Williams* (1890) 2 Q B 167 repudiated the original practice and declared the whole statement admissible. In that case at p 177 *Huckins J* observed 'After a very careful consideration any authority to the contrary is not bound by the fact of our doing a complaint of the woman is consistent with her testimony on oath given in the witness box negativing her consent and affirming that the acts complained of were against her will and in accordance with the conduct they would expect in a truthful woman under the circumstances detailed by her. The jury, and they only, are the persons to be satisfied whether the woman's conduct was so consistent or not. Without proof of her conduct demeritours and verbal expressions, all of which are of vital importance in the consideration of that question, how is it possible for them satisfactorily to determine it? Is it to be left to the witness to whom the statement is made to determine and report to the jury whether what the woman said amounted to a real complaint? Are the jury bound to accept the witness's interpretation of her words as binding upon them without having the opportunity to form their own conclusions from imperfect evidence? The witness's speculation as to the charge for the prosecution 9 Cox Cr 447 301 *Hedge v Osborne* (1903) 1 K B 301 *Graham v Newell* (1900) Case, 3 Cr App 262, *Graham's Case* 4 Cr App 218, *Christie's Case*, 10 Cr App 141-1914 A C 45, *R v Norcott* (1916) 1 K B 347 It appears from illustrations (i) and (j) that the Indian Legislature has given effect to the sound reasoning expressed by *Parke J* in *R v Waller*, 11 M & R 212 and *Bramwell* in *Reg v Wood* 14 Cox 46 So under this section the particulars of a complaint are also admissible in evidence. *Stoke's Anglo Indian Code*, 858, see also *Soosalal v Emperor*, 82 Ind Cas 142, *Emperor v Phagunia*, 82 Ind Cas 1043-1926 P 58

Time for making the complaint The rule is that the complaint should be made at the earliest reasonable opportunity. But what is the earliest and reasonable opportunity of complaint depends on the circumstances of each case. *R v Lee* 7 Cr A. R 31 In *Chesney v Neusholme*, (1908) P 301, which was a case of immoral acts by a clergyman with a boy the boy's statement to his mother on the same evening was admitted, but not his statement on the next evening

to negative assent' In the case of the rape of an innocent girl of tender age, the evidence is not sufficient to sustain a conviction unless the accused is identified by the victim. In the case of the rape of an innocent girl of tender age, the evidence is not sufficient to sustain a conviction unless the accused is identified by the victim.

Complaint in answer to question. The complaint must be volunteered, and not in answer to questions. *R v Mervin*, 19 Cr C C 432. In *King v Osborne*, (1905) 1 K B 551, the prisoner was indicted for an indecent assault on a girl, and the question was whether the girl's reply to a question put to her by the prisoner was a complaint of the prisoner's conduct to her. In that case *Ridley J* in reading the judgment said that the girl's reply was a complaint of the prisoner's conduct to her. In that case *Ridley J* in his first point, the girl had been put to the question, and the complaint was made in answer to a question, it was a conversation and not a complaint, and he declined to allow it to be given in evidence. It does not appear, however, from the report, what the question was that was put to the girl. It appears to us that in such cases

What is the matter? or why are you crying? will not do so. These are natural and, if he do ought to be rejected. In each case the decision on the character of the question put, as well as other circumstances, such as the relationship of the questioner to the room, in no anti

R v Norcott, 12 Cr A R 166

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girls but when one looks at the facts of those cases, it is apparent that the
antithesis which the Judge had in mind was not an antithesis between cases in
which a complaint of this nature was made by a female and cases where a
complaint of this nature was made by a male person, but the antithesis between
what may be broadly described as sexual offence on the one hand and non-sexual

offences on the other" But section 8 of the Evidence Act is very wide, and a complaint of any offence is admissible. *Vide illustration (k)*

In *R v Foster*, 6 C & P 325, which was a case of man-slaughter *Parle J* allowed the statement of the deceased, made to a prisoner by immediately after the accident, to . . . the best possible test . . . what it was that had . . . that was the evidence . . . was not admitted to show the conduct of the prosecutor but apparently as part of *res gestae*. Strictly speaking this testimonial evidence was admitted as an exception to the ordinary rule as spontaneous declaration for which no provision has been made in the Act, but the admission of which is indicated as a part of *res gestae* under section 6, illustration (a)

Explanation 2 Under this explanation another class of statements, i.e. statements which affect the conduct of a person, whose conduct is relevant under this section, is admissible. Illustrations (f), (g) and (h) are examples of such statements. The conduct of A in illustrations (f), (g) and (h) shows nothing unless the statements are put before the tribunal. Here the statements made in the presence of the party are admissible as the ground work of their conduct. Here the conduct of A is equivocal and statements are admissible to explain that conduct as part of the *res gestae* under the rule of Verbal Act doctrine explained in s 6. In this explanation statement includes document addressed to a party. *Vide illustration (h); Reg v Thompson*, (1910) 1 K B 640. "But before a bare statement made by another person in an accused's presence and prejudicial to him is allowed to be used as evidence against him, there must be something in the shape of action, conduct or words, which in the opinion of the Judge, would justify the jury in drawing an inference that the accused sub-

Emperor, 12
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observations or explanations he thought fit to make, substantially admitted the truth of the whole or portion of it" *Ibid*. But in *Rex v Thompson*, (1910) 1 K B 640 = 79 L J K B 321 at p 322, Lord Alton of Liverpool said, "But if the case is never is true
it goes to 71 J
P. 103, by the
consideration whether the prisoner has admitted the truth of the statement
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Reg v
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d done
"Steele
it, she said 'you' and on being asked by another person said 'you'
Norton," and pointed to the accused. The accused said, "No, Madge, you are
"on," and pointed to
"If I have done it,
whether the statement
a Court consisting
of *Richford J* observed,
investigation are
ay; but to this rule
there are exceptions. One is that statements, made in the presence of a prisoner
upon an occasion on which he might reasonably be expected to make some

observation, explanation, or denial, are admissible under certain circumstances. We think it is not strictly accurate and may be misleading, to say that they are prisoners, as such an expression may seem to

of the facts stated in them; they explanatory of the answer given to them by the person in whose presence they are made. Such answer may of course be given either by words or by conduct—for example, by remaining silent on an occasion which demanded an answer.

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(10th Ed.) = 814

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whether given by words or conduct, acknowledges the truth of all or part of them. If there be no such evidence the contents of such statements should be excluded. It is perhaps too wide to say that in no case can the statements

be given in evidence when they are denied by the prisoner as it is possible that a denial may be given under such circumstances and in such a manner as to constitute evidence from which an acknowledgment may be inferred, but as above stated we think they should be rejected unless there is some evidence of

v *Christie*,

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"That is the

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Lord *Atkinson*

the statement made in the presence of the accused is admissible. In giving his judgment observed: "As to the second ground, the rule of law

undoubtedly is that a statement even upon an occasion which should

explanation or denial from him, save so far as to make it, in effect his

only, then to that extent alone it becomes his statement. He may accept the

accused of the facts mentioned in the statement necessarily render the statement inadmissible because he may deny the statement in such a manner and under such circumstances as may lead a jury to disbelieve him, and constitute evidence from which an acknowledgment may be inferred by them." In the same case Lord *Moulton* said: "If the prisoner admits the charge the evidence is obviously relevant. If he denies it it may or may not be relevant. For instance, if he is

behaviour of the prisoner, for the fact that some one makes a statement to him subsequently to the commission of the crime cannot in itself have any value as evidence for or against him. The only evidence for or against him is his behaviour in response to the charge but I can see no justification for laying down as a rule of law that any particular form of response, whether of a positive or negative character, is such that it cannot in some circumstances have an evidential value. I am therefore of opinion that there is no rule of law that evidence cannot be given of the accused being charged with the offence and of his behaviour on hearing such charge where that behaviour amounts to a denial of his guilt." In the same case Lord *Reading* also observed: "In general, such evidence can have little value in the direct bearing on the case unless the accused, upon hearing the statement, by conduct and demeanour, or by the answer made by him, or in certain circumstances by the refraining from

Which affects such conduct. The statements whether oral or written must be shown "to affect the conduct" of the person to whom they are made, and therefore mere statement to persons, which cannot be shown to be in any way connected with or to bear upon his conduct, would be inadmissible. *Cum Er 97*
In *R. v. Bexley*, 70 J P 263, the prisoner was charged with murder of her child.

1 A & E 165
Subsequent conduct of the accused is not a basis for establishing the guilt of the accused. The correct conduct of the accused is not a basis for establishing the correctness of the evidence of the prosecution witnesses. By itself however it is not a legitimate proof of the guilt of the accused. *Chandra Ka Prasad v Emperor*
126 Ind Cas 684-31 Cr L J 1051-A 1 R 1930 Oudh 324-7 O W N 564

Facts necessary to explain or introduce relevant facts

nary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of any thing or person whose identity is relevant or place at which any fact in issue or relevant fact show the relation of parties by whom any fact is proved, are relevant in so far as they are necessary.

Illustrations

(a) The question is, whether a given document is the will of A. The state of A's property and of his family at the date of the alleged will may be relevant facts.

(b) A sues B for a libel imputing disgraceful conduct to A; B affirms that the matter alleged to be libellous is true

The position and relations of the parties at the time when the libel was published are facts in issue and a matter unconnected with the dispute may be proved.

(e) A is accused of a crime

(e) A is accused of a crime
The fact that, soon after the commission of the crime, A absconded from his house, is relevant under section 8, as conduct subsequent to and affected by facts in issue

The fact that at the time when he left home he had sudden and urgent business at the place to which he went, is relevant, as tending to explain the fact that he left home suddenly.

The details of the business on which he left are not relevant, except in so far as they are necessary to show that the business was sudden and urgent.

(d) A sues B for inducing C to break a contract of service made by him with A. C, on leaving A's service, says to A—"I am leaving you because B has made me a better offer." This statement is a relevant fact as explanatory of C's conduct, which is relevant as a fact in issue.

(e) A, accused of theft, is seen to give the stolen property to B, who is seen to give it to A's wife. B says as he delivers it—"A says you are to hide this." B's statement is relevant as explanatory of a fact which is part of the transaction.

(f) A is tried for a riot and is proved to have marched at the head of a mob. The cries of the mob are relevant as explanatory of the nature of the transaction.

Introductory facts. It would be practically impossible, in the conduct of

These circumstances in relation to an action or suit may not *per se* be relevant, but in connection with the main issues to be put before the tribunal, they are treated as the introduction to the main matters or by way of inducement to it. They take the place of the preamble to a statute, which, while it has no power in variety of variety of s to their re illustra ons *Hunt*,

land referred to at a foreclosure sale with her money and for her. Upon direct its, setting ought the

introductory and explanatory are

R 36 (50, 51)=17 W R Cr 15; see also illustrations (a) and (b) and illustration (c) to section 6

used in a conversation, the demonstration of the use of a scientific instrument,

testimony showing that

extraneous facts may be drawn are those which may be explanatory. A fact may well be a limited inference neither one of the *res gestae* nor probative in any direct line of proof to the existence of such a fact. It will be received if it explain or complete a *res gestae* or probative fact in such a way as to create, increase or diminish its direct probative value. The objective inferences which may properly be drawn from it. If a fact is not in evidence fulfil these conditions it is not even a bar to its admissibility, that, as direct evidence it would be rejected under our positive rule of law or procedure. Facts of this nature are as it were correlating; they state the relations between the *res gestae* or probative facts either with each other or with extrinsic circumstances necessary to their full understanding. Where the latter are entirely intelligible and complete in and of themselves no explanatory or supplementary facts are rationally required. Facts of an explanatory or supplementary nature may even be used to give force and cogency to those in the direct line of proof. The effect of evidence of this nature is not however in all cases affirmative. An explanation may equally well be intended and calculated to diminish the force of the evidence produced by one's adversary. In point of time, the explanatory or supplemental fact may precede accompany or follow the probative or *res gestae* fact to which it is correlated. (*Chamberlayne's Ev.* 1755 Clause (c)) affords an illustration of how an accused person alleged to have absconded after the events can produce evidence to explain his sudden departure, and thereby rebut the presumption which arose from his equivocal conduct. *Donough Ev.* 46. The field book or *Chitta* which describes the various plots is admissible under this section as explanatory of the partition paper which without the *Chitta* might be very difficult to understand. *Janki v. Dingo*, 2 Ind. Cas. 367, but see *Gopal v. Madhub*, 11 W. R. 29. The Bombay Police received a telegram purporting to emanate from the chief commissioner of Police *Naya salad*, informing him that bank drafts in duplicate had been stolen and it was feared that signatures would be forged and negotiation attempted in Bombay. A second telegram was received from *Naya salad* in reply to inquiries made by Bombay Police. The accused cashed a draft at the French Bank, Bombay and presented another at the Eastern Bank, Bombay. The clerk informed his superiors and as a result the accused was arrested. It was held that the telegrams purporting to be sent by the *Naya salad* Police were relevant to explain the conduct of the clerk of the Eastern Bank and the Bombay Police and were therefore admissible in evidence under this section. *Emjor v. Abdul Gani* 91 Ind. Cas. 690 = 27 Bom. L. R. 1373 = 49 B. 879 = A. 1 R. 1926 B. 71.

Sudden flight—explanation. The fact of the flight of the accused or his attempts to escape, is relevant under s. 8. It may be the result of guilty knowledge or conscience, or it may be perfectly innocent. Anything therefore that the party absconding says at the time of the act is receivable as explanatory of a relevant fact. It would also be receivable as part of the *res gestae* and as a declaration accompanying an act. *Norton Ev.* 119 see also illustrations (c) A and B after the commission of a murder which they are suspected of being guilty of, fly from their houses to a distant State. This raises a presumption of guilt. The fact that A and B fled because of a fear of violence at the hands of their pursuers overthrows this presumption. *Plummer v. Com.* 1 Bush 76, *Golden v. State*, 25 Ga. 52, *Arnold v. State*, 11 Tex. App. 436. In *Plummer v. Com.* the Court observed: "But there was evidence before the jury tending to explain the concealment and flight of appellant upon the ground that they were occasioned by an apprehension of violence for soldiers or otherwise, and this in our opinion was competent evidence which the jury had a right to regard as conducing to rebut the presumption of guilt arising from the concealment of flight of the appellants. In the case of *Oscar Slater*, who was charged with murder he was able to prove that his trip to America was not a flight from justice as the prosecution alleged, but made in pursuance of a long contemplated plan and that his apparently sudden departure a few days after the event was a mere coincidence. *Donough Ev.* 46. If after the commission of a crime a person, whose name is mentioned as a

participator in the crime [the crime] the crime [the crime] the other [the other]

an explanation made sometime after flight is excluded *State, 76 S. W. 167* But *Sherrill v. State, 37 So* 129

doctrine (vide § 6) has been the test of an alleged act of bankruptcy and requires explanation *Robinson v. Haugh, 9 Moore* *Gyde, 9 Bing 349, Touch v* of flight under section 8 at p 148.

Facts of the utmost importance unexplained, legitimate suspicion against a man, and any fact which tends to dispel that suspicion is relevant *Cum F* 100 case by bringing in new data

capacity to produce

really important and was likely to have been the true source of the effect observed, so that the proponent's instance may or must be attributed to that other and not to the alleged tendency or cause in question (3) The third method takes away the force of the proponent's instance by offering other instances in which the same effect is found, but without the presence of the alleged cause *Wigmore § 449* Evidence of other offences committed by the prisoner is somewhat more admissible

of a witness el, where the to produce received by after *R v* *Swain, 111 Il. 40* So where the prisoner was charged with robbing the prosecutor of a coat by threatening to accuse him of an unnatural crime, evidence of a ticket was found on his back, as confirmatory of

by proving that, shortly the prisoner had robbed another person [*R v Briggs 2 M & Rob (199)*], and

question of his guilt and whether the previous statement is made to a Police officer, or to a judicial officer or to a third party is immaterial if the statement is relevant to the fact in issue. - *F 11 for*

"3 Ind Cas 963-1 P L R 831
of minority when the question

Pande, 18 A 176 (179), *Sulish Chandra v Mohendralal*, 17 C 849 Where the accused were charged with committing or conspiring to commit dacoity and not with the charge of belonging to any gang it was held that the evidence tending to show the closeness of their association with the approver was inadmissible under s 11, though the same might be admissible under section 9 *Imperor v Shahiduddin* 51 B 524-A I R 1930 Bom 157. The absence of an entry in a book of account has no doubt been required as a relevant fact, not under section 31 but under sections 9 and 11 of the Indian Evidence Act to prove that an alleged payment was not made *Ganjiram v Lachiram* 19 C W N 612-23 Ind Cas 70. *Tara Kumar v Kumar Irin Chitra* 74 Ind Cas 393-36 C L J 389; *Jari v Siddhar* 15 C L J 7-17 C W N 105, *Sagarmal v Manraj*, 4 C W N 107. *His Vahir v Hanil* 25 A 90 *Deoha v Rye* 11 N L J 21-A I R 1918 Nag 153 In *Imperor v Ginesh Damodar*, 34 B 391 the accused published a book containing eighteen poems, of which four were subject matter of charge. The general trend of the poems charged as well as the remaining ones in the books evinced a spirit of blood thirstiness and murderous eagerness directed against the Government. Held, that the Court was entitled to look into the poems other than those forming the subject matter of the charge for the purpose of finding out the intention of the writer and the design of the publication. In order to rely on the evidence of persons who identified the accused in jail but failed to do so in Court the fact of the jail identification must be stated in witness evidence. An identification in jail is in essence a statement by the witness "I saw this man who is before me taking part in the dacoity." That statement can be used to corroborate this evidence given in Court if the witness says in his evidence "A number of persons were shown to me at the jail and from among them I pointed out those persons whom I had seen taking part in the offence." *identant evidence such to prove the identity though the witness himself may not correctly remember who they were* *Chutthan v King Emperor* A I R 1926 Oudh 36-90 Ind Cas 444-28 O C 283, *Abdul v Emperor* 47 A 39

Basis for admission of explanatory facts The peculiar danger, of inductive proof is that there may be other explanations than the desired one for the fact taken as the basis of proof *Silguick Fallacies* 270 But in the study of Logic we are concerned with discovering the defects of a mode of Proof, while in the Law of Evidence, we are concerned merely with the propriety of admitting the fact at all with its quality as a possible Inference, not as absolute Proof. If then, the potential defect of inductive Proof is that the fact offered as the basis of the conclusion may be open to one of the test or requirement for mere identity, the fact must be something far short of this. If other rational hypothesis would be and yet if only that single other hypothesis an extremely high degree of probability for the conclusion under the Law of Evidence *Wigmore* § 37 Thus throughout the whole realm of evidence, circumstantial and testimonial, the theory of the inductive argument, as practically explanatory fact will be non it is when hable

Identity as a probandum—other principles discriminated "In evidence that proposition commonly spoken of as Identity, there is apt to be a confusion in thought with two other processes which are really not germane (1) It is perhaps natural to apply the notion of Identity or Identification to the general process of proving an accused person guilty. He is said to be "identified" as the murderer or the thief, & the whole process of proof

and the whole mass of evidence is thought of as involving identity of the accused and the guilty person. From this point of view, all distinctions between the various sorts of evidence heretofore analyzed are merged and become useless. Such an indiscriminate confusion and merger of all sorts of probative elements naturally excites suspicion of the propriety of the term (identification) as thus applied. In truth, there is no propriety in it. The very looseness of the term shows that, since the various sorts of evidence thus covered by it may be further analyzed and separated, there would remain no

but needs to be distinguished

"Suppose, for example, to prove a murder evidence is offered that a gun found three days later in the defendant's possession is exactly fitted by a bullet found in the body of the deceased. Here there are two inferences involved (a) Because the defendant possessed the gun when found later, therefore he probably possessed it at the time," this inference is always open to doubt, since the defendant may have borrowed the gun since the killing, or some third person may have surreptitiously placed the gun on his premises, (b) 'Because the gun, thus possessed by the defendant at the time of the killing, fitted the bullet found in the body, therefore the defendant's gun must be the one that shot the deceased', here the inference is open to doubt because the bullet may fit other

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ces as pointing back to an
Wigmore's Principles of

General Principle of Identity Evidence 'Identity may be thought of as a quality of a person or thing,—the quality of sameness with another person or thing. The essential assumption is that two persons or things are first thought of as existing, and that then the one is alleged because of common features, to be the same as the other. The process of inference thus has two necessary elements (1) it is a concomitant one, in its logical scheme, and (2) it operates by comparing common marks, found to exist in the two supposed separate objects of thought, with reference to the possibility of their being the same. It follows that its force depends on the necessity of the association between the mark and a single object. Where a certain circumstance feature or mark, may commonly be found associated with a large number of objects, the presence of that feature or mark in two supposed objects is little indication of their identity, because, on the general principle of relevancy, the other conceivable hypotheses are so numerous: a the objects that possess that mark are numerous and therefore two of them possessing it may well be different. But where the objects possessing the mark are only one or a few, and the mark is found in two supposed instances, the chances of the two being different are nil or are comparatively small. Hence, in the process of identification of two supposed objects by a common mark the force of the inference depends on the degree of necessity of association

associated with a single object. Rarely can one circumstance alone be so
instance is circum
whole cannot be
Wigmore § 411
cation thus consists
of which by itself
er can conceivably

9. to exist in a single object only. Each additional circumstance reduces the chance of there being more than one object so associated. The process thus corresponds accurately to the

"It may be negative as well as affirmative. If an object in issue, the lack of that feature in a particular object offered tends to show that it cannot be the object in issue—in analogy with the argument from essential inconsistency. *Wigmore's Principles of Judicial Proof* § 140.

Scope of the identity. This section does not deal with Circumstantial evidence of identity. It may be proved or disproved not only by

with a certain person in issue (height, size, hair, complexion, voice, marks, faculties, or peculiarities), relationship, education, travel, religion, knowledge of particular people, place, or facts, and other details of personal history (*R v Collins*, *Stephens*). In this connection too identity of mental qualities, habits and disposition may become relevant, though it would be excluded in more specific enquiries. *Phy Et* 132. The inference of identity of a person, made by the use of singular motion

a mark of identification. The sound in question may well be that of a voice. *Clamberlayne's Et* § 186. Peculiar facts and many other facts, in a very satisfactory way, as part of the basis of the inference of the witness as to identification. In much the same fashion, the possession of skill and other mental training may be shown by its exhibition on other occasions and, in this way, serve to identify the doer of a particular act who must have possessed the qualities in question in order to have been able to do as he has done. *Id* § 1869.

Test of Admissibility. The only matter that is here of concern is the admissibility of circumstantial evidence of identification, and it will easily be

low that it is that but it does not make it

up *Wigmore* § 412

of a person can be ascertained

(139), *R v Broome*, *Danough* 81, *R v Crippen* *Wills* 490, *R v Wainwright* *Sturivant* 117 *Mas* 131. Not Tr

(1909), *Arshad* *Layton* 61 (1909) knowledge used was

45; *R v* the murder of a man, same ball

(b) Residence, and *Peerage* *L R* 10 App C 763, 775

Hule's Tr. of a writing. S.
Fulborne in Brooks v.
the plaintiff, so to spell the word was proved, it was some evidence against
the plaintiff to show that he wrote the libel. Indeed, we think that proposi-
tion a a habit of
pecul degree of
plain which the

the identity of that person are relevant
see also *R v. Ball*, (1911) A C 47, *R v.*
other offences committed by the prisoner is sometimes admitted, with a view to
establish identity. *Taylor* § 107. At a trial for offences under ss 302, 120 B
and 380 I some two years
subsequent identity, design
and motive pursued by the
accused alleged in the
subsequent alleged in the
or 14 or 15 of the Evidence Act *Emperor v Panchu Das*, 38 Ind C 19 929=24
C W N 501=31 C L J 102=47 C 671

the next indictment. So the general principle that where a circumstance is relevant for some purpose, the incidental revelation, in offering it, of other criminal conduct by an accused does not stand in the way of receiving the evidence. *Higmore* § 416

Identity of name Identity of name raises a presumption of identity of person, where there is similarity of residence or trade, or circumstances, or where the name is an unusual one, but *aliter* where the name is a common one and there are several persons known of the same name and of the same place *Lewisson* *Pre Dy* 307 "A concordance in name alone is always some evidence of identity, and it is not correct to say — 'it is not proof of the facts relating to the person named, then to the person named, then of name goes for nothing, conclusion," *Grales v* *L T R N S* 795; *Re W*, *R 14 Eq* 245; *Maden v* *D 218* *Re Hocking*, (1898)

The question is whether one Samuel Fry of Plymouth Rock, has written certain letters—he being the defendant in the case. A witness testifies that he knows the handwriting of a Samuel Fry of Plymouth Rock the only person of that name at the place. Ph

vessel. A pilot named Henderson was in Court and answered this description. The presumption was that he was the defendant. There the Court observed, "The Court will not assume to be the defendant. But then the counsel objects that the statement is not made under oath. As to that there are many things which are

9. incapable of strict legal proof. A man's name is mere matter of reputation, that which is termed in Scotch law the *status* of a man is matter of reputation and if precise evidence of the relationship of one man to another or other matters of that nature were always required no fact of that kind could ever be proved in practice. Here there was evidence of the identity of the defendant although it was not proved directly that the name of the party who answered in Court was William. There was evidence that he was a pilot, that he was the pilot on board the vessel, and he answered to the name of Henderson. I think that is sufficient. In an action against Charles Lyon for goods sold to his intestate, and a plea in *plene administration* the plaintiff in order to show assets offered a copy of a bill and answer by one Charles Lyon to a Bill filed in Chancery against him in the character of an administrator. The presumption is that they are the same person and evidence is admitted. *Hennell v Lyon*, 1 B & Ald 112. In that case Bayle J observed: "There is nothing to show two administrations, and it is rather extraordinary to suppose that two persons of the same name should sustain the same character. It is not to be presumed that there are two persons but the identity is rather to be presumed, unless the plaintiff could have shown the contrary."

An action is brought on a bill of exchange directed to, 'Charles Binner Crawford, East India House,' and accepted 'C B Crawford.' A witness proves that the signature was that of a gentleman of that name, formerly a clerk in the East India House but he does not know whether that Mr Crawford is the defendant here. The presumption is that the two are the same. *Green v Green*, 9 M & W 314. Lord Abinger said: "I am of opinion that the evidence was quite sufficient. Here the bill is drawn upon by Charles Binner Crawford, and addressed to him at the India House. The evidence is that there is a person of the name of Charles Binner Crawford; that he once belonged to the India House and the acceptance is in his hand writing. That is surely sufficient evidence of identity. In an action against one William Evans for goods sold and delivered it appears that five years before, a person of that name had been a customer of plaintiff and had written a letter acknowledging the receipt of the goods. The witness who proves this does not know whether the defendant who answered to the name is the same person. The presumption is that he is. *Smell v Evans*, 4 Q B 626. In the course of argument Denman C J asked: Does the name go for nothing at all in any case? Suppose the name of the defendant had been William Lionel Gulliver Evans and a sale had been proved to a party so named? An action is brought against Henry Thomas a person of that name had kept cash at the bank when the bill was made payable and that the acceptance is in his hand writing. He cannot identify him with the defendant of the same name. This is sufficient *prima facie* case. *Roden v Ryde*, 4 Q B 626. In this case Lord Denman said: "In cases where a particular circumstance tends to raise a question as to the party being the same, even identity or name is something from which an inference may be drawn. If the name were only John Smith which is of very frequent concurrence there might not be much ground for drawing the conclusion. But Henry Thomas Rydes are not so numerous, and from that and the circumstances generally there is every reason to believe that the acceptor and the defendant are identical. Lord Lydhurst asks (in *Whitlock v Musgrove*, 3 Tyrw 513) 'why the onus of proving a negative in these cases should be thrown upon the defendant?' the answer is because the proof is so easy. He might come into Court and have the witness asked whether he was the man."

A note signed "Hugh Jones" is sued upon. It appears that there are several "Hugh Jones" at the place where the note was signed, and there is no evidence to show that the "Hugh Jones" who is sued is the "Hugh Jones" who signed the note. The plaintiff is non-suited. *Jones v Jones*, 9 M & W 75.

Identity from family name and initial. The fact that family name and initials are the same raises no presumption that the parties are the same. *Ambs v R Co* 44 Minn 266; *London v Walpole* 1 Ind 321; *Bennet v Labhart*, 27 Mich 489; *Burford v McCru*, 53 Pa St 431; *Law Pro* 314.

Two persons of same name but of different position. Where two persons of the same name occupy different positions or relations, the presumption is that they are different persons. *Law Pro* 315; *Nicholas v Lanstute*,

Lull Sel Cas. 21, *Ellisworth v. Moore*, 11 Iowa, 486; *Correns v. Gillispie*, S. 94 Mo 82.

of things may be presumed from circumstances 234; *Byrd v. Fleming*, 4 Bible 145. *Person Pro Ex* 320 The inference of a witness from the great and he like. *Chamberlain* those in common use,

the fact that while such

object, of special attention In other words, they either have no "ear mark" or none which is commonly observed In the first class would fall ordinary coins, stamped out in large numbers by means of a die In the second would be embraced bank notes, seldom identified by their position in a numerical series Pay checks may be regarded in a similar way This difficulty of identification affects merely the weight which may properly be attached to the mental result of the witness The evidence of the inference is, nevertheless, admissible. *Ibid* § 1872 Identification by the witness may extend to establish

Ibid § 1872

Surendra

Identity of a person by voice or appearance A witness may testify to a person's identity from his voice alone *Hulet's Trial* 5 How St. Tr 1185, *Harrison's Trial* 12 How St. Tr 846, *The Threshers' Trial*, 30 How St. Tr. 197; *Pickens Trial*, 30 How St. Tr 245, *R v Castro* Tichborne Case, see also *Emperor*, 20 C W N 100, *Emperor*, A I R 1925 Lah 137,

testified from observing his stature, from the sight of the person's photograph, person's age, or intoxication merely

from his appearance Chattels may be identified by their appearance and other qualities *Wigmore* § 660

Identity of person by photograph "The photograph was admissible" said *Wills J* in *R v Tolson*, 4 F. & F 103, "because it is only a visible representation of the image or impression made upon the minds of the witnesses by the sight of the person or the object it represents, and therefore is in reality only another species of the evidence which persons give of identity when they speak from memory, *Hindson v. Ashby*, (1896) 2 Ch 21, 27, *Hill v. Hill*, 11 T L R. 541

The identity of a person may be established by a person's photograph *Frith v. Frith*, which was a case for divorce upon a photograph alone and this is asked to do this, but it should be known that it is not the practice of the Court, except under very special circumstances, to act upon a photograph alone It is high time that this should be understood The same rule is applicable in all matrimonial cases, *Vide, Dawson v. Dawson*, 23 T L R 716, *Hill v. Hill*, *supra*, *Philp* 386 As regards identification by photograph, *Vide Emperor v. Panchu Das*, 24 C W N 501 (F B) at p 524 In cases of

officer to show to persons photographs of those whom they 19 *R v Ferguson*, (1924) hat of a prisoner whom prisoner was picked out by

the prosecutor from a number of men in a room *Held*, that there was no ground for complaint against the method of identification *R v Melaney* 157 L J Jo 46; see also *Bindle*

Ind Cas 167 So, an engraving to a

9 given by a witness who has precisely identified the prisoner by a photograph must always be subject to that fact. *R v Dwyer*, (1925) 2 K B 799

Identification of Prisoners Act The Identification of Prisoners Act, 1920 (Act No XXXIII of 1920) has been passed in order to provide legal authority for taking measurements, finger impressions, foot prints and photographs of persons convicted of, or arrested in connection with certain offences. This Act has been passed because the value of the scientific use of finger impressions, foot prints and photographs as agents in detecting crime and the identification of criminals is well known in England and other European countries and as such this subject can no longer be ignored—*See Statement of Objects and Reasons* Under section 5 of the Act which authorises a Magistrate to take the measurement which as defined in the Act includes finger impression and foot print impressions or photographs of convict and others, the thumb impression of the accused taken at the trial is admissible in evidence. *Superintendent v Kiran Bala*, 11 C L J 79=30 C W N 373=27 Cr L J, 109

Identity evidence—Foot prints To connect a person accused of crime with the scene of its commission in a most important circumstance is frequently that of foot prints or other tracks or marks made in the soil or on surrounding objects by some portion of the body of the person involved in the inquiry or the vehicle in which he was carried or by the animal which drew it. The discovery of such marks and the legitimate inferences to be drawn from them may constitute a valuable link in the chain of incriminating evidence especially necessary in cases where no direct proof of the *res gestae* is attainable. Naturally the probative force of such circumstances resides largely in the correspondence discovered to exist between the marks at the place of the *res gestae* and those produced appropriate articles is credited with the individual in question. These correspondences may under certain circumstances be stated by one who has observed them although an element of reasoning is necessarily combined with such a statement. The declaration it is true be simply a method of stating facts. Thus an observer may properly say whether a certain boot, shoe, or other specimen of foot wear is capable of producing particular tracks. On the other hand, that certain marks were actually made by a given individual or even were the same as or similar to those made by him is an invasion of the province of the jury to justify which an adequate administrative necessity must be shown. A contrary view has however been maintained. The inference that certain foot prints corresponded has been received although there is a lack of unanimity on the point. It is not required that a skilled witness should testify as to the existence of a correspondence. It will be required as an administrative matter that the witness be shown to be possessed of knowledge so adequate to the statement made that jury might reasonably be justified in acting upon it. In connection with inferences from correspondence of foot prints it will not be regarded as sufficient that the witness from a general idea of the size and configuration of the boot, believes that the shape of the individual in question would make the marks actually found or ones similar to them. In general where the facts detailed by the witness as the basis of his inference are clearly insufficient to support it as a matter of reason the results of the mental process are excluded.—*Chamberlain v Freese* 1874

Actions of blood hounds The conduct and behaviour of blood hounds after being set on the trail of a fugitive criminal cannot be given in evidence to prove that the scent of the accused and the scent of the person who perpetrated the crime which is being investigated are identical. *Chamberlain v Freese* 1874 (a)

Circumstantial and Testimonial Evidence of Identity, distinguished The foregoing inferences from circumstances forming an identity mark, and the inference from testimony asserting identity, must be distinguished. In the former type, the identifying mark or marks are supposed to be known and proved; and it then becomes a question of the strength of the inference from those circumstances as tested by the logical principle. But in the latter type we are given simply the testimonial assertion that the two things are identical, and our problem then is, to enquire into the testimonial basis of perception and recollection for that assertion and to ascertain the possible sources of error. For example, if the identity of J S with a testamentary claimant is in issue, and it is known that J S ten years ago had a deep knife scar on the sole of the left

foot, and if it is equally a fact that the claimant now has a similar knife scar, the problem is the validity of an inference from this knife scar to identity of the person. But in the same case we may have, of ten witnesses who know J. S. five of them now and five of them asserting these opposite basis for these opposite inferences. But on the other event, the testimonial evidence of Wigmore's Proposition, and person B is now presented to an observer who has seen A, and the observer is asked, 'Is this now person the same human being as that former person seen

son bearing the same mark has been some how proof was effected. But upon assertion of the fact with the conditions with the inference from identity thus brings up recollection, and (some-

times) in Narration

'Now, in ordinary judicial practice, a testimonial assertion as to identity is made in one of three typical forms

saw his left the prin pres look is t vari he gives a reason for his recognition, but the essential thing in the recognition so that our enquiry now must be, what is the psychic process of recognition of identity?

'Let us here realize that we have only one mental process to examine, be Resem- In the words more or less quoted in Arnold, *Psychology Applied to Legal* marks b c d e f, and the observer perceived or

involved in Recognition, ness' in varying degree of Identity?—Wigmore'

Mental conditions attending the Recognition of Identity The original mental record of a perceived event preserves the several items of the perceived event connected in the memory record, this is the 'association of ideas' When later, a record, This pre blance,

9. is, first, that the original stages of perception and record and the later one of recognition may be (not necessarily are) *subconscious*, and secondly, that the revival or recognition stage may be merely a general or single sensation of sameness (or resemblance) without a consciousness of the particular item or mark that has served as the stimulus e.g. when I first make the acquaintance, at a convention of Mr A from San Francisco of my perception and record of his marks of personality are or may be subconscious; i.e., I am not conscious of any specific items b c d etc. and when next year I meet that person again, I may recognize him, with a single idea as Mr A from San Francisco without first being conscious of the particular item or items that have stimulated the idea of Mr A as a single whole. *Wignam's Principles of Judicial Proof* § 207

Caution and Precaution in dealing with Testimony to Identity (1) It calls for caution in that testimony as to identity must be accepted only after the most careful consideration. On the one hand, the process of Recognition being often more or less subconscious it may be quite correct, even though no specification of marks can be given as reasons for recognition. On the other hand the risk of injustice being so serious, the great possibilities of lurking error should cause hesitation and the investigator should seek to establish as many marks as possible that may serve circumstantially to check the testimonial assertions. At this point there may be a logical value in numbers of witnesses.

(2) The process also calls for precaution in taking measures beforehand objectively to reduce the chances of testimonial error.

(i) At the time of original observation the investigator (police) should obtain from the observer a note of any marks of the personality observed, so that there will be less need to depend later on the observer's memory.

(ii) At the time of presenting for recognition, whether upon arrest or at trial in the Court room measures should be taken to increase the stimulus of association and to decrease the risk of false suggestion. (a) The person to be identified should be clothed and placed (so far as feasible) in the same conditions as when originally observed. (b) The person to be identified should be presented in company with a dozen others of not too dissimilar personalities. *Wignam's Principles of Judicial Proof* § 208

Value of evidence as regards identity based on personal impression "You compare in your mind said Baron Parke, in *Fryer v Gethercole*, 13 Jur 542, the man you have seen with the man you see at the trial." But 'evidence as to identity based on personal impression however *bona fide*, is perhaps of all classes of evidence the least to be relied on and therefore unless supported by other facts an unwise basis for the verdict of the jury." *Wignam's Principles of Judicial Proof* § 209

Qualification of observer To be qualified as witnesses in this matter of identity the ordinary observers who testify must have seen the persons or articles to be identified and speak upon the basis of such personal perception. They are not at liberty to testify from information furnished by others. They cannot, as would be proper in the case of experts state their judgment upon the facts observed by others. It has been held that the mental result of the witness will not be received at all unless accompanied by a detailed statement of such constituent phenomena as will enable the Court to perceive that the jury might reasonably act in accordance with this inference. *Chamberlayne's Ev* § 1863. Direct and positive evidence of identification is not in all cases obtainable. Obviously, therefore, it is not indispensable. The primary evidence of inspection is naturally, however, of greater weight, other things being equal, than the secondary evidence of circumstantial proof. Witnesses therefore, who speak as to identity from the inspection of the person in question will, so far as this single circumstance is concerned be accorded greater weight than those who speak merely as to identifying circumstances. Where more forceful proof of identity is lacking even as low a grade of evidence as that a given individual resembled defendant more than he did any one else known to the witness, or that two things appear to be similar, has been received. It is not, however, sufficient identification especially in a serious matter, that the witness 'thought' or was 'impressed' to the effect that defendant was identical with the doer of a given act. That a witness was 'satisfied' with the identity of a defendant is not sufficient. Only the weight of the evidence is affected by the fact that the basis is a slight one.

Where no ground whatever is furnished, the inference is rejected, *as of course* S.
Chamberlayne's Et § 1864

that a person is of opinion
 to th list, is not relevant
 is not admissible
 is the general rule of law, and is founded
 matters in dispute—the Judge or jury, as the
 their conclusions from the facts before

whether the defendant was *genuine*, so far as the witness proposed, not
 merely to speak of the apparent sameness of appearance, with the person he
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 l from minute
 be described in
 human language, so as to convey any accurate impression of the object, and
 therefore, unless opinions are received there must be a failure of evidence. When
 facts and peculiarities upon which the opinion is formed can be stated and
 described, they must be, and it is then for the jury and not the witness to form
 an opinion. The reasons for its admission is thus also stated in *Cooper v State*,
 23 Tex. 341 "I may feel a strong conviction, not, however, amounting to certainty

same man whom I knew in another place. My opinion is entitled to some weight
 because it is the statement of a fact, about which, to be sure, I can not speak
 certainty as to satisfy the minds of

hand writing, quantity, value, weight, measure, time, distance, velocity, form,
 size, age, strength, heat, cold, sickness, and health questions, also, concerning

photographs and powder puffs were found upon him and in his rooms. Held that the evidence was admissible as it tended to show that the appellant had abnormal propensities of the kind in question, and therefore that it was some evidence of identity. *Thompson v R* (1918) A C 221=87 L J K B 478-118 L T 418. So photographs could properly be put in evidence as being things unlikely to be found on a male. *Tuis*, (1918) for conviction.

clearly identified by persons who were picked out of a crowd in circumstances of fraud or error, conviction based on such evidence is not valid. *R v Emperor*, 2 Luck 411=101 Ind Cas 407. *R v Dundayal*, 81 Ind Cas 949, dissented from. The evidence which goes to prove that a person has identified another person as having taken part in a particular offence either in jail identification proceedings or elsewhere is admissible though the value of such evidence is weakened perceptibly as a general rule by failure to identify subsequently in Court. *Parbhu v Emperor* 104 Ind Cas 626=28 Cr L J 800, see also *Ramprosad v Emperor*, 1 Luck C 339=A I R 1927 Oudh 369. Evidence of identification of person precisely unknown after a number of months that certain persons took part in an attack is unreliable, unless there was a regular identification parade in which the witnesses picked out those persons from among others especially where it is not stated that such persons bear any distinguishing marks by which they can be recognised. *Wilham Singh v Crown* 1924 Lah 722. In criminal cases it is improper to identify the accused only when in the dock the police should place him, before hand with others and ask the witness to pick him out. Nor should the witness be guided in any way nor asked is that the man? *R v Cartwright*, 10 Cr App R 219, *R v Williams*, 11 id 81 *R v Chapman* 7 id 53, *R v Bundy*, 5 id 270-1. *R v Dickson* 11 id 142-143 *R v Smith*, 1 id 203, *Philip Li* 387. There is no section in the Evidence Act, which renders identification proceedings in jail illegal.

28 O C 258

Admissibility of other evidence in question of identity One of the questions in *Gauri Shank* whether one of a totally different case.

Use of burglary the thief had gained admittance to the house by means of a pen knife which was broken in the attempt, and part left at the window frame, the broken knife was found in the pocket of the prisoner, and perfectly corresponded with the fragment. In another case identification was established by the correspondence of the wadding of fire arms with a the N pistol, ponde 3rd section: *Suren*. *Lall*, 11 C 171. *Fattich*.

A man may survey ten thousand people before he sees two faces perfectly alike, Collect Jud s as an tinct on nimals.

and in an army of an hundred thousand men every one may be known from another. If there should be a dissimilarity of features there may be a dissimilarity of voice, a difference in the gesture, the smile and various other things; whereas a family likeness generally runs through all these, for in everything there is a resemblance, not of features size, attitude and action." See also *Percy's Case*, 12 How St Tr 1199, *James v Angles*, 17 How St Tr 1139, *Day v Day* quoted in *Hibbert's Case*, 351, *Inch v* 1st J 9 C & P 7, *Morris v Davis* 3 C & P 211-5 Cl & F 1836, *Bailey v Bigot* (1878) 1 L R 1 R 308, *Furnaby v Bullie*, 12 Ch D 282 (-90)

Thumb Impression A comparison of thumb impression of the person, who presented the document for the Registrar with that of another person is admissible under this section if the similarity of the impressions can establish the identity of that person with the second person or under clause (2) of section 11 of the Act if their dissimilarity makes such identification improbable. In order to come under this section such comparison must be made by the Court itself. *Per Danerjee J in Queen Empress v Jalir Sheikh* 1 C W N 33. The opinion of an expert as to the similarity of such impression is now admissible under s 45 of the Act. Often a criminal is detected from finger prints. From the finding of the trace or mark it is inferred that some person leaving that trace or mark was present at the time or place of doing the act charged and from the peculiarities of the trace or mark it is inferred that the accused was identical with that person. Now the question is do human finger prints present a combination having the highest degree of certainty? Science answers that they do. In brief the accepted conclusion, after much other evidence, is that the thumb impression of a criminal mark a mathematical combination confirmed the marks is the properly held view. *See* § 414

In the case of finger prints the inference from identical marks is extraordinarily strong. But in the case of foot marks this inference is especially weak. This is because the features usually taken as the basis of inference—size, depth, colour etc.—may not be

Verification of time and place Under this section facts which are necessary to fix the time and place of an occurrence are admissible. The time and place of the crime should be stated with certainty in the indictment though it is not necessary to prove them precisely as stated unless they are necessary ingredients in the crime. *Underhill Cr Et* 56. When however time and place are material the details of time and place must be proved previously as alleged. *Ibid*. The question is

For removal of the son, woman

was charged with the murder of a young man on the day the deceased was murdered, he replied, seemingly without embarrassment that he had been all day employed at his master's work a statement which his master and fellow servants who were present, confirmed. Subsequently it was proved that he was absent from his work about half an hour (the time being distinctly ascertained) in the forenoon of that day. It was also proved by a young girl that she saw a person exactly like him where the deceased was absent at the time of the crime. *Attorney v Lyon's*

Med Jurisprudence Where the defence rests on alibi, the accused must show that he was present at some other place before the time of the alleged crime for such a length of time that it was impossible for him to have been at the place where the crime was committed either before or after the time he was at such other place. *Alays v State*, 72 Neb 723-101 N W 979. So the question of

time is material in the case of an execution of a document when both persons die from a common accident, etc. Similarly the place of occurrence is very material in many cases.

This section makes admissible all facts which fix the time and place. Often time is proved by Opinion evidence. In *State v. Baldwin*, 40 Kan 10, *Johnson J* said "Facts which are made up of a great variety of circumstances and a combination of appearances which from the infirmity of language cannot properly be described [are admissible] in this category may be placed matters involving magnitude or quantities portions of time, space, motion, gratification value, and such as relate to the condition or appearance of persons or things."

"Amongst the numerous physical and mechanical circumstances which occasionally lead to the detection of forgery and fraud, a discrepancy between date of a writing and the *anno domini* water mark in the fabric of the paper is one of the most striking. -- was detected by the circumstance that a letter was written upon paper made in England the death of a person by violent means, it often becomes necessary to ascertain the time of his death. In such a case in the absence of any direct evidence, the time of death is ascertained by *post mortem* examination. Time of death is generally ascertained by digestion, by putrefaction by *rigor mortis* and by temperature of the body. *Lyons v. Med Juris*

In the case of *Empress v. Sudhabode Bhattachary*, Reported in *Lyons Medical Juris* at p. 154, the hour of the death of the deceased became very important. The deceased had taken a meal of chapatties curry and rice with her husband (the prisoner) and then left the house at 4 A.M. The prisoner was returned at 10 P.M. The question to be decided was whether the death occurred at 4 A.M. during which the prisoner was in her room, or did it occur after his leaving the house? After examining the contents of the stomach the medical expert gave the opinion that in all probability the death occurred before the prisoner left the house. So in such a case in order to ascertain the time of death evidence is admissible to show what food she took, when she took the food condition of her health, her age etc. vide *Lyons Medical Juris* p. 154.

Testimonial evidence as regards time. The ordinary observer, the average man, is entirely familiar with the duration of intervals of time. Such a witness may state the moment at which a given event occurred or the place between two events. In the latter case the amount of elapsed time may be stated in standard units of duration hours, minutes seconds and the like or on the other hand, the statement may be one more general in form. Such an act of reasoning is, in many instances merely the statement of a fact. Although such an inference more largely embodies the element of reasoning an observer may be required for the doing of a funeral or a telegram and so forth. How long it crosses a high way or bring about some other definite result or occurrence may be to one familiar with the facts, a very simple act of reasoning. *Chamberlaine v. Dv* & 2093

Illustration (a) This illustration is an example of introductory fact. This may also serve to illustrate section 7, as being an instance of facts which may be taken into consideration of the court. It is to be noted that the illustration is of a fact which is not the altered fact, (XXXIX) *Hiscocks v. Wilson* 9

O.I. & F. 556 and other cases cited in *Basu v. Succession Act* under section 75. So where the factum of the will is in issue such evidence is ordinarily admissible as introductory facts. Where the question is whether a will is forged or not, these facts may rebut an inference suggested by a fact in issue. *Ido* Act 117

on him *Clair v Motenoux* 3 Q B D 237, *Jenoué v Delmege* (1891) App Cas 73, *Royal Aquarium & Socy v Jarlison* (1892) 1 Q B 443. Malice is proved when it is shown that the defendant
 9 Ex 615, *Dickson v L*
 C 457. But to go into waste of too much time. It is sufficient to show that there was a quarrel *Simpson v Robinson* 12 Q B D 511. *Valin v Andrews*, M & W 336, *Nort Ev* 117.

Illustration (c) The fact of absconding which is a misfeasance under s 8 is in itself equivocal. It may be the result of guilty knowledge or conscience, or it may be perfectly innocent. Anything, therefore, that the party absconding says at the time of the act is receivable as explanatory of a relevant fact. It would also be receivable as part of the *res gestae* and as a declaration accompanying an act. The question frequently arises in bankruptcy when it is necessary to decide whether leaving the house is an act of bankruptcy or not. The presumption of inference arising from the act of absconding is thus rebutted. *Nort Ev*

Illustrations (d) and (e) It is presumed says *Norton* that the statements made by C in one case, and B in the other are only to be receivable as evidence

transaction. *Hoodroffe Ev* 104. But it is submitted that explanation presupposes an adverse inference after which only an explanation is admissible to rebut that inference. As regards illustration (e) the statement is neither admissible as part of *res gestae* under the Verbal Act doctrine nor is it not being a spontaneous declaration its sanctity is guaranteed.

Illustration (f) This illustration is founded on the well known case of *R v Lord George Gordon* 21 How St Trial 514. In the case put the cries

10 Where there is reasonable ground to believe that two or

Things said or done by conspirator in reference to common design more persons have conspired together to commit an offence or an actionable wrong, anything said done or written by any one of

0. such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it

Illustrations

Relevant ground exists for believing that A has joined in a conspiracy to wage war against the Queen

The facts that B procured arms in Europe for the purpose of the conspiracy, C collected money in Calcutta for a like object, D procured persons to join the conspiracy in Bombay, E published writings advocating the object in view at Agra, and F transmitted from D letters to G at Calcutta the money which C had collected at Calcutta and the receipt for a letter written by H giving an account of the conspiracy, are each relevant to his proof the existence of the conspiracy and to prove A's complicity in it, although he may have been ignorant of all of them, and although the persons by whom they were done were stranger to him and although they may have taken place before he joined the conspiracy or after he left it

Conspiracy A conspiracy may be described in general terms, as a combination of two or more persons by some concerted action, to accomplish some criminal or unlawful purpose or to accomplish some purpose not in itself criminal or unlawful, by criminal or unlawful means. *Greenleaf Cr. Vol III § 89*, see also *Dial v Stuart* 10 U S App 173, *U S v Benson*, 44 U S 219; *State v Clark*, 9 Hon 1 536, *Pettibone v U S*, 149 U S 197 'Conspiracy' says Mr Bishop is the corrupt agreeing together if two or more persons to do by concerted action something unlawful either as a means or as an end. *Fishp Cr Law Vol II § 171* The English Commissioners in their Report of 1843 proposed 'The crime of conspiracy consists in an agreement of two persons (not being husband and wife), or more than two persons to commit a crime or fraudulently or maliciously to injure or prejudice the public or any individual person. 7th Rep Cr Law Com 1843 p 27. Section 120 A of the Indian Penal Code, lays down — When two or more persons agree to do or cause to be done — (1) an illegal act or (2) an act which is not illegal by illegal means such

U J observed The crime of conspiracy is complete, if two or more than two should agree to do an illegal thing that is to effect something in itself unlawful or to effect by unlawful means something which in itself may be indifferent or even lawful. It has accordingly been always held to be the law that the gist of the offence of conspiracy is the agreement itself, whether

mean criminal for there are many cases in which a combination to do a thing is a crime, although the act itself, if done by an individual, would not be a crime, on the other hand, 'unlawful' does not mean 'tortious' for there are torts which it is not a crime to conspire to commit. Nor again, does any case go so far as to decide that a combination to commit a breach of contract is a criminal conspiracy. *Roscoe, Cr Ev* 526 Hence the word unlawful in the definition of conspiracy has no precise meaning. *Ibid* But a conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act or to do a lawful act by unlawful means.

for criminal object for the use of criminal means The number and the

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is not necessary, in order to constitute a conspiracy, that the acts agreed to be done should be acts which if done should be criminal. It is enough if the acts agreed to be done, although not criminal, are wrongful: e, amount to a civil wrong." Thus a combination to use another's automobile without his consent may be a civil wrong, but it need not affect the individual. It is sufficient if it does and for which, by which, by

towards another person. It may be punished criminally by indictment, or civilly

in my opinion, the same though to sustain an action special damage must be proved. It has often been debated whether, assuming the existence of a

convinced that a number of actions and things not in themselves actionable or unlawful if done separately without conspiracy may with conspiracy, become dangerous and alarming, just as a grain of gunpowder is harmless but a pound may be highly destructive, or the administration of one grain of a particular drug may be most beneficial as a medicine but administered frequently or in larger quantities with a view to harm may be fatal as a poison. Many illustrations of these views might be suggested, but I need them not if I have made myself understood." Per Lord Hampton in *Quinn v Leatham*, (1901) A C at pp 529, 530, see also *Mogul Case*, (1892) A C 25, *Rex v Journeymen Tailors*, and *Mansfield*

So conspiracy differs from other charges in this respect, that in other charges the intention to do a criminal act is not a crime of itself, until something is done amounting to the doing or attempting to do some act to carry out that intention. Conspiracy on the other hand, consists simply in the agreement of confederacy to do some act no matter whether it is done or not. *Per Chesby B in R v Herbert* 13 Cox 82; *R v Most*, 7 Q B D 214, *Kahl Munda v King Emperor*, 28 C 797. But a conspiracy agreed to be done, and have involved a civil in *Hearney v Lloyd*, 26 L v *Laurie* 25 B 230. Only where acts without preconcert *nons*, 1 Q B 155 T 132, *Templeton*

Union of Wills Obviously there must be, between the conspirators, a con

conspirator. Let where the conspiracy is to commit a particular offence, it is not essential that both should be capable of it as principals of the first degree. One to be chargeable need not have been the original contriver of the mischief, for he may become a partaker in it by joining the others while it is being executed. If he actually concurs, no proof is required of an agreement to concur. *Dist p* *Crim* *have* *The* *inferred by the jury from other facts proved, in other words from circumstantial evidence* *Bishop's Cr Lau* § 190 (2)

Combination to commit crime A combination to commit a substantive crime is an indictable offence. *Roscoe Cr Ev* 526. In England at common law, husband and wife who are considered as one person are incapable of conspiring together. 1 *Russ Cr* 146; *Director of P P v Blady*, (1912) 2 K II 89, 90. But they can severally or jointly conspire with other persons. *R v Whitehouse* 11 Cox 38. It is immaterial whether the principal offence is a felony, or misdemeanour or wil

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R v Boulton, 12 Cox 87. Criminal conspiracy consists in the agreement of two or more persons to commit an offence punishable by law. It is undoubtedly true the law does not take notice of the intention or the state of the mind of the offender and there must be some overt act to give expression to that intention. *Numal v King Emperor*, 31 C W N 239.

Combination to Commit Torts an indictable conspiracy in many, it what cases *Kenny* says any tort that is a trespass committed *bona fide* by persons eager to assert their supposed right of way. *Roscoe Cr Ev* 526. In many cases an agreement to do a certain thing has been considered as the subject of an indictment for conspiracy at common law, though the same act if done separately by each individual without any criminal or even actionable

have certainly a right to express by ap

369, see also *Gregory v Duke of Brunswick*, 6 M & G 953, *R v Leigh* 1 C & K 28n, *Wright on Conspiracy*, 37. The law on the subject is thus summarised by *Bouen L J in Mogul Steamship Co v Mc Gregor & Co*, 23 Q B D 598. Of the general proposition that certain kinds of conduct not criminal in any one individual may become criminal if done by combination

among several there can be no doubt. The distinction is based on sound reason, for a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise and the very fact of the combination may show that the object is simply to do harm and not to exercise one's just rights. This case was approved by the House of Lords on appeal *vide* (1892) A C 25 see also *Allen v Flood* (1893) A C 1, *Quinn v Leatham* (1901) A C 495 *S Wales Minerals Federation v Glamorgan* (1905) A C 239, 252. But in the application of this undoubted principle it is necessary to be very careful not to go beyond that which is necessary for the public interest. *Mogul Steamship v McGregor* 23 Q B 600. So a combination to violate without just cause private rights contractual or other in which the public has a sufficient interest is an action. Violation of the private right is an action. *McGregor* (1893) A C 25 (48) see also *R v A conspiracy to commit fraud is indictable* *R v Warburton*, 11 Cox C C 56. If it can be proved to be co-trespassers by other competent evidence the declarations of one as to the motives and circumstances of the trespass will be evidence against the others.

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Agree to commit breach of contract : Agreement to commit a breach of contract in circumstances that are peculiarly injurious to the public is conspiracy. *Verdine v L Clive & Burr* 2473, see also *Roscoe Cr Ev* 527.

Proof of conspiracy. Direct evidence is not essential to prove the conspiracy. It need not be shown that the parties actually came together and agreed in express terms to enter in and pursue a common design. *Underhill Cr Ev* § 491. In many cases the existence of conspiracy is a matter of inference deduced from criminal purpose.

I L 306 (317). The conspiracy may be and the jury from proof

of facts and circumstances which taken together apparently indicate that they are merely parts of some complete whole. *R v Parsons* 1 W B 392. *Emperor v Annappa* 9 Bom L R 347. *Kishen Chand v Emperor* 92 Ind Cas 419. Although the common design is the root of the charge it is not necessary to prove that the defendants came together and actually agreed in express terms to have the common design and to pursue it by into execution for in many cases of the most there are no means of proving any such thing. *Brilliant*, 3 Cox 76, *R v Parnell* 14 Cox 60. persons pursue by their acts the same object, often by the same means one per forming one part of an act and the other another part of the same act so as to

conspiracy is to be inferred from the conduct of the parties *R. v Duffell* 5 Cox 404; *R. v Cope*, 1 Str. 144

When the proof of conspiracy depends upon proof of the participation of the accused in an overt act which itself amounts to an offence, the proper course is to put the accused on the trial for that offence. However, the accused may legally be charged merely with the offence of criminal conspiracy. The mere association of an accused with any of the conspirators is not enough by itself to convict him of being a member of the conspiracy. *Kalidas v Emperor*, 39 C L J. 151-83 Ind Cas 513. Where the accused is charged with an offence of conspiracy and acts of cheating in pursuance of conspiracy, the charge is not bad and it is open to the prosecution to prove such acts in order that from these the existence of the conspiracy may be proved. *Abdur King Emperor*, 35 C L J. 279, *Subramania v Emperor*, 25 M 61 distinguished. Conspiracy can be proved from surrounding circumstances and conduct of the accused. It need not be proved by direct evidence. *Emperor v Annappa*, 5 Cr L J 323 see also *Chidamboran Pillai v Emperor*, 32 M. 3. Criminal conspiracy might be proved by direct or circumstantial evidence. In a charge for the offence of conspiracy the overt acts by which the object of the conspiracy is sought to be attained need not be given. *Aishen Chind v Crown*, 92 Ind Cas 419-27 Cr L J 243-20 S L R 18-A I R 1926 Sind 171

Scope of the section The operation of this section is strictly conditional upon there being reasonable ground to believe that two or more persons have conspired together to commit an offence. *Per Jenkins C J in Barindra v Emperor*, 97 C 467 at p 504. Before anything said done or written by any one alleged member of a conspiracy can be used as evidence against another, the Court must have reasonable ground for believing that the conspiracy between them existed. 1930 M W N 1264. So it is reasonable as a general rule, that some *prima facie* and satisfactory evidence should, in the first instance, be given of the common purpose, before evidence of the acts in it by a multitude of persons who but for such common purpose would be absolute strangers, should be received. *Nori Ev* 120. In *R. v McKenna*, 1r Circ Rep 461, *Pennefather C J* said "It is necessary to prove the evidence of a conspiracy, and to connect the prisoner with it in the first instance where you seek to give in evidence against him the declaration of a co-conspirator; and having done so you are then at liberty to give in evidence against the prisoner acts done by any of the parties, whom you have connected with the conspiracy, but when a party's own declarations are to be given in evidence such preliminary proof is not requisite and you may as in any other offence, prove the whole case against him by his own admissions. So if a *prima facie* evidence of a conspiracy is given and accepted, the evidence of statements made by any one of the conspirators in furtherance of the common object is admissible against all. *Rez v Blake* 6 Q B D 126, *Per v Baskerville* (1916) 2 K B 658-86 L J K B 28. The Indian Evidence Act did not mean to depart from the law as expounded in those cases. *Lalaram Gangannull*, 1r 81 Ind. Cas 817-25 Cr L J 1041-20 L W 203. But a conspiracy within the terms of section 10 of the Act contemplates something more than the joint action of two or more persons to commit an offence. If that were not so this section would be applicable to any offence committed by two or more persons jointly with deliberation and this would import into a trial a mass of hearsay evidence which the accused persons would find it impossible to meet. *Agantra Bala v The Empress*, 4 C W N 528. For the application of this section there must be reasonable ground to believe that two or more persons have conspired together to commit an offence, and that being shown, anything said, done or written by any one of such persons in reference to their common intention may be proved both for the purpose of proving the existence of the conspiracy as also for showing that any such person was party to it. *Kalid v King Emperor*, 25 C 797, see also *Kusir Bap v Emperor*, 18 C L J 590. But statements made by an alleged conspirator to a third party suggesting that there had been a conspiracy between the plaintiff and others in connection with the forgery of an alleged will, are not relevant when such statements are used to prove (a) the existence of a conspiracy as to which there is no issue, or (b) that the plaintiff was a party to it. *Kadambam Dass v Kumudini*, 30 C 933, see also *Pulni v Emperor*, 15 C L J 517. Where an agreement exists between two parties, in pursuance of which speeches are delivered by them such speeches are admissible

of law is that when several persons are proved to have combined together for the same illegal purpose any act done by one of the parties in pursuance of the concerted plan and with reference to the common object, is in the contemplation of the law the act of the whole. Each party
out the objects of the conspiracy and do
common design. *Per Couch C J in Queen v*
R Cr 15; see also *Emperor v Abani*, 33 C 100-101 W N 20

It is a rule of substantive law and not a rule of Evidence. The rule underlying this section is a rule of substantive law and not a rule of evidence. The following extracts from the writings of Professor James Bradley Thayer, from *American Law Review*, XV 80, is very instructive on the point. "The term *res gesta* is

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whether it shall be so used as having been brought home to him, and whether he shall be chargeable with it as if it were his own. When the enquiry is whether the utterance of a agent or a co-conspirator is chargeable as not a party and it is said

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engaged in the common enterprise and regarding that,—in such cases it is common to express this idea by saying that the declarations must be made as a part of the *res gesta*, and if it is not so made, it is deemed to be *res inter alios gesta*. Now it is obvious, on a little reflection, that to settle this question adversely to the admissibility of that which is offered in evidence, is really to settle a question as to the law of evidence, and not as to the law of conspiracy.

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enterprise, about the affairs of it, and as a part of the *res gesta*, but as regards nothing, it is used as a compact expression for the business, as regards which the law for certain purposes identifies the two conspirators or the principal and agent. In such cases, evidently, the declaration may be about a past fact as well as a present one, so long as it comes up to the above-named requirements.

Part of the *res gesta* is the declaration of other conspirators.

part of the *res gesta*,

conspiracy is to be inferred from the conduct of the parties *R v Duffield*, 5 Cox. 404; *R v Cope*, 1 Str. 141

When the proof of conspiracy depends upon proof of the participation of the accused in an overt act which itself amounts to an offence, the proper course is to put the accused on the trial for that offence. However, the accused may legally be charged merely with the offence of criminal conspiracy. The mere association of an accused with any of the conspirators is not enough by itself to convict him of being a member of the conspiracy. *Kalidas v Emperor*, 33 C L J. 151-82

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Chidamboran Pillai v Emperor, 32 M. 3 Criminal conspiracy might be proved by direct or circumstantial evidence. In a charge for the offence of conspiracy the overt acts by which the object of the conspiracy is sought to be attained need not be given. *Kishen Chand v Crown*, 92 Ind Cas 419-27 Cr L J 243-208 L R. 18-A I R 1926 Sind 171.

Scope of the section. The operation of this section is strictly conditional upon there being reasonable ground to believe that two or more persons have

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have connected with the conspiracy, but when a party's own declarations are to be given in evidence, such preliminary proof is not requisite, and you may as in any other offence, prove the whole case against him by his own admissions. So if a *prima facie* evidence of a conspiracy is given and accepted, the evidence

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written by any one of such persons in reference to their common intention may be proved both for the purpose of proving the existence of the conspiracy as also for showing that any such person was party to it. *Kahl v King Emperor*, 25 C 797, see also *Kusir Bap v. Emperor*, 18 C L J 590. But statements made by an alleged conspirator to a third party suggesting that there had been a conspiracy between the plaintiff and others in connection with the forgery of an alleged will, are not relevant when such statements are used to prove (a) the existence of a conspiracy as to which there is no issue, or (b) that the plaintiff was a party to it. *Kadambini Dassi v. Kumudini*, 30 C 983, see also *Pulin v Emperor*, 15 C 1. J. 517. Where an agreement exists, between two parties, in pursuance of which speeches are delivered by them such speeches are admissible

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This section makes evidence communications between different conspirators while conspiracy is going on, with reference to the carrying out of a conspiracy. But it is not intended to make evidence the confession of a co-accused and put it on the same footing as a communication passing between conspirators, or between conspirators and other persons, with reference to the conspiracy. *Emperor v. Abani*, 15 C W N 25=38 C 169. So letters written by one co-conspirator may be evidence against others even when they are not written in furtherance of the conspiracy. *Vide, Queen v. Amir Khan*, 17 W R Cr 15; *Queen v. Amuruddin*, 7 B L R 63=15 W R Cr 25. The illustration to this section is inconsistent with the section. The way that the words "and to prove A's complicity in it" come into the illustration are not quite in accordance with common sense or with the section but where the fact from the nature of things matter much. *Emperor*, 28

Existence of Reasonable Ground. For the application of this section there must be reasonable ground to believe that two or more persons have conspired together to commit an offence and that being shown anything said, done or written by any one of such persons in reference to their common intention may be proved both for the purpose of showing that any such C 797, see also *Kusir Bap v* 14 C W N 1114=37 C 467, N 676, 1930 M W N 1264

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and done by *Ramray* when the prisoner was not present are not relevant facts as against the prisoner, as the prisoner was not present when they were told unless

And here, also, as in the case of other conspirators, while the conspiracy is said or done by them in furtherance of the common intention, the declarations made and done by them are admissible. *Greenleaf T*

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Difference between English and Indian Law
sible in cases of conspiracy much evidence under the English Law. The provisions of the English Law. *Ramprasad v Emperor*

ance of the common design. *Per Coleridge J in R v Murphy*, 8 C & P 311. So also it does not matter, whether the acts were done, or the declarations made, in the presence or in the absence of the accused, but everything said or done by any one of the conspirators or co-

the evidence against a conspirator is admissible, whether written or oral, or absent, and where it takes place. *R v Brand*, 535. As the English doctrine, a distinction is made between statements themselves purporting to accompany and explain the acts, which, although made during the continuance of the plot are in fact a mere narrative of the measures that have already been taken. The last statement accordingly is inadmissible. So a letter written by a co-conspirator to a private friend unconnected with the plot is inadmissible. *Per Lord Hale*

society to which he belonged, which excluded the writer, and that it was not the act of the part of the conspirators against him. *Macdonald*, 32 How St Tr 451, 453 and laid down the law which is consonant with the principle indicated above. It has already been stated that this rule, is not a rule of evidence as erroneously believed but is a rule of substantive law which considers the conspirators as one person and as such any statement made by one should be considered as an admission by each one of the rest. *Per Lord Hale*
used against other conspirators as explained under s 10 of the Indian Evidence Act, only when they are in the nature of narratives, declarations or admissions, and not when they are in the nature of statements of fact. The provisions of s 10 of the Indian Evidence Act, which the act or declaration must have been done or said, not only with reference to the common intention but also in pursuance of the same. *Menda v King Emperor*, 5 Oudh Cas 321; *Ram Prasad v Emperor*, 1 Luck C 339-A I R 1927 Oudh 369.

This section makes evidence communications between different conspirators while conspiracy is going on, with reference to the carrying out of a conspiracy. But it is not intended to make evidence the confession of a co-accused and put it on the same footing as a communication passing between conspirators, or between conspirators and other persons, with reference to the conspiracy. *Emperor v. Abani*, 15 C W N. 25=38 C 169. So letters written by one co-conspirator may be evidence against others even when they are not written in furtherance of the conspiracy. *Id.*, *Queen v. Amir Khan*, 17 W R Cr 15; *Queen v. Amiruddin*, 7 B L R 63=15 W R Cr. 25. The illustration to this section is inconsistent with the section. The way that the words "and to prove A's complicity in it" come into the illustration are not quite in accordance with common sense or with the section but where the fact from the nature of things matter much. *Emperor*, 28

application of this section there more persons have conspired g shown anything said, done or written by any one of such persons in reference to their common intention may be proved both for the purpose of for showing that any such pers C 797, see also *Kusir Bap v En* 14 C W N 1114 = 37 C 467, *Am* N 676, 1930 M W N 1264 81 I.

Attenuat v King Emperor, 5 Oudh Cas 321 In that case the prisoner was

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against the prisoner, and that unless such reasonable ground exists things said and done by Ramiraj when the prisoner was not present are not relevant facts as they are not the reason for the arrest of the prisoner when they were told unless they are relevant to the case.

590 There is a difference between a reasonable ground to believe a thing and a proof of that thing. *Balmulani v Imperor*, 23 Ind Ca = 738 = 1. P R 1915 Cr = 16 Cr L J 358 Proof of conspiracy is not essential to the admissibility of the evidence itself. Reasonable proof of a conspiracy may however, be demanded before the agency of one alleged conspirator may be properly held to affect those claimed to be his associates. *Chamberlains* Ex § 3244

Communications between conspirators As soon as it is proved that the prisoner was privy to the general conspiracy, everything done by each of his fellow conspirators must be imputed to him as a part of the conspiracy if it was done to carry out their general purpose. *Per Eyre J in R v Hardy* 24 How St Tr 151 The day book kept by one of the conspirators is evidence of something done in the course of the transaction (*Per Lord Denman C J in R v Blake* 6 Q B 137), and as such it is receivable in evidence as a step in the proof of the conspiracy. *Ibid*, per *Patterson J* In the same case *Coleridge J* said at p 140 'As to the counterfoil it is quite clear that no declaration of it is needed in evidence against *Blake* which was made in *Blake's* absence then was the statement' *In Hardy's Case*, 24 How of a letter written by wife, who was not a party to the crime. *Tyde* the whole matter up thus 'I letter as anything more than J'

in carrying the papers and the transaction itself' See also *Paril* 70 But it appears that such a letter is admissible under this section

Order of Proof It has already been stated that this section comes into

Emperor, b Quun C O Connell, 5 State Tr N S 710, *Pennfather O J* said "When evidence is once given to the jury of a conspiracy, against A, B, and C whatever is done by A, B, or C, in furtherance of the common commercial object is evidence against A, B, and C, though no direct proof be given that A, B, or C, knew of it or actually participated in it. If the conspiracy be proved to have existed, or rather if evidence be given to the jury of its existence the acts of one in furtherance of the common design are the acts of all, and whatever one does in the furtherance of common design, he does as the agent of the co-conspirators"; see also *R v Hardy*, 24 How St Tr 401, *R v Stone*, 25 How St Tr 1; *R v Watson* 30 How St Tr 80 359, 539, *R v Brandreth* 24 How St Tr 766, 852, *R v Hut*

must be proved before giving related acts may be proved. *Fort v Elliot* 4 Ex In *R v Duffield*, 5 Cox pen one in a thousand times comes before the jury to conspire together, and species of evidence conspiracy is to be seen taking seen through for the jury about that end. *Russ Cr* 192

So the fact of conspiracy must be established before the act of one can be made the act of all. But the common law may be proved by direct or indirect evidence. *R v Blalock*, 6 Cr 22; *R v Baskerville*, (1916) 2 K B 659; 120; 1 East P C. 96, 2 Stark Ev 326; 2 B & B 302; *R v Jacobs*, 1 Cox 414. The object of this section is merely to ensure that one person shall not be made responsible for the acts or deeds of another until some bond in the nature of agency has been established between them and the acts words or writing of another which it is proposed to attribute vicariously to the person charged must be in furtherance of the common design and after such design was entertained. *Indra v Chandra Emperor*, 116 Ind Cas. 756=30 Cr L J 646=A. I R 1929 Pat 145 (F. B.)

The rule is applied by East as follows: "In this (high treason), as in cases founded in conspiracy, the conspiracy or agreement among several to act in concert together for a particular end must be established by proof, before any evidence can be given of the acts of any person not in the presence of the prisoner. And this must generally speaking, be done by evidence of the party's own act, and cannot be collected from the acts of others, independent of his own, as by express evidence of the fact of a previous conspiracy together, or of a concurrent knowledge and approbation of each other's acts." But it may also be done by "evidence of the acts of the prisoner, and of any other with whom he is

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evidence against another who is charged as a fellow conspirator, until such a

act, etc. . . . of one . . . can properly be used as evidence to show designs of another; yet in some peculiar instances where it would be difficult to establish the defendant's privity without first proving the existence of the conspiracy, a deviation has been made from this rule, and evidence of acts and conduct of

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that it is an inversion of the usual order for the sake of convenience, and such evidence is, in the result, material so far only as the assent of the accused to what has been done by others is proved." *Roscoe Cr Li* pp 533, 534; *Per Buller J in Hardy's Case* 21 How St Tr 451. So it is clear that the general principle affecting the order of evidence leaves it ultimately to be controlled by the trial Court's discretion. In the present application, the rule of conditional relevancy naturally applies, i.e. statements of A being receivable against B as

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2 B & B 303 (310) *Abbot C J* observed We are of opinion that on a prosecution for a crime to be proved by conspiracy general evidence of an existing conspiracy may, in the first instance, be received as a preliminary step to the more particular evidence by which it is shown that the individual defendants were guilty of the particular of the acts of it is permitted But it is to be observed, that in such cases the general nature of the whole evidence intended to be adduced is previously opened to the Court, whereby the Judge is enabled to form, an opinion as to the probability of affecting the individual defendants by particular proof applicable to them of the alleged conspiracy, and the proof of a sufficient quantity of evidence to be received, as to be an

unreasonable prejudice would certainly be a useless waste of time

The admissibility of the act or declaration of a co conspirator against the party defendant before the Court does not depend on whether such co conspirator is indicted or not or tried or not with the defendant 2 *Starkie Ev* 309 see also *R v Duguid* 94 L T 897 In the case of a conspiracy to carry on the business of common cheats, proof at different times of similar acts is admissible as cumulative instances are necessary to prove the offence *R v Roberts* 1 Camp 399

Anything said or done etc In England originally such evidence was admissible on the principle of *res gestae* Vide *Phil Ev* 9th Ed Vol I 189 It follows, that any writings or verbal expressions, being acts in themselves explaining other acts, and therefore part of the res gestae, and coming home to one conspirator, are evidence against him if it sufficiently appears that they were used in the design *Phil Ev* 9th Ed Vol I, 204, see also *r* 404 What the effect of such evidence will be must depend on a variety of circumstances, as whether the prisoner was attending to the conversation whether he approved or disapproved *Per Eyre C J* in *It* 1 see also *Stone's Case* 6 f R 527, *Rex v Salter* 5 Esp 125 So also consult *It* 189 *lance* (1 *ord Russel's* *Cu* *e*

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tion of a fellow conspirator against a defendant whether the former be indicted or not, or tried or not with the latter, for the making one a co defendant does not make his acts or declarations evidence against another, any more than they were before, the principle upon which they are admissible at all is, that the act or declaration of one is that of both united in common design, a principle which is wholly unaffected by the consideration of their being jointly indicted." 2 Stark Ev 329 3rd Ed. But where the conspiracy was charged with "divers other person" *Watson J* made an order for the names to be given forthwith *R v Perin*, 72 J P 144

A letter written by a person who is a stranger to the transaction is not admissible *Ang Emperor v Keshab* 25 Bom L R 248 In a trial of several accused for sedition an exercise book was put in evidence On each one save five of the 63 pages of the book there appeared an entry consisting in most cases of a name or pseudonym followed by an address and in most cases by a series of what was clearly pass words Each name was preceded by a pair of letters or a single letter and these were arranged in order so as to be divided into groups and it was clear that a particular letter or pair of letters was appropriate to the addresses in a particular locality Simultaneous searches at the residence of several of the named persons and investigation of their activities disclosed evidence that for the greater part they exhibited a form of activity manifested in different ways but in nearly all cases of a revolutionary trend and in many instances directed to actual violence in support of such trend The accused could give no account or explanation of the code Held that the cipher code book was not to be treated as the act, word or deed of a particular individual, but the fact that it existed, the fact that set forth the names and address of a substantial number of persons charged, the fact that it was in a peculiar form such as is not likely to be found in any code intended to be used for lawful purposes, and many internal in use of words and names having a probability amounting almost associated for some unlawful purpose be kept secret and in absence of evidence that the persons named in it were associated for some legitimate purpose to be kept secret for some legitimate reason, the cipher code was in itself a good ground for supposing that the persons named have conspired to commit an offence and any other acts or writings of individual conspirators in furtherance of the common design became admissible under s 10 *Indra Chandra v Emperor*, 116 Ind Cas 756-A I R 1929 Pat 145-30 Cr L J 646 (F B) A and B are indicted in England for a conspiracy to commit a felony The only evidence of the conspiracy consists of facts done to and by

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Illustrations In *Balmukand v Emperor*, 28 Ind Cas 733-17 P R 1915 Cr *Johnstone J* observed "I am however inclined to agree with *Mr Beechey* as to point (2) in support of which he quoted *Barindra Kumar Ghosh v Emperor*, 7 Ind Cas 359-14 C W N 1114-11 Cr L J 453-37 C 467 They say that the words "and to prove A's complicity in it come into the be section as Calcutta and A's complicity or otherwise implicating A only of adling proof of the existence and nature of conspiracy At the risk of being

tedious, I must give an illustration to explain my view. In the case given in the text, a manufacturer, to send otherwise *prima facie*, both as to the nature and A's name in no way comes into the business of ordering arms in Europe, how can it be said that B's ordering of arms there can produce in the mind of the Judge any added conviction that A was a member of the conspiracy? Of course in framing a law for the purpose the idea that the create a barren, an ar matte matte the this is not to ot, if as a towards nderlying absence

committing jointly any criminal offence are deemed to be mutual agents or confederates for the purpose only of the execution of the joint purpose. Accordingly any act done by one of them in the execution of common purpose is deemed the act of the others also. *Wills' Ev* 167; see also *R v Caton*, 12 Cox 634; *R v Blake*, 6 Q B 126; *R v Murphy*, 8 C & P 297. So when a co-conspirator leaves a conspiracy, the mutual agency terminates so far as he is concerned and as such acts and declarations of other conspirators should not be admissible against him. In England also, a conversation held by D and E, two members of the conspiracy an hour after th

an abortion which A and B conspired to procure on July, 24. Evidence of doctor that B called on him in June and asked for a remedy for her condition, was held admissible against A as the act was in furtherance of the common purpose. But a diary kept by B, incriminating A, and a letter intended for, but not sent to him, both written after the abortion, were rejected as not in furtherance of the common purpose. Statement of a co-accused after arrest is not admissible against other co-accused. *Sital v Emperor*, 46 C 7000-30 C L J 255. The acts and declarations of a particular defendant conspiracy *Dwyer*, 24.

are indicted, in *Middlesex* for a conspiracy to destroy property. After proof acts in Surrey don 21 54, Phip 222

death in attempting to escape from confinement in jail. He procured 'saw' by some with certain as witness r the death e convicts 100. The request was repeated twice. Held, that the evidence of the constable was admissible under the circumstances under s 10 *Maula Bahsh v Emperor*, 119 Ind. Cas

762=30 Cr L J 1103=129 Cr L J 190=A I R 1929 Lab 631 Where S.
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American law—common purpose is not sufficient A common purpose is not sufficient, standing alone, to secure admissibility for the evidence of what happened on other occasions. The several acts may well have been done for the same purpose or in pursuance of a single agreement, the evidence nevertheless is not admissible unless the common purpose runs through the several acts rather than up to them. In other words, the individual transactions must be connected, correlated and systematized in such a way that each act, though, perhaps, in a sense, complete in itself, is yet a necessary element in a plan to reach an ulterior object which has been in view from the start, simply unity of purpose is not sufficient. A mere conspiracy to do a number of disconnected acts of a similar nature, e. g., to rob all the houses of a given neighbourhood and the carrying out of such an arrangement, would not be sufficient to authorize the Court in receiving evidence of one robbery as proof of the commission of another. Those associated in common plan may each be liable, under the rules of substantive law governing the relations of conspirators, for the doing of any acts which may have been done during and in pursuance of the conspiracy. But such a situation does not disclose an instance of the working of the rule under consideration. *Chamberlayne's Ev* § 3244

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 them were acquitted, the other is entitled to an acquittal, as a matter of course
Profulla v King-Emperor, 30 C W. N 94=91 Ind Cas 813; *R v Manning*,
 13 Q B D 241, *Kasem v Emperor*, 45 C L J 204, *Manindra v. Emperor*, 41
 C 754

When facts not other-
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11. Facts not otherwise relevant are relevant—

- (1) if they are inconsistent with any fact in issue or relevant fact;
- (2) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

Illustrations

(a) The question is whether A committed a crime at Calcutta, on a certain day.

The fact that, on that day, A was at Lahore is relevant.

The fact that, near the time when the crime was committed, A was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant.

(b) The question is, whether A committed a crime

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Scope of the section. This section is, no doubt, expressed in terms so extensive that any fact which can, by a chain of ratiocination, be brought into

which are regarded as relevant facts either because the circumstances under which they are made invest them with importance, or because no better evidence can be got. The sort of facts which the section was intended to include are facts which either exclude or imply more or less distinctly the existence of the facts sought to be proved. Some degree of latitude was designedly left in the wording of the section (in compliance with a suggestion from the Madras Government) on account of the variety of matters to which it might apply.

This section is not always controlled by s 32. As a general rule s 11 of the Evidence Act is controlled by s 32 of the Act where the evidence consists of statements of persons who are ' ' rule is subject to certain exceptions. 1 9 Bom L R 1047, *Ambica v Humud A* 521. In the former case *Bentan J* in question being whether a will was made in forged for the s been w is tende cannot on the ground that it is itself a relevant fact under s 11. While I adhere to the correctness of general rule s of persons wh exceptions. Tl

tion Where however witnesses cannot be brought before the Court their previous statements may be read in evidence, not, except under by necessity to take plainly and at once of testing the man

statement of a person who is dead or who cannot be found is relevant under Section 11 and 13.

that he did say it. In these circumstances no one at all was even
alter the fact, if it be a fact that he did
needed to bring the thing said under
a case at this for example, suppo-

119 will where the fact that is relevant under s 11 is not what a deceased person chose to predicate about a thing but that he mentioned it at all, whether what he predicated of it were true or false, then and then only it is a case out side s. 32'

Fact whether includes judgment Everything which has been called into being by some agency or other, is in the widest sense a fact and in certain sense, a judgment may be said to be a fact within the meaning of s 3 of the Act. *Gajul Lal v Fattah Lal*, 6 C. 171, *Per Jackson J*, contra *ibid Mitter J* Former judgments which are not of the nature of judgments *in rem*, nor judgments be admitted, where parties are different, as s 11 or under any other section of the Act, 10 B 43 *The Collector of Gorakhpur v Palal*, 12 A 1 Though the recital in a judgment cannot be used as evidence still the judgment is evidence as a relevant fact in issue or as a transaction with families see also *Indar Singh v Fateh Singh*, 1 Lah 540

Facts, not otherwise relevant As regards clause (2) of this section Mr

it is a ma made so cannot be depended upon for any important purpose unless they are made usual special circ they render and if they which may probative fc judgment of *Beaman J* in 9 Bom. L R 1047 cited *supra*.

Facts inconsistent with any facts in issue The usual theory of essential act is istency, it since ly fair bsolute and its ntral ough place ding, nth, arm unt in it with fact in issue *Sheo Bhandan v* Cas 895

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really positive evidence which in the nature of things necessarily implied a negative.' When a defence rests on proof of an *alibi*, it must cover the time when the offence is shown to have been committed, so as to preclude the possibility of the prisoner's presence at the place of the murder for it is possible that he could have been at both places the proof of the *alibi* is valueless. *Per Agnew J* in *Brice and v Com*, 74 P 463 469. Such expressions however seem in truth to refer only to the weight of the *alibi* argument, by pointing out that it falls short of complete proof except on these conditions. If they were intended to mean anything more, they are clearly unsound, and would exclude nine *alibi* arguments out of ten. Even as affecting the weight of the argument (with which statements seem erroneous, for an *alibi* but only high improbability, and yet be

Non access of husband to show illegitimacy Since legitimacy of offspring implies a begetting by the husband it would be relevant, in disproving legitimacy to use his absence from wife at the probable time of begetting as showing the impossibility of the act of begetting. *Wigmore* § 137, *Binbury Peerage Case*, App p 1 etc, *Le Marchants Rep of Gardner Peerage* 436, 489, 1 Sim & St 153, *Morris v Davies* 3 C & P 215, 217, *Gordon v Gordon*, Prob 141.

Survival of the alleged deceased Where the *corpus delicti* is disputed as for example, in a charge of homicide the alleged deceased is claimed by the defendant not to have been killed the argument is obviously available that he is still alive after the time of the supposed death for this would be absolutely inconsistent with his death as supposed. *Wigmore* § 138.

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or both might be innocent, and a common guilt or a common innocence was as presumable as the guilt of one only. But proof that certain acts constituting a part of the criminal transaction itself were done by W M might have been of high importance to the prisoner by removing so much of the inference of guilt as would be raised were those acts brought home to him. Proof that the taking was by any one other than the prisoner perhaps might repel this inference (of guilt)—not because the guilt of one shows the innocence of the other but because proof that specific acts were done by one weakens or removes the presumption that the same acts were done by another.

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180, *Field C J* said. If it could be shown that during the week before her death she had actually attempted to drown herself and had been prevented from doing so it seems manifest that this act, according to the general experience of mankind would have some tendency to show that she might have made a second attempt. In *Spencer Cowpers Trial*, 13 How St Tr 1166 where the issue was whether the deceased had committed suicide or was killed, evidence was received of her being melancholy and depressed, she said her d stemper lay in her mind and the sooner it did kill her the better, she neglected herself in doing those things that were necessary for her health in hope it would carry her off and often wished herself dead.

Highly probable The words 'highly probable' point out that the connection between the facts in issue and the collateral facts sought to be proved must be so mediate as to render the co existence of the two highly probable. *Per Mitter J* in *Empress v M J Vyapoory*, 6 C 655 at p 662. In *Govt of Bombay v*

Merwanji, 10 Bom L R 997, at p 419, *Batchelor J* observed: "In s 11 of the Evidence Act provision is made for the admission of facts not otherwise relevant when they make the existence or non existence of any fact in issue or relevant fact highly probable or improbable, and the adverb was not introduced into the section without good reason" In *In the matter of the Malabar Timber Yards etc* 13 M L T 282=18 Ind Cas 997 at p 1004 *Layaby J* said: "It has recently been pointed out by the Bombay High Court, in *Government of Bombay v Merwanji Mencharji*, 10 Bom L R 997, that the words 'highly probable' are of great importance in considering this section. It is clear that, in regard to this section the admissibility of the particular piece of evidence, that is offered, is closely connected with and in fact depends upon the weight to be attached to that piece of evidence if it is taken into consideration. In other words, this section makes only those facts admissible which assuming that they are admitted in evidence, will be of great weight in bringing the Court to a conclusion one way or the other as regards the existence or non existence of the facts in question. I agree with the learned Chief Justice, that if these letters were admitted in evidence they would not be of much assistance to us in coming to the conclusion one way or the other on the facts in question. That being so, it seems to me that under section 11 of the Evidence Act, that cannot be admissible at all." So there must always be room for the exercise of discretion when the relevancy of testimony rests upon its effect towards making the affirmation or negation of a proposition highly probable. *R v Prabhu Das*, 11 B H. C. R 90. The following extract from professor *Thayer's* article in 3 *Harvard Law Review*, p 143 is very instructive. "In stating thus our two fundamental conceptions, we must not fall into the error of supposing that relevancy, logical connection real or supposed, is the only test of admissibility, for so we should drop out of sight the chief part of the law of evidence. When we have said (1) that, without any exception, nothing which is not supposed to be logically relevant is admissible, and (2) that subject to many exceptions and qualifications, whatever is logically relevant is admissible, it is obvious that, in reality, there are tests of admissibility other than logical relevancy. Some things are rejected as being of too slight a significance, or as having too conjectural and remote a connection, others as being dangerous and likely to be misused or over estimated by a jury, others, as being impolitic and unsafe for the State, others on the bare ground of precedent. [The law] assuming, as it does, that in general what is evidential is receivable is occupied in pointing out what part of this matter is excluded. It denies to this excluded part not the name of evidence but the name of admissible evidence. Admissibility is determined, first by relevancy—an affair of logic and not of law,—secondly, but only indirectly by the law of Evidence which in strictness, only declares whether matter which is logically probative is excluded. It is here that *Mr Justice Stephen's* treatment of the law of evidence is perplexing, indeed it comes to have the aspect of a *tour de force*..... How are we to know what those things are (that are logically probative)? Not by any rule of the law. The law furnishes no test of relevancy, for this it tacitly refers to logic, assuming that the principles of reasoning are known to its Judge and ministers just as a vast multitude of other things are assumed as already sufficiently known. ... Admissibility is determined, first, by relevancy,—an affair of logic and not of law." But the statement is not accurately true. So long as Courts continue to declare in judicial rulings what their notions of logic are just so long will there be rules of law which much be observed. *Wigmore* § 12 in *State v Lapage*, 57 N H 288 *Currier C J* thus differentiates the rules of logic and the rules of law. "Although undoubtedly the relevancy of testimony is originally a matter of logic and common sense, still there are many instances in which the evidence of particular facts as bearing upon particular issues has been so often the subject of discussion in Courts of law, and so often ruled upon that the united logic of great many Judges and lawyers may be said to furnish evidence of the sense common to a great many individuals, and, therefore, the best evidence of what may be properly called common sense and thus to acquire the authority of law. It is for this reason that the subject of the relevancy of testimony has become, to so great an extent matter of precedent and authority that we may with entire propriety speak of its legal relevancy.

Admissibility, on the other hand falls short of Proof or Demonstration. The distinction is due to the circumstance that each evidential fact is offered separately and the quality of complete demonstration could therefore never be

expected of it. Since the production of evidence takes time and since one piece of evidence must precede another, the rule of admissibility if there be any at all, can have nothing to do with the inquiry whether certain evidence effects complete proof. *Wigmore* § 12

Degree of probative value required The general and broad requirement for Relevancy is that the claimed conclusion from the offered fact must be a probable or a more probable hypothesis with reference to the possibility of other hypotheses. *Wigmore* § 38. So it is competent to a jury to find matters of fact without direct or positive testimony of those facts and upon circumstantial evidences only although the inference or conclusion to be drawn from the circumstances proved be not absolutely certain or necessary, that it is sufficient if the circumstantial evidence be such as may afford a fair and reasonable presumption of the facts to be true, and if the evidence has that tendency it ought to be received and left to the consideration of the jury, to whom alone belongs to determine upon the precise force and effect of the circumstances proved and whether they are sufficiently satisfactory and convincing to warrant them in finding the fact in issue. *Gibson v Hunter*, 2 H M 298. 'The proper test for the admissibility of evidence ought to be, we think, whether it has a tendency to affect belief in the mind of a reasonably cautious person who should receive and weigh it with judicial fairness. *Stewart v People*, 23 Mich 75

Illustration (b) Where the guilt lies between A and C and there is no reason for believing that C has any concern with the commission of the crime, while the motive and other surrounding circumstances are too incriminating against A, the irresistible inference is that A has committed the crime. *Mehro v Crown* 8 P W R 1907 Cr = 5 Cr L J 182

Venereal Disease to show adultery The existence of venereal disease in a husband is some evidence of an act of adultery on his part. Whether this disease is sufficient evidence of adultery may depend upon circumstances. *Popkin v Popkin*, 1 Hog Eccl 765, 767

Pecuniary Capacity A party's pecuniary capacity to pay a debt or to lend money is relevant to the probability of his paying or lending. To show his pecuniary condition as to his capacity, his conduct in borrowing and not paying thus becomes relevant. *Wigmore* § 224, see also *Dowling v Dowling*, 10 Ir C L R 224

Report to the police In cases where forcible re entry by the lessor is set up by the lessee the fact that a report complaining of the use of force or intimidation was made to the police soon after the occurrence is a relevant fact under this section and is admissible in evidence. *Habibullah v Bakht Bati* 30 Ind Cas 292 = 2 O L J 299

between strangers to the suit, suit or their predecessors cutants of the document is 9 Lah 78 = 111 Ind Cas Lah 448 = 8 Lah 651. So third parties in favour of utant is not dead and does I H 1928 Lah 428, see 448 = 8 Lah 276 = 9 L L J "Nisar Chandra, 44 C L J adhab 86 Ind Cas 734 = 41 = A I R 1928 Cal 893; Laypat v Faiz 8 Lah 651 = 103 Ind Cas 889 = A I R 1927 Lah 448. Abdul v Jonabadi A I R 1923 Cal 299, Trimdak v Ganesh A I R 1923 Nag 21, Brojo v Gaya 30 C W N 761 = 97 Ind Cas 265, Abdul Karim v Chhab Ahamei 91 Ind Cas 688 = A I R 1926 Cal 479, Nihar v Kider Bakht 1923 C W N 1092 = 84 Ind Cas n Saroj Kumar v Uned Ali, ided that a document of this rovisions of either section 11 uthorities some of which are Mr Justice Mukherjee who C L J 659 had apparently

Laypat v Faiz 8 Lah 651 = 103 Ind Cas 889 = A I R 1927 Lah 448. Abdul v Jonabadi A I R 1923 Cal 299, Trimdak v Ganesh A I R 1923 Nag 21, Brojo v Gaya 30 C W N 761 = 97 Ind Cas 265, Abdul Karim v Chhab Ahamei 91 Ind Cas 688 = A I R 1926 Cal 479, Nihar v Kider Bakht 1923 C W N 1092 = 84 Ind Cas

held that a document of this nature was admissible in evidence under sections 11 and 13 of the Indian Evidence Act, altered his view in the decision in *Abdulla v Kunj Behari* 16 C W N 252=14 C L J 467 where he held that a document of this nature was not admissible in evidence under the provisions of sections 11 and 13 of the Indian Evidence Act, thus differing from the view which he had previously expressed. Both the cases in *Saroj Kumar v Umed Ali* and *Abdulla v Kunj Behari*, must be taken to overrule the decision in *Dwarkanath v Mukunda Lal*, 5 C L J 55, where it was held that a document of this nature was admissible under the provisions of sections 11 and 13, of the Indian Evidence Act. See also *Abdul Ali v Sayed Rajan* 19 C W N 468, *Cherig Ali v Mohini Bardhan*, 19 Ind Cas 61, *Sarat Chandra v Sarala Bala*, 105 Ind Cas 61, *Kumud Kumari v Dilsukh*, 45 C L J 138=101 Ind Cas 542. A lessor's statement in the *pattah* previously granted would not be said to be a fact within the meaning of section 11 and that section could not be invoked for admitting the statement. *Radha v Sarbeswar*, 29 C W N 469=86 Ind Cas 674.

Where certain lands are entered in the record of rights as *chaukidari* *chikran* lands so far as a stranger is concerned, the only way in which those papers can be treated as evidence would be under this section. *Rahimuddin v Umesh Chitra*, A I R 1926 Cal 115=87 Ind Cas 694.

A document relating to land on the boundaries of the land in dispute is not admissible in evidence for the purpose of determining whether a certain party was or was not in possession of the land in dispute at the date of the execution of the document. *Abdul Karim v Chhale Ahmed*, 91 Ind Cas 688=A I R 1976 Cal 479.

The plaintiff brought a suit against his son for recovery of possession of a land which stood in the name of the latter alleging that the same was acquired *benami* by him. The defendant alleged that the land was purchased for him by his paternal grandfather. The plaintiff answered that his father had died before the property was acquired, and he produced a mortgage bond executed by him long before the date of the purchase in which he described his father as dead. Held that the statement made by the plaintiff in the mortgage bond to which the defendant objected was admissible in evidence as against the latter with section 11, clause (2) of the Evidence Act. *Sayeruddin* R 1923 Cal 378.

Documents containing recitals that a particular plot of land belongs to a particular Will are admissible in evidence either under section 11 (b) or section 13 of the Evidence Act although they are no between parties to the suit. *Fartand v Zafar Ali* 46 Ind Cas 119=132 P W R 1918. This case was decided relying on *Dwarkanath Bakshi v Mukunda Lal*, 5 C L J 55 in which also reliance was placed in *Vythilinga v Venkataswami*, 16 M 194 and *Dattaraj Mohanti v Jugadinaho*, 73 W R 293. But the case of *Dwarkanath v Mukunda Lal*, 5 C L J 55 was overruled by *Suraj Kumar v Umed Ali*, 25 C W N 102=35 C L J 19.

In the case of a house said to have been built to who constructed it may not be easily ascertained by whom it was built are admissible. *Jari* 82 Ind Cas 582=A I R 1924.

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and 4 sold a *jote* to defendant subsequently colluded with the sale, the statements previously made by him, and the statements were made in pursuance of clause (2) of the Evidence Act. *Bibi v Narhan* 16 B 125.

Statements made by testator in his Will. In *Nana v Shanter*, who attended on the testatrix and made the statement to the witness by Will. The District Judge in delivering the judgment

of the Court *Jenkins C J* observed: "For the appellant it is urged that it would be admissible under section 11 of the Evidence Act The defendant on the other hand refers to *Atkinson v Morris*, L R 1897 P D 40 as a conclusive authority against its admissibility; for it was there held that statements made by a testator are not admissible to prove the execution by him of a Will. This case, however, and the others on which it proceeds, are based on the fact that the English Wills Act prescribes a particular form of proof, while to the Will in this case no such rule applies (the testator being an inhabitant of Poona) *Atkinson v Morris* therefore, throws no light on the point, we have to decide and it must be determined by other principles. Now this Will would only operate on that, which, in its absence, would devolve on *Ganga's* representatives, and a statement by her suggesting any inference as to the execution of a Will would be an admission relevant against her representatives and would therefore be admissible as evidence."

History of a family. Where the history and status of a particular family, which is one of a group, is in question, evidence may be adduced to elucidate the history and status of connected families in the same group, and such evidence is admissible under this section. *Sarada v Uma Kantia* 77 Ind. Cas 450=37 C L J 433=50 C 370

Absence of entry. The fact that no found in the defendant's books is relevant. *Haji Jamil*, 75 Ind Cas 337=A I R 1 v *Manraj*, 4 C W N 161, *Imrit v Sr Ali Naur v Manik*, 25 A 92, but see *Queen Empress v Gries Chandra*, 10 C 1024, *In the matter of Jaggun Lal*, 7 C L R 356. *Ramprasad Singh v Lakshpati Kuar* 30 C 231 (247)=7 C W N 162. So it is clear that on this point there is some divergence of judicial opinion. It was pointed out in *Imzimbandi v. Mulsadar*, 45 C 878=28 C L J 407=23 C W N 50 P C and *Imrit v Sridhar*, *ubi supra*, the cases of *Queen Empress v Gries Chunder Ranerjee*, *ubi supra* and *In the matter of J Juggun* of account are relevant to Evidence Act such a book is absence of any entry. The *Davey and Lord Robertson* in at 247=30 I A 1=7 C V.

Manraj ubi supra it was ruled, however, that the cases just mentioned did not decide that the fact of absence of an entry is no evidence at all under any section of the Indian Evidence Act, and that evidence that there is no entry in the account books, though not admissible under section 34 may be admissible under sections 9 and 11. The question arose again before a Full Bench of the Allahabad High Court in *Sadhu Sahu v Raju Ram*, 16 A 40 (F B)=A W N 1893, 200 and the Judges were divided in opinion. The point may now be taken to have been set at rest by the judgment of the Judicial Committee in *Imzimbandi v. Mulsadar ubi supra*, where the fact of absence of entry was held relevant, its effect to be determined in the light of the general evidence in the case. This fits in with the opinion expressed by *Turner J* in *Wise v Bhobon Majeed*, 10 V I A 165 at 174. In that case, reliance was placed on the fact that a disputed Taluk was not mentioned in the Decennial or Quinquennial Settlement as such, the relevancy of the circumstances was not questioned, but Judicial Committee observed, that even assuming the statements to be accurate, in the absence of particulars of the settlements, the fact did not seem to afford any strong inference against the existence of the Taluk, see also *Dwarka Nath Roy v Horonauth W. R.* (1864) 238, *Tara Kumar Ghosh v Kumar Arun Chandra*, 30 C L J 389=A I R 1923 C 261, *Ganga Ram v Lachmi Ram*, 28 Ind Cas 705=19 C W N 611.

Highly probable or improbable—Cases. Accused were charged with having obtained money from complainants by falsely representing that they were servants of one Albari Begum, a wealthy lady of Rampur, who was anxious to lend money on easy terms. *held* that the evidence that at or about the very same time when the accused were alleged to have made such a representation to the complainants they had been making precisely the same representation to a third person, was admissible under sections 11 and 14 of the Evidence Act to corroborate the story of the prosecution and to prove the intention of the

held that a document of this nature was admissible in evidence under sections 11 and 13 of the Indian Evidence Act, altered his view in the decision in *Abdulla v Kunj Behari* 16 C W N 232=14 C L J 467 where he held that a document of this nature was not admissible in evidence under the provisions of sections 11 and 13 of the Indian Evidence Act, thus differing from the view which he had previously expressed. Both the cases in *Saroj Kumar v Umed Ali* and *Abdulla v Kunj Behari* must be taken to overrule the decision in *Dwarkanath v Mukunda Lal* 5 C L J 55 where it was held that a document of this nature was admissible under the provisions of sections 11 and 13 of the Indian Evidence Act. See also *Abdul Ali v Sayed Rajan* 19 C W N 463 *Cherig Ali v Mohini Bardhan*, 19 Ind Cas 61, *Sarat Chandra v Sarala Bala*, 105 Ind Cas 61, *Kumud Kumari v Dilhoo*, 45 C L J 138=101 Ind Cas 542. A lessor's statement in the *pattish* previously granted would not be said to be a fact within the meaning of section 11 and that section could not be invoked for admitting the statement. *Radha v Sarbeswar*, 29 C W N 469=86 Ind Cas 674.

Where certain lands are entered in the record of rights as *chaukidari* and as lands so far as a stranger is concerned the only way in which those papers can be treated as evidence would be under this section. *Rahmuddin v Umish Chandra* A I R 1926 Cal 115=87 Ind Cas 694.

A document relating to land on the boundaries of the land in dispute is not admissible in evidence for the purpose of determining whether a certain party was or was not in possession of the land in dispute at the date of the execution of the document. *Abdul Karim v Chhale Ahmed*, 91 Ind Cas 688=A I R 1956 Cal 479.

The plaintiff brought a suit against his son for recovery of possession of a land which stood in the name of the latter alleging that the same was acquired *benami* by him. The defendant alleged that the land was purchased for him by his paternal grandfather. The plaintiff answered that his father had died before the property was acquired and he produced a mortgage bond executed by him long before the date of the purchase in which he described his father as dead. Held that the statement made by the plaintiff in the mortgage bond to which the defendant was not a party might be admissible in evidence as against the latter either under section 21, clause (3) read with section 11, clause (2) of the Evidence Act or under section 37, clause (5) or under section 159 of the Act. *Sayeruddin v Samiruddin* 72 Ind Cas 935=A I R 1923 Cal 378.

Documents containing recitals that a particular plot of land belongs to a particular Will are admissible in evidence either under section 11 (b) or section 13 of the Evidence Act although they are not between parties to the suit. *Fazlud v Zafar Ali* 46 Ind Cas 119=132 P W R 1918. This case was decided relying on *Dwarkanath Bakshi v Mukunda Lal* 5 C L J 55 in which also reliance was placed in *Vythilinga v Ventatachali*, 16 M 194 and *Dufari Mohanti v Jugabanahoo* 23 W R 293. But the case of *Dwarkanath v Mukunda Lal*, 5 C L J 55 was overruled by *Suraj Kuar v Umed Ali*, 25 C W N 1027=35 C L J 19.

Recital in old documents. In the case of a house said to have been built over half century ago direct evidence as to who constructed it may not be easily available and old documents mentioning by whom it was built are admissible in evidence. *Raghunath v Bindshwari* 82 Ind Cas 582=A I R 1914 All 526.

Admission. Where the defendants Nos 2 and 4 sold a *jote* to defendant No 1 and he subsequently colluded with the sale, the statements previously made by him and the statements made by him and the statements made by him (2) of the Evidence Act. *Biya v Narhan* 16 B 125. 5 C 210, see also *Naro Vinayak*.

Statements made by testatrix to prove the Will. In *Nana v Shanter* 3 Bom L R 465, which was a probate case, a witness who attended on the testatrix during her last illness, was asked to depose to a statement made to the witness by the testatrix as to the disposition of her ornaments by Will. The District Judge disallowed the question. On appeal to the High Court, in delivering the judgment

of the Court *Jenkins C* / observed - 'For the appellant it is urged that it would be admissible under section 11 of the Evidence Act S
The defendant on the other hand refers to *Atkinson v Morris*, L R 1897 P D 40 as a conclusive authority against its admissibility; for it was there held that statements made by a testator are not admissible to prove the execution by him of a Will. This case, however, and the others on which it proceeds, are based on the fact that the English Wills Act prescribes a particular form of proof, while to the Will in this case no such rule applies (the testator being an inhabitant of Poona). *Atkinson v Morris* therefore, throws no light on the point, we have to decide and it must be determined by other principles. Now this Will would only operate on that, which, in its absence, would devolve on *Gangu's* representatives, and a statement by her suggesting any inference as to the execution of a Will would be an admission relevant against her representatives and would therefore be admissible as evidence."

History of a family Where the history and status of a particular family, which is one of a group, is in question, evidence may be adduced to elucidate the history and status of connected families in the same group, and such evidence is admissible under this section *Sarada v Uma Kanta* 77 Ind Cas 450=37 C L J 433=50 C 370

Absence of entry The fact that no entry of the alleged payment was to be found in the defendant's books is relevant under this section *Kalam v Firm of Hujji Jamal*, 75 Ind Cas 327=A I R 1924 Nag 23, see also *Sagurnull v Manraj*, 4 C W N 200, *Imrit v Sridhar* 15 C L J 7=17 C W N 108, *Ali Naur v Manik*, 25 A 93, but see *Queen Empress v Grees Chandra* 10 C 1024, *In the matter of Juggun Lal*, 7 C L J 1000, *Kuar*, 30 C 231 (247)=7 C W N 16 is some divergence of judicial opinion
Mutadai, 45 C 878=28 C L J 403=23
ubi supra, the cases of *Queen Empress*,
In the matter of Juggun Lal, ubi supra, assume that though entries in a book of account are relevant to the extent provided by section 35 of the Indian Evidence Act such a book is not by absence of any entry. The same view
Davey and Lord Robertson in Ram F.
at 247=30 I A 1=7 C W N 16
Manraj ubi supra it was ruled, how decide that the fact of absence of an of the Indian Evidence Act, and that evidence that there is no entry in the account books, though not admissible under section 34 may be admissible under sections 9 and 11. The question arose again before a Full Bench of the Allahabad High Court in *Sadhu Sahu v Raja Ram*, 16 A 40 (F B)=A W N 1893 200 and the Judges were divided in opinion. The point may now be taken to have been set at rest by the judgment of the Judicial Committee in *Imzambandi v Mutsaddi ubi supra*, where the fact of absence of entry was held relevant, its effect to be determined in the light of the general evidence in the case. This fits in with the opinion expressed by *Turner J* in *Wise v Bhoobon Moyee*, 10 M I A 165 at 174. In that case, reliance was placed on the fact that a disputed Taluk was not mentioned in the Decennial or Quinquennial Settlement as such, the relevancy of the circumstances was not questioned, but Judicial Committee observed that even assuming the statements to be accurate, in the absence of particulars of the settlements, the fact did not seem to afford any strong inference against the existence of the Taluk, see also *Dwarka Nath Roy v Horonauth W* 11 (1864) 238, *Tara Kumar Ghosh v Kumar Arun Chandra*, 30 C L J 389=A I R 1923 C 261, *Ganga Ram v Lachmi Ram*, 28 Ind Cas 705=19 C W N 611

Highly probable or improbable—Cases Accused were charged with having obtained money from complainants by falsely representing that they were servants of one Akbari Begum, a wealthy lady of Rampur, who was anxious to lend money on easy terms. *Held*, that the evidence that at or about the very same time when the accused were alleged to have made such a representation to the complainants they had been making precisely the same representation to a third person, was admissible under sections 11 and 14 of the Evidence Act to corroborate the story of the prosecution and to prove the intention of the

accused *Emperor v Yakub*, 39 Ind. Cas. 673=15 A L J 241=39 A 273=18 Cr L J 529

Where in a case of a disputed deed of adoption the defendant alleged that the deceased executant had become shortly after the execution of the deed, aware of its existence, purport a cancel it or to nullify became admittedly a merely a relevant fact, but a very important fact in the case; and the evidence offered by the defendant as to statements made by the executant in the interval of the view taken by him of the deed which he had conceived himself to be irrelevant, but is admissible under section 11 of the Act *Mir Sayed*

v Tayyaba Begam, 26 Ind Cas 547=1 O L J 591

Self serving statements are admissible where they make relevant fact highly probable or improbable or where they are *res gestae* *Harishar Prosad v Keiko Prosad*, A I R 1925 Pat 68=92 Ind Cas 954

A cablegram, purporting to be from one, in Calcutta was sent to P in London on the receipt of the cablegram and expressly referring to it P posted a reply to B would be a relevant fact under section 11 that B was the sender of the cablegram *C H 79=18 C L J 567=18 C W N 386=15 Cr L J 33*, see also *R v Derrington*, 2 C & P 418

An admission made by one of the defendants in a previous suit (to which he was himself a party, as to the common character of a portion of a lane, may be used in evidence against other defendants even though they may not be parties to that previous suit. A statement to the same effect made by one of the defendants in a deed put in by him to prove his title to his own house is admissible in evidence to establish the common character of the entire lane alleged by the plaintiff under section 11 of the Evidence Act. Facts are relevant which make the existence of a fact in issue highly probable, therefore, the fact of common ownership in other parts of the lane should be treated as relevant to the issue as to the common character of the entire land *Naro Vinayak v Narahari*, 16 B 125

Where in a suit for rent under a lease of land, alleged to be purchased from and leased to the defendant again the defendant totally denied the sale and lease of the defendant proved that he did not sell the land the fact that he did not sell it would be inconsistent with the fact of the lease, and hence, relevant under 11 (1) *King Hla Pru v San Paw*, 3 L B R 90

Frequent transfers of the interest in a tank without any change in the terms of the holding, or in the amount of rent paid extending over a period of more than 60 years, were held to prove that the tenure was permanent and transferable, the fact of the transfer being inconsistent with the interest being terminable at will *Nidhi Krishina v Nistarini*, 13 B L R 416=21 W R 316

On the question whether certain lease, were perpetual, it was held that the fact that the intention implicated by the acts and conduct of the parties was to make perpetual, under similar circumstances, same was the intention with a view to these leases would be *Dayal v Ram Narayan*, 30 C N 297, *Kamalahari v Kanhari*

In a charge of forgery, evidence of possession by the accused of other documents suspected or even proved to be forged is admissible under this section *Reg v Prabhudas*, 11 B H C 90

The statement of a witness for the defence, that a witness for the prosecution was at a particular place at a particular time, and consequently could not then have been at another place, when the latter states he was and saw the accused persons, is properly admissible in evidence, even though the witness for the prosecution may not himself have been cross examined on the point *Reg v Sathis Ram*, 11 B H C 166

When the question is whether a man is a habitual cheat, the fact that he belonged to an organisation formed for the purpose of habitually cheating in concert is relevant under 5 of the Evidence Act *Kalu Misra v Emperor*, 37 C 91=14 C W N 49=5 Ind Cas 29

The mental feelings of a person who is dead are highly relevant to the question of his religion and the expression of these feelings in a formal manner, such as in a Will executed by the deceased, are valuable evidence as to their existence. Such statements are admissible both under s 11 (2) and s 21 (2) of the Evidence Act. *Leong Hone v Leon Ah Foon*, 7 R 720=121 Ind Cas 796=A I R 1930 Rang 42

Where the suit related to rights to properties belonging to a *math* and the question as to dedication was put in issue and the gift of a certain item of property belonging to the institution was sought to be relied on as throwing light on the general question *held* that it was admissible under s 11 (2) of the Evidence Act. *Bhagwati Prasad v Bindeswar*, 1930 A L J 964

In a charge under s 401, I P Code, a former judgment of 25 years old convicting accused of dacoity, was held admissible to show criminal tendency and not habit. A I R 1925 Bom 195=26 Bom L R. 1223=26 Cr. L J 1391=89 Ind Cas 527

In a trial for an offence under s 4 (a) of the Prevention of Gambling Act, 1887, the evidence that he was previously convicted of similar offence cannot be let in either under s 54 or s 11 of the Evidence Act. *Emperor v Alloomya*, 28 B 129

The statement of a person who is dead is admissible evidence where the statement is made at a period of extremely strained communal feeling enunciated that it was the

Emperor, 33 C W N 477=47 C L J 444=111 Ind Cas 396. Judgments *inter partes* are relevant as authoritative statements of facts as found by the Court. *Gopal Rao v Sitaram*, A I R 1927 Nag 19. The author of a book was proceeded against by the Government for creating class hatred and the books themselves were forfeited. The author applied to the High Court under section 99 of the Criminal Procedure Code to set aside that order. It was dismissed. The judgment was held admissible in a prosecution against the same person under s 153 A of the Penal Code. *Kali v Emperor*, 25 A L J 845=A I R 1927 All 654=28 Cr L J 785. *Balwara* papers are admissible in evidence against strangers if they can be under s 11 of the Evidence Act. *Rahimuddin v Umesh* 87 Ind Cas 694. *Ex parte* decrees for rent obtained by a landlord against the heirs of a tenant and satisfied by the latter, are evidence of the existence of the tenancy at the date of those decrees. *Anukul v Kamala*, A I R 1923 Cal 270. Where the question was whether proceedings in lunacy held under Act XXXIV of 1858, are admissible in evidence in a subsequent suit to show that the defendant was a lunatic at a particular time it was held that the orders and reports made under the Act by the Judge before whom the lunacy proceedings were held, were admissible in evidence. *Srimati Padmabati v Bonomali*, 24 C W N 378=58 Ind Cas 566. A full horoscope prepared from a short one is admissible in evidence so far as the date of the birth and the parentage is concerned. *Harbahadur v Chand Raj*, 21 O C 298=48 Ind Cas 400. An entry made in a register of indoor patients in a hospital is admissible in evidence to prove that the person mentioned in the entry was in the hospital on a certain date. *Amolak v Emperor*, 56 P L R 1918=13 P W R Cr 1918=43 Ind Cas 429. The judgment and the proceedings in a civil suit against a vakil, out of which a charge of professional misconduct is framed against him, are admissible in evidence in an enquiry into the latter charge. *Row*, 23 M L J

case was that a charge of intimidation was made soon after the occurrence was a relevant fact under s 11 of the Evidence

Scope of the section. In a case for damage no denial or defence shall be necessary as to damages claimed, or their amount, but they shall be deemed to be put in issue in all cases unless expressly admitted—*vide Roscoe v Nis, Pius Ev* 286 So in a suit in which damages are claimed, the amount of damages is

Damage—definition of Damages may be defined as the pecuniary compensation which the law awards to a person for the injury he has sustained by reason of the act or default of another, whether such act or default is a breach of contract or tort, or, to put more shortly, damages are the recompense given by process of law to a person for the wrong that another has done him. *Halsbury, Vol 10 p 303.*

Amount of damages how ascertained Theoretically speaking the great underlying principle by which the Courts are guided in awarding damages is *restitutio in integrum* Per Bowen J in *The Argentina*, 13 P D 191 at p 200, 201 By this is meant that the law will endeavour, so far as money can do it, to place the injured person in the same situation as if the contract has been performed (*Robinson v Harman* 1 Exch 850, *Bain v Fothergill* L R 7 H L 150, *Gray v Fowler*, L R 8 Exch 249, *Mance v Gandet*, L R 6 Q B 199), or in the position he occupied before the occurrence of the tort (*Philips v Landon and South Western Rail Co* (1879) 5 Q B D 78, *Livingston v Bauyards Coal Co* 1 App Cas 25; *The Mediana*, (1900) A C 113) which adversely

plary damages the principle
ry damages are generally
Finlay v. Churney, 2 Q.

re concerned, an exemplary

damage is only awarded in the case of breach of promise of marriage *Smith v. Woodfine*, 1 C B N. S 660; *Berry v Da Costa*, L R 1 C P. 331 Such damages are generally awarded in an action for tort, as for instance, assault, trespass, negligence, nuisance, libel, slander, seduction, malicious prosecution, and false imprisonment: *Halsbury Vol. 10, p 307*

Measure of damages in breach of contract Upon a breach of contract such damages are to be given which will put the injured party in the position he would have been in the contemplation of the law had the contract been performed, or the probable result of the breach where the contracting parties arrange beforehand among themselves at what sum the amount of damages for breach of contract shall be estimated, it is the duty of the Courts to enforce the law *Palmer v The Secre* cannot recover as damages *Madhab v Lukhu*, 9 W R before a Court can give a decree for damages *Kisto Mohun v Juggurnath* 11 W R 236 The measure of damages in a suit for breach of contract is the

date of breach
Sut, 1 L B R
v Messrs Gokul
Chand, 27 C W
that of Hender v

Damages in cases of torts In cases of torts "one who commits a wrongful act is responsible for the ordinary consequences which are likely to occur, but generally speaking he is not liable for damage which is not the natural or ordinary consequence, unless it is shown that he knows or has reasonable means of knowing that the consequences not usually resulting from the act are, by reason

of some existing cause, likely to intervene so as to cause damage" *Sharp v Powell*, (1872) L R 7 C. P 253

Aggravation and mitigation In actions of contracts as a rule the motives or conduct of the defendants are not to be taken into account in assessing damages, nor feelings, injury to feelings, injury to 323 In
Hamilin v Great Gene-
 rally speaking, entirely
 with the jury, ry to the
 party's feelings and the pain he has experienced, as, for instance, in extent of
 violation in an action of assault, and many of the
 find place in an action for tort or wrong
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moneys counted, of money which would replace a person in his position as he was before he underwent by reason of an injury or damage which he has suffered, and which he recognises that as a topic upon which damages can be given Thomp-
 Evidence in *son v Place* 1 Mood in giving
 such evidence the al matters
Simpson v Thompson N C 272,
Jebson v East and O, Greery v
 C. P. 7 C & P 64 -tracted

claimed the difference between the value of the work done by him as a member of the firm and the value of the work done by him as a member of the firm, showing that the value of the work done by him as a member of the firm was greater than the value of the work done by him as a member of the firm, and that he had been the J stopped this judgment for the examination of damages. In that case the loss had been for this liability that acting the ant ought the face could prob-

The evidence of character is not admissible in an action of contract or defence as the character is not admissible to which, measure of damages with one whose character is unblemished and is still to crime negligent

to show that by evidence."—*v. Moor*, 1 M & S 281 In *Eduard v. Kansas City Times Co.*, 32 Fed 813, a leading American case, *Bence J* puts it a little better. After stating: "repute, he is impure, and is entitled to n

that I am known in the community, and justly so, as a common drunkard, a bar room loafer, one that every man despises as he meets, and one of you should circulate and publish a statement against me that I had told a lie, or that I had stolen money. That may not have been my reputation before. People may simply have looked upon me as a mere wreck, a dissipated and worthless man, and may not have looked upon me as one who was a liar or a thief. Of course, in a certain sense, by the publication of statement you have injured my reputation; you have gotten people before but on the other hand, if I say 'Well, it does not hurt before me they do after the statement; my character and reputation in the community is not worth much, you cannot hurt that which is already injured.' And inasmuch as the action for libel or slander is brought for the injury to the reputation the less valuable that reputation is, the less proportionate damage is suffered. In the last mentioned case the learned Judge thus applies his reason-

added to a bad reputation that she had already. Now, in respect to her reputation you have the testimony of their witnesses as to what it was in that community; you have also the testimony of one witness in which he says that he saw this plaintiff and her brother having improper intercourse. If it be true that she did have that incestuous intercourse with her brother, then, although it may not be true that she was injured by that intercourse, your common sense tell by this defendant may show that she was injured by reason of the sum by way of damage *v. Mukund Roy*, 17 *thereunder*

Conduct of the defendant. In an action for libel the plaintiff may show that the libel was scattered broad cast when the defendant was under no duty and had not right to publish *v. Wellsley*, 5 Bing 4 *Miall*, 15 L J Ex 179 of the suit, may aggravate 12 Q B 511 at pp 5 conduct in putting a prove and will not abate

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Q B D p 55

DO ALSO IN CASES OF SEDUCTION THE CONDUCT OF THE DEFENDANT
of the plaintiff's daughter by fraud and under cover of a promise of marriage
may be taken into consideration *Halsbury* Vol 10, p 325 So also where a
insulting or oppressive
though actual injury is
laden, L R 4 Exch 13;

Moore v Shelley 8 App Cas 285, 294 P C The defendant's conduct may also be proved in mitigation of damages *Mountford v Gibson* 4 East 411, *Cook v Hostle* 8 C & P 568

Proof of financial standing of defendant It comes rather as a shock to the lay mind that there is one law for the rich and another for the poor although in the administration of the law the better of the community is easily analysed. We have relevant in civil actions and that generally when admitted such evidence received to affect the measure of damages. The stage marks one law for the man of good repute and another for him who is said to live evilly. Under ordinary circumstances the financial situation and standing of the parties are wholly irrelevant. The amount of damages depends upon the terms of the contract or in action of tort upon other circumstances wholly independent of the wealth or poverty of the parties but it is well settled that there is a class of cases in which the wealth of the defendant becomes a material fact, and which may be proved on the question of the amount of damages. For example

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fortune. Evidence of the wealth or standing of the defendant is relevant for the purpose of determining compensatory damages. This is for the reason that the financial standing of the defendant is one of the elements of his social environment and there are injuries caused by the fact that the persons responsible for the cause of action rests upon an injury to the character or an insult to the person. Compensatory damages may be increased by proof of the wealth of the defendant. This is upon the ground that wealth is an element which goes to make up his rank and influence in society and thereby renders the injury or insult resulting from the wrongful acts the greater. *Johnson v Smith*, 64 Mc 553 (555). Evidence of the pecuniary circumstances of the defendant is admissible in two

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Ind Cas 1018=A 1 R 13 30 C 1 363 (R R)

Breach of promise of marriage In estimating the damages, in an action for breach of promise of marriage where the plaintiff had been seduced by the defendant, the altered position of the plaintiff in relation to her house and family through the defendant's conduct is relevant. *Maung Hamaing v Ma Pica We*, L R 1 C P 331, *Hamlin v Ducosta*, L R 1 C P 331, *Parshotamdas v Parshotamdas* 21 B 23. Damages for a breach of contract of marriage may be awarded to a man. But the fact that the man has merely become the butt of his acquaintances' jests or has experienced a feeling of shame does not constitute an injury for which damages can be awarded in a suit of this nature. *Ma Ngue Yin v Maung Po Tai* 7 Bur L T 14-23 Ind. Cas 376

Defendant's fortune In an action for breach of a promise of marriage obviously tends to duress (James Taylor, L R 9

Q. B. 79); nor for malicious prosecution; for it is nothing to the purpose, "that damages are taken from a deep pocket." *Short v Story*, Winton Sun; *Roscoe v P Lr* 86

S. 1

Time and place In an action for assault and battery the circumstances of the time and place, when, damages, thus it is a greater in a private room *Per Bath* v *Oxford*, 2 M & S 77 *Merest v Harvey*, 5 Taunt 412

Proof of facts attending of plaintiff *Amerson v Is* In actions in

assault and battery, the pecuniary circumstances, and condition of his family may be given in evidence especially where the case is one of exemplary

13. Where the question is as to the existence of any right or custom, the following facts are relevant.—

- (a) any transaction by which the right or custom in question was created, claimed, modified, recognised, asserted or denied, or which was inconsistent with its existence;
- (b) particular instances in which the right or custom was claimed, recognized or exercised, or in which its exercise was disputed, asserted or departed from

Illustration

fisher grant instances in which A's father exercised the right, or in which the exercise of the right was stopped by A's neighbours, are relevant facts

Principle and Scope The general principle is that a party may prove all facts

tha 315 of as an ancient water course or a right of common, or corporeal, as a field, or a road strip In such cases every act of enjoyment or possession is a relevant fact, since the right claimed is constituted by an indefinite number of acts of user exercised *animo domini* But inasmuch as such acts are more or less discontinuous in their character—and in the case of ancient rights the evidence of them is by lapse of time rendered even more so—the question for the jury is whether the acts proved are so numerous and so connected that the right of possession may be inferred from them If they are so frequent and of such a character as

existence of a right and the *el rarnama* comes both within clauses (a) and (b); it is both a transaction in which the right was claimed and an instance in which the right was exercised. If authority, that

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under various conditions, are to be taken into account in determining the sufficiency of possession." Per Lord O'Hagan in *Lord Advocate v Lord Lavat*, 5 App Cas 273 (283), cited with approval by Lord Macnaghten in *Johuston v O'Neill*, (1912) A C 552 (583) and by Lord Shaw in *Kirby v Couderoy*, (1912) A C 599-81 L J P C 232

So title to real or personal property may be inferred from acts of ownership, done by the party for or against whom they are tendered, e.g. possession, receipts of rents and profits, or the discharge of burdens and repairs of the property. Planting or felling timber *Ashburner*, 21 L T 595, and

agginson, 4 M. & W.
h facts are receivable
proof is admissible

head of hearsay are usually classed those cases in which expired leases, grants,

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Dug 189, *Bristow v Cormican*, 3 App Cas 641 And such counterparts are evidence of seisin, though only executed by the lessee *Doe v Palman*, 8 Q B D 622, *Magdalen v Knolls*, 8 Ch D 709 C A ; *Roscoe Lk* 18th Ed ¶ 53

Clause (a) Where the ques
brahmattar right in a certain p
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brahmattar land, was produced :

clause (a) of section 15 is the requirements or that clause are satisfied The question being whether the defendants have a *niskar brahmattar* right, a deed conferring the *niskar brahmattar* right on the defendant's predecessor would be admissible as a transaction by which the right was created, but not a sale deed executed by the defendants in respect of that right. The word, *claimed*, need not

from the transaction by which it was created or modified and so the words 'created' or 'modified' are omitted in clause (b). There may be a transaction by which there has been the recognition of a right or custom, there may also be particular instances of its recognition, and so 'recognised' appears in both the clauses. Instead of the words, "by which the right or custom is asserted or denied or which was inconsistent with its existence" we have the words "in which the right or custom was exercised or in which the exercise was disputed, asserted or departed from". It is clear that in clause (b) instances of assertions or denials of a right or custom are not covered by the words "by which the right or custom is asserted or denied".

fail to see any. I am therefore of opinion that a transaction or instance in which there is mere assertion or denial of a right is not covered by clause (b) 13 but only such a transaction is covered by clause (a). It has been urged that the word "transaction" is used in a wide view, but I do not see that it does.

question is whether A has a right to a fishery. In such a case a deed conferring the fishery on A's ancestors should be a transaction by which a right to the fishery was created; so a mortgage by A's father would be a transaction by which a right to a mortgage was created.

Recitals in a deed are not transactions but instances of assertions or denials of the existence of the right. They come neither under clause (a) nor under clause (b). They are statements which unless they are relevant under some other provisions of the law e.g., as admissions or statements of deceased persons, etc., are not admissible in evidence." *Brojendra Kishore v Mohun Chandra*, 31 C W N 88 (88, 89).

The word "claim," denotes a demand or assertion in relation to a thing or attribute as against or from some person or persons, showing the existence of a right to it in the claimant. A bare statement may or may not be a claim according to the attending circumstances in which it is made. It may amount to a claim or be a mere statement of claim though in some circumstances a statement may amount to a claim. A statement in the *pattah* that the land to the west of

a judgment may be an instance. *Sri Protap Chandra v Sri Raja Jagadish*, 82

Right, meaning of. In *Guyy Lal v Fattah Lal* 11 C. 171 (F B), at pages 186, 187 *Garth C J* said "It may be difficult, perhaps, to define precisely the scope of the word 'right' but I think it was here intended to include those

3. properties only of an incorporeal nature, which in legal phraseology are generally called 'rights'. It is certain that the word 'custom' (see s 48 and art 1 'rights of customs' and in private rights of that is a right which may the expression is used in this limited sense is shown also, as it seems to me, in the words with which it is associated. The right mentioned in the section is one which can be 'created or exercised' which expressions are perfectly appropriate when speaking of an incorporeal right, but would be wholly inapplicable to the word 'right' when used in its more extended sense. It would be quite correct to speak of the creation or the exercise of a right of way or of a franchise, but a lawyer would think of saying that a right to a chattel or to damages had been 'created or exercised'. In the same case *Jackson J* said at pp 184, 185 "It seems to me as clear as anything can be, that the 'right' here spoken of is something quite distinct from ownership. What is referred to in the section cited is evidently

real rights only, because in other places where the same words occur in conjunction in that sense. In the first place, it is a real right. It is not a general natural or corporeal, but it is a

in question refers only to a does not seem to me to be suggest a reason which

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nerjee J observed
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Full Bench in *Guyul*
the word 'right'

Sir Charles Sargent C

Bapu, 10 M 439, that the majority of the Full Bench of the High Court in *Guyul v Palleh Lall*, put too narrow a construction on the word 'right' in s 13 and that 'right' there includes not only incorporeal rights but a right of ownership. This view was also accepted by *Ranode J* in *Lakshmi v Amrit*, 24 B 591 (599). See also *Rama Sami v Appa*, 12 M 113, *Venkata Sami v Venkataraddi*, 15 M 12, *Pythulinga v Venkatacharya*, 16 M 194, *Stephen Dig* Art 5. The illustration to this section shows that the right mentioned in it, is not a public right only the right there mentioned being a private one viz A's right to a fishery. *Surya v Bushambhar*, 23 W R 311. So right and custom in this section must be understood as comprehending all rights and customs recognised by law, and therefore, including a right of ownership. *Ranchhodas v Bapu*, 10 B 439 (441). At present the balance of authority favours the extension of the term "right" to include every right known to the law. *Per Beaman J* in *Mahammad v Ali* on 31 B 143 (154). The whole context indicates that the section is dealing with continuous rights which may be interrupted without being necessarily destroyed. *Ibid* at p 155. But a right which is not a public right is not a public right. A document does not admit of denial, and is, therefore, the rights denoted in this section. 1014 p 154.

Custom A custom is a particular rule which had existed either actually or presumptively from time immemorial, and has obtained the force of law in a particular locality. S.
 common law
 218 A custom is a general right

can never be considered binding until it has become a law by some act, legislative or judicial, of some sovereign. It is to be found in one judgment of the House of Lords (*Charlu*, 1 Mad H C 424). It is open to the obvious objection that a decision in its favour would ever be judicially recognized for the first time. A decision in its favour would assume that it was already binding. The sounder view appears to be that law and usage act and react upon each other. A belief in the propriety, or the propriety of a rule, is a source of law in a particular locality.

v. Lsu 4 B 545; *Mayne's Hindu Law*, 6th Ed 56. So local customary law has its source in those immemorial customs which prevail in particular parts of a country and in the general law of the country. In derogation of the general law of the country, an immemorial custom does upon occasion respect of the former operation, it is which as a source of law retains the

distinguished as legal and conventional. A legal custom is one whose legal authority is absolute—one which in itself and *proprio vigore* possesses the force of law. A conventional custom is one whose authority is conditional on its

custom, prevalent or having the force of law in a particular locality only, or the general custom of the realm, in force as law throughout all over the country.—*Salmond's Jurisprudence*, p 211. The word 'custom' in this section

3. properties only
called 'rights'
It is certain
sub section 4 of s 32, wh
'rights', and in s 13

when speaking of
word 'right' when
speak of the
lawyer would think of saying that a right to a chattel or to damages had been

this interpretation, the object, the particular
to the section, all seem to me to conduce

in question refers only to incorporate
does not seem to me to be warranted
suggest a reason which would justify the existence of a right

the word 'rights'
Sir Charles Sargent C J
Bapu, 10 B 439, that the
in *Guppal v Talleh Lall*,
and that 'right' there incl
This view was also seen
see also *Rama Sami v*
Vythilinga v Venkatacha,
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the right there mentioned be
v *Bishambhar*, 23 W R 311

which in legal phraseology are generally
conjunction with the word 'evidence'
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or general 'rights' or
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uninjuries had been
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In the same case *Jackson J* said at pp. 184, 185

But in the same case *Mitter J*, in dis-
-interpretation to the word 'right'
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Calcutta High Court
construction on the word 'right' in s 13,
real rights but a right of ownership,
Shakim v Amrit, 24 B 591 (500),
Shakata Sami v Venkataraddi, 15 M 13,
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favour the extension of the term "right" to
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favour the extension of the term "right" to
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171. Although I always have a S

recognised in I cannot see why

usage *Dalglish v. Gutzuffer*, 23 C 427;
ng to Sir John Woodroffe the word custom

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would be 'usage' within the meaning of the section " *Dalglish v. Gutzuffer*, 23 C.
427 (429); *Sariatallah v. Prun*, 26 1b5 In the Indian Evidence Act we find
mention of three kinds of customs, (1) private, (2) general (*vide* s 48) and (3)
public (*vide* s 32 clause 4)

Private Custom—usage of a single family In *Raj Kishen v. Ramjoy*, 1 C
186 (195, 196) 19 W R 8 P C their Lordships of the Privy Council said
"Their Lordships cannot find any principle or authority, for holding that in point
of law a manner of descent of an ordinary estate, depending solely on family

Family custom—how proved If a party rely upon the especial custom of

particular family has from a long usage obtained the force of law which must
be the general rule
3 I A 259 (285),
Cas 43 Such a
v *Janki*, 3 Ind
of comparatively
period is wholly
Narayan, 3 M L
h distinctness and
certainly *Serumah v. Palathan* 15 W. R 41 r. C as an acknowledged

3. *Durga Charn v Raghu Nath*, 18 C W N 55 (58) A family custom must be established by clear and unambiguous evidence *Abdul v Sona* 45 C 40-27 C. L. J 240; see also *Lal Gayendra v Lal Mathura*, 20 C W. N. 876, *Nogendra v Raghu*, W R (1861) 20

General Custom The words "general custom" are used in section 48 of the Evidence Act. The term "general custom" in that section probably includes "public custom" *Whitely Stokes*, Vol II p. 881. According to English law the term includes the custom of manors.

Brandao v Barnett 3 C

Bank of Australia v White, 4

of gravel kind and borough *Langham v Deudamore*, 1703, 2 Ld Raym 1024-1026) i.e. such as have an extended local application *Wills' Ev* 2nd Ed 20

According to Mr Justice Woodroffe the expression "general custom" is defined to include customs common to any considerable class of persons and includes (a) local custom; (b) caste or class custom, and (c) trade custom or usage *Woodroffe's Evidence* 8th Ed p 169. If we are to take the analogy from public rights and "general rights" we must say that general customs are those in which some class of the community has a common interest, as for examples, those which are based on the customs of manors (*Doe v Sisson* 12 East 59. *Crease v Barrett* 1 C M & R 919), *public* customs are those in which all the subjects of the king are interested *Public* *M D C* (1899) 1 C

are connected with hamlets (*Thomas v* of manors (*Barnes* customs are those in which all the subjects of the king are interested

In order that a local custom may be valid and operative as a source of law, it must conform to certain conditions

1. C 116; *Satyannarain v Satya* v *Barn* 17 W R 316; *Marquis* By Ben Reg IV of 1827, s 26 the

though contrary to Mahomedan law *Abas* R 36. As to pre-emption in village *Kuniar Ahmad*, 19 C W N 393, *Madhab* or usage is termed *desachar*. *Field* Ev 7th Ed 563

Caste or class custom *Cutcha* the whole of their property by will regards the succession amongst the *Alemon's Case*, *Perry Or Cas* 110, *In re Hajj Ismail* 11 B 452; *Ashabai*, s 115. As regards tribal custom, vide 16 B 470 (476) and 24 P L R 1903

Requisites of valid custom Under the English law a valid custom must fulfil the following conditions—

- (a) It must be ancient; i.e., it must be in existence beyond the memory of man or it must go back as far as the reign of Richard I (*Leake v Cooper*, 7 C & P 119)
- (b) It must be reasonable.
- (c) It must be certain
- (d) It must have been continued
- (e) Perceivable (*Lala v Hira*, 2 A 49)
- (f) Compulsory
- (g) Not immoral or unnecessary

Antiquity In the words of *Littleton* "No custom is to be allowed, but such custom as hath been used by title of prescription, that is to say, from time out of mind" So "no usage can be part of law, or have the force of custom, but is not" 15 In *London Corporation* "A custom originating within at law." In *Chapman v*

Smith, 2 Ves 505, *Lord Hardwicke*, L. C. at p 610 said: 'Local, common law, S.

practice

word "

if proved to extend for a hundred years may very well be called immemorial

7 B 528; *Hur Prosad v Sheo Dyal*,
L J. 806; *Jugamohan v Manick*,
Gouria 6 B L R 238; *Durg*, v
1, 11 B H. C R 271, *Mahamaya*

Reasonableness. A custom must be reasonable. Co Litt 62 (a), *Tanistry*
Broadbent v Wilkes,
1005 24 C W N
H C 19, *De Souza*
A 257, *Kuarsen v*
235; *Hurpurshad v*
Shubnarain v Bhut-
W N 735, *Gauri*
1-61 Ind Cas 182;

Radha Prasad v Dinunath, 43 Ind Cas 451 (Pat) So even where a custom is
established by evidence, it cannot be treated as a valid custom on the ground of

ively proves that the usage, even though it may have existed from time imme-
morial, must have resulted from accident or indulgence and not from any right
conferred in ancient times on the party setting up the custom. *Halsbury Vol*
Johnson v Clark, (1903)
valid must be reason
Clark, *ubi supra* The
s inception *Mercer v*
Tyson v Smith, 11 Add

& El 406; *Sheikh v Behar*, Lall 6 Pat. L J 11-61 Ind Cas 132 A custom
is not unreasonable where it is beneficial to a community but against the
interest of a particular person *Tyson v Smith*, *ubi supra*

Certainty

Dov 1r at p 33;
Blount v Tregon,
Hurpurshad v St
Laichman v Abb

Tanistry Case (1603)
v Scott, Filz G 55
10, (1904) 2 Ch 534;
anya, 17 W R 553,
voy, 1 C 195 (196);

Raturaj v Pahlwan, 33 A 196 (F B); *Lali v Hira Singh*, 2 A 48; *Krishna v Atul*, 39 C L J 612, *Lachman Bai v Akbar Khan*, 1 A 449, *Jamila Khatun v Pagal*, 1 W R 250; *Beni Madhab v Joy Krishna* 7 B L R 152, *Rani Mina v Ichamoyee*, 27 C L J 587, *Rai Jatindra v Hari Charan* 20 C L J 426 *Gop v Abdul*, 34 C L J 319, *Tekari v Tekari*, 20 W. R 157, *Bhagawan Das v Balgobind*, 1 Bc R S N (X) In *Broadbent v Wilks, Wiles*, 360, *Wiles C J* said "That every custom must be certain is laid down as a rule in all the books, which treat of customs. It is still of a custom as by way of definition, that *consuetudo ex certa et rationabili causa privat communum legem*, and it must be certain because, if it be not certain, it cannot be proved to have been time out of mind, for how anything can be said to have been time out of mind when it is not certain what it is?" There must be some definite limit to the right claimed as exist under an alleged custom—in respect of its nature generally, in respect of the locality where the custom is alleged to exist and in respect of the person alleged to be affected by the custom. *Halsbury Vol X p 227 228*

Continuity A custom to be valid must be continued without interruption since time immemorial *Halsbury Vol X 231, Tanistry Case, Dov Jr 32, Lyon v Smith 9 Ad & El 406 Simpson v Walls, L R 7 B 314, Abraham v Abraham, 9 V L A 242, Rama v Apparau, 12 V 14, Sulemanja v Muthu, 3 M H C 75, Beni v Jai Kissen, 7 B L R 152* It should be unaltered, uniform and constant *Jameela v Pagul, 1 W R 250, Lala v Hira 2 A 49, In Ram Kishen v Ramjoy, 1 C 190* 'It is the esse and continuous, and them This would causes, about b 3 M H s been intentionally brought also *Tara Chand v Reeb Ram C A C J 113* In cases

3 M H of a widely spread local custom want of continuity would be evidence that it had never had a legal existence *Mayne's Hindu Law*, p 58, see also *per Jessel M R in Hammerton v Honey*, 24 W R 603 There is however, a distinction between an interruption of the right which forms the subject matter of the custom, and an interruption in the possession of that right, or the user and enjoyment of that right. If for a short a period, the right revival would involve upon the custom would be void But as regards interruption of the possession or enjoyment of the right such an interruption may occur and continue for ten or twenty years without being merely non-user during it was no interruption of the possession or enjoyment of the right. *Fatima v Bhola*, 52 Ind Cas 869

Kart v Velthelus 11 M 459, 461, 462 A caste custom which is against law ought to be established by very clear proof that the conscience of the members of the caste had come to regard it as binding *Patal Vendra ran v Patal Mamal* 16 B. 470 A custom to be valid must be acquiesced in *Ailya v Provas* 24 C W N 309

Not immoral or unreasonable A custom deserves to be recognized and enforced by the Courts, unless it is injurious to the public interests, or is in conflict with any express law of the ruling power. *Tiruchani v Reeb Ram*, 3 M H C 56, *Ihau v Sundrabai*, 11 B H C 249, *Mathura v Esu*, 4 B 545. So a custom should not be immoral or opposed to public policy or unreasonable. *Raja Yurmah v Rabi Yurmah*, 1 M 235, *Lakshmi v Sadatula*, 9 C 65. *Lachmeepul v Sadatulla*, 9 C 693, *Krishna Sircani v Vira Sircani*, 10 M 133. *DeSosa v Pestonji*, 2 B 408, *Langa v Pengari* 20 C W N 406-22 C L J 92, *Syed Ah v Sarjan*, 18 C W N 733, *Krishna v Raman*, 14 L W 329.

Immoral custom is not recognized as valid *Ghasbi v Umarayan*, 20 I A 149 S. 1 (P C), *Chinna v Tegarai*, 1 M 168

Transaction Transaction in its ordinary management of any undertaking or business been brought partly or wholly to a conclusion or obligations *Standard Dictionary* Worcester defines it as the act of transacting or conducting any business, negotiation, management a proceeding *Webster*, as in the management of any affair; performance, as the derivation of persons by a cross or reciprocal action as it were *1st Jackson J in Guppu Lall v Fattah Lall* 6 C 180 Whatever may be done by one person which affects another's rights and out of which a cause of action may arise, is a transaction *Scarborough v Smith*, 18 Kan 399, 406 It is a broader term than the contract for while every contract is a transaction every transaction is not a contract *Roberts v Donorian*, 70 Cal 108, 113 The term transaction is one of large import, and might although by in a suit, *Jackson J in Guppu Lall v Fattah Lall* 6 C 180 vide post

The word 'transaction' in section 13 of the Evidence Act means a business or dealing which is carried on or transacted between two or more persons Written statements filed in suits are not transactions within the meaning of the section Where in the specified boundaries of an adjacent land the suit land is described as belonging to one of the parties it is transaction but not a party is asserted claimed or even recognised dence under section 13 *Saripali v Fota* Ind Cas 747 A private transaction between

m) A transaction contemplated by section 13 is a genuine and bona fide transaction, but a benami transaction

land was held admissible both under clause (a) and clause (b) of section 13 on the ground that it was a transaction in which the right was exercised In this case the was dou *Ali v Sjed Rejanah* 19 C W N 468 *Mahanti* 194 and also upon the decision later *Ind Cas* 747

Previous transaction in respect of different property is not a transaction within the section *Radha Krishna v Sarabeswar Nag* 29 C W N 469 86 Ind Cas 674 = A. I R 1925 Cal 684, see also *Abdul Ali v Rejan Ali*, 21 Ind Cas 618.

Instar something (*Webster's* *Dictionary* the right or custom which its *Section 13 of the Evidence Act* of lands other than *Abdulla* *statement of an agent*

that his principal was a bastard was admissible under section 13 of the Evidence Act as establishing an instance in which the legitimacy of the person in question was denied. *Held* also that a judgment referring to such illegitimacy was also admissible under the same section. *Raj Fateh Singh v Baldeo Singh* 5 O W N 143-109 Ind Cas 310-A I R 1928 Oudh 233. When a custom has been established, instances showing that there has been no variation in the custom are important and should be relied upon, no matter if such instances relate to transactions which took place after the suit involving the question of custom had been instituted. *Akshan Singh v Faqir*, A I R 1928 Lah 166. Uncontested instances are by no means worthless evidence of the existence of a right. *Muhammud Husain v Ghulam Muhammad* 10 Ind Cas -138 P L R 1911. Statements contained in petitions by members of a family recognizing the existence of a custom of primogeniture in the family, are relevant and admissible as evidence of particular instances in which the custom was recognized as affecting their own rights. *Shyamanand v Rama Kant* 32 C 6. Instances in the neighbouring subdivisions of a town are relevant on the question of custom in a particular subdivision of a town under section 13 of the Evidence Act and they may be treated as evidence supplementary to the evidence afforded by instances in the subdivision. Admission by a vendee in a suit for pre-emption that the custom for pre-emption existed in the locality is an instance of the recognition of a right which is relevant under section 13 of the Evidence Act. *Sant Singh v Jowala Saik* 59 P L R 1903-42 P R 1903. Statements made by persons in a suit cannot be considered as instances although the whole litigation ending in a judgment can well be called an instance. *Sree Pralab v Sree Raja Jagadis* 40 C L J 331 (363).

Proof of trade custom by particular instances. In evidencing a custom or usage (i.e. the habit of a body of persons) by specific instances, the following general principle is applicable that is the instances offered (a) should be sufficiently numerous to indicate a regular course of business, and (b) should occur under conditions substantially similar to that in question. *Wigmore* § 379.

Number of instances. Individual instances offered one at a time are receivable. *Doe v Mason* 3 Wills 63. In *Roe v Jeffrey* 2 M & S 92 *Ellenborough* L C J said. It is true that one act undisturbed does not make a custom, but it will be evidence of custom. The alleged custom must be very satisfactorily proved by evidence of particular instances so numerous as to justify the Court in finding in favour of the custom. *Durga v Raghunath*, 18 C W N 55. *Lachman v Akbar*, 1 A 440. *Debendra v Putamber* 93 Ind Cas 43-A I R 1927 CIL 177. *Jugmohandas v Mangaldas* 10 B 528 (543), *Sarabjit v Indrajit* 27 A 203, *Chandika v Minia* 24 A 273-291 A 70.

Custom should occur under conditions substantially similar to that in question. It is obvious that there must be such a similarity or unity of conditions that what is done by one or more persons or sets of persons may be taken as indicating the probable general habit of the class of persons under similar circumstances. The precedents illustrate all sorts of trade and usage and no detailed generalization seems feasible. *Wigmore* § 376. To prove a custom of London as to the stowage of goods in regard to general average a similar custom in other English ports was received. *Milward v Hibbert* 3 Q B 120 139. So also to prove a custom of trade between Liverpool and California, after incorporation with the United States as to discounts on freight, a similar custom as to trade with Texas after incorporation and as to other ports of British America, etc. was received. *Falkner v Earle* 3 B & S 360. Similarly in proving, usage as to bleaching linen in Nottingham usage at Loughborough was admitted by reason of the vicinity of the places and the interchange of trade. In *Flet v Morton*, L R 2 Q B D 126-41 L J Q B N S 49 the action was for the price of fruit on a sold note signed by the brokers only the dispute being whether in that trade brokers were liable on such notes for the default of principals. The custom of trade being held to be involved in the contract, evidence was received with some hesitation, of the custom on the point in the colonial market. *Blackburn J* observed. It seemed to be conceded in the trial that the two trades were so far allied to each other that the same usages would be likely to prevail in both, and I thought that upon the question of the liability of a broker evidence of his liability in a similar trade ought to be received. So it is enough to point out (1) that no particular circumstance is conclusive either *pro* or *con*, (2) that

instances from another trade or another region are not necessarily without effect at the place where the custom is claimed. The same locality are not the offered
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100, *M. Raman v. Munnai*, 1 I R C 11 110

Customary rights in land, etc Custom in India is transcendent law But a custom cannot be established by a few instances or by instances of recent date Consequently, it is the duty of the Court when it has to pronounce upon the not only as to the sufficiency
in fact the also required to

sion of
the alleged custom has been acted upon, and by the proof afforded by judicial or revenue records of private accounts and receipts that the custom has been enforced" Per Turner J in *Lachman Rai v. Akbar Khan*, 1 A 440 (441), see also *Ashutosh v. Chandi*, A I R, 1927 Cal 177-98 Ind Cas 43 Though judicial the establishment of custom-
Tara Chand v. Reeb Ram,
v *Baboo Burm Narain Singh*,
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a family recognising the existence of a custom of primogeniture in the family, are relevant and admissible as evidence of particular instances in which the custom was recognized as affecting their own rights *Shyamanand v Rama Kanta*, 32 C 8 In *Pal & Dhari Rai v. Mannars*, 23 C 179, a suit by a landlord for ejectment of purchasers from *rayats* having only a right of occupancy, on the ground that the holdings of such *rayats* were not transferable without the landlord's consent, the defendants pleaded custom or usage in support of the transfers Questions arose as to the character of the usage required to be proved in such cases, and the nature of the evidence required to prove the usage In that case the Court observed at p that he has been purcha
200 *lobalas* of such lands which are on the record and by themselves would certainly establish neither a custom nor a usage as to such transactions We would here refer to section 13 of the Evidence Act as showing the character of evidence by which a right or custom may be proved Mr Mannars' evidence is not of that description The Subordinate Judge next states that 'one of the purchases was made so long ago as in the year 1277' which is a related instance, and it relates ced in evidence also ext refers to the fact some of their other

not be properly regarded as a recognition of a custom or usage by the consent of the landlord"

Instances occurring within the same manor, it is clear, will be received, because the original unity of the holding allows each instance to appear as merely

one illustration of a general system working uniformly. So in order to prove a custom of descent in the female line, particular instances were received of such descent in other estates of the manor, as well as of a general custom of descent in the manor, "branches from the same root" P

12 East. 62 Similarly to prove custom in the same township were admitted

Howard, 1 M & S 292, see also *Jett v Dearley* 4 L R 1re 63 On the same principle however, instances from other manors may be received, provided that, behind their apparent difference of conditions a unity of some sort can be shown which makes instances from the one equally illustrative of a general system including and operating in the other *Wigmore* § 390 In *Moulin v Dallison* Cro Car 484, the question was whether an estate descended by custom to the eldest daughter in manor S After showing that S was a part of a manor O, and thus establishing the unity of custom, the fact was received of the rule of descent in O see also *Champion v Atkinson*, 3 Keb 90, *Someset v France*, 1 Biza 654 In *Furpeaux v Hutchins* 2 Cowp 807 Lord Mansfield C J said, "Proof of the custom in other parishes is no evidence to affect the parish in question unless the custom had been proved as a custom of the whole country" In *Ross v Brenton*, 8 B & C 737, 738, the issue was as to the ownership of copper mines and the rights of a plaintiff who was a 'conventional lessee' in the copper on his land there were 17 manors in the duchy, and some of the above tenancies, renewable every 7 years, existed in each manor Evidence was received as to the terms of the customary right of such a tenant in those other manors *Tenderden* 1 C J said 'The same character, whatever that may be belongs to them all It certainly belongs to all those called 'free conventionals', in this district Must we not, then in fairness, in order to ascertain what are the relative rights of the lords and these tenants in one part of the district enquire what are the rights in another' In the same case *Bayley* J said "I am of opinion that the usage which has prevailed in one part, is evidence to explain a grant expressed in similar terms to any other part of the district" Similarly in *Anglesey v Hatherton* 10 M & W 218 *Abinger* C B said "It should be established clearly and beyond all controversy that the two manors originally formed one manor there prevails throughout those manors a particular species of tenure, called tenant right, since in those manors all the tenants hold under the same right if it should happen that in one particular manor no example can be adduced of what is the custom in any particular case in order to explain the nature which is not confined to one manor but prevails in a great number you may show what is the general usage in respect to that tenure' He also approved *Ross v Brenton*, *ubi supra* In the same case, *Alderson* B said, "If indeed there be some general connecting link between them—for instance if the custom in question be a particular incident of the general tenure which is common to two manors then you have a right to show what the custom of one manor is as to the tenure, for the purpose of showing what the custom of the other manor is as to that tenure; but you must begin by showing that there is a general tenure common to both, that fact fails here"

To prove a custom or usage that occupancy holdings are transferable in any locality, it is not sufficient to show simply that such holdings are sold in the village or neighbouring villages The essence of a usage of transferability is that transfers made to the knowledge of but without the consent of the landlord are valid and must be recognised by him *Pearry Mohun v Jote Kumar*, 11 C W N 83

Transaction whether includes judgment 'A transaction in the ordinary sense of the word is some business or dealing which is carried on or transacted between two or more persons If the parties to a suit were to adjust differences *inter se*, the adjustment would be a transaction, and by a somewhat strained use of the word the proceedings in a suit might also be called transaction, but to say that the decision of a Court of Justice is a transaction is an application of the term' *Per Garth C J* C. 171 at p 186 A transaction, as the deed has been concluded between persons by a cross

the Court admitted, in evidence against the defendant the *instance* right had been successfully asserted the tenure that was said to have created the defendant had not been a party. *Sir Richard* ment of the Court said that he could not think that such judgments were intended to be excluded, and that the expression 'transaction' in section 13 was large enough to include proceedings in suits, and that the section did not require the suit to have been between the same parties, but left it to the Court to decide what weight attached to it. In *Narain Bikhambai v Dipa Umed*, 11 B 3, where the plaintiffs sought to recover arrears of a *Chirda Lak*, *Westroff, C. J* and *Melville, J.*, adopting the views taken by *Couch O J.* of section 13, held that decrees establishing the right in prior suits between the same persons were admissible in evidence "for the purpose of been asserted, but recognized by the tribunals" In *Ranchhoddas v. Bapu*, 10 B 439 at

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doubted whether such was the intention of the framer of the code. In *Tepu Khan Roions Mohan*, 2 O W N 501, (504)=25 C 522 (F B) *Banerjee J* said: "If the meaning of clause place, ransac-

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B 143 "It seems to me the true point is, not that the judgments and decrees themselves are 'transaction', and the place they are the best evidence. *Per* *kdhari*, 12 A 1 (F. B); see also *I* per *Sir William De Grey*.

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determining what are the terms of their act. In *ignore* 3 21-10 100 m 6
tion of a transaction, either voluntary or compulsory. In the former instance it
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the law insists, independently of the parties' choice that the transaction be embodied in
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3. as adjudicated, and this supercedes the miscellaneous mass of oral and written pleading, motions, and orders which have gone to make up the proceedings in legal th and many strictness need to appear in the record,—hence may be established without regard to the contents of the record. This involves the whole theory of trials and appeals. From the above observation of *Prof Wigmore*, one of the greatest authority on the Law of Evidence it is abundantly clear that a judgment or decree is but an integration of various transactions. When such transactions are relevant under section 13, a judgment or decree is also admissible under this section. As regards the probative value of such judgments and decrees *vide infra*.

Judgment whether relevant under this section. Judgments in Courts of Justice on other occasions form an exception to the exclusion of evidence of transactions not specifically connected with facts in issue. *See Intro 161*. There are two kinds of judgments, namely judgments *in rem* and judgments *in personam*. The former kinds of judgments are always relevant (*vide s 41*). Judgments in *personam* bind only parties and privies to facts in issue (*vide Notes under s 40*). So a judgment which operates as *res judicata* is relevant in a subsequent suit (*vide s 40*). So also judgments, orders, or decrees are relevant if they relate to matters of public nature relevant to the enquiry (*vide s 42*). Now the question is whether judgments, which are not judgments *in rem*, nor public nature section. Such are presumed to be faithfully recorded and as such is proof of its own existence, date and of its legal consequences not simply *inter partes*, but against all the world, but not of the truth of the fact on which it rested. In other words, the law attributes unerring verity to the substantive as opposed to the judicial portions of the record. *Phil Ev 392*. Thus where A has been tried and acquitted of a crime against B and afterwards sues B for malicious prosecution the record in the criminal trial is conclusive evidence of A's acquittal, but it is no proof whatever that A was innocent or that B was the prosecutor, or actuated by malice. *Leyath v Tollerley* 14 East 302, *Purcell v Macnamara*, 9 East 36; *Leyman v Lalimer* 3 Ex D 352 354 *Phil Ev 392*. Such judgments are also relevant under section 43 of the Evidence Act if the existence of such judgment is a fact in issue, or is relevant under some other sections (*vide section 43*). *Hill v Clifford*, (1907) 2 Ch 936. Otherwise such judgments when tendered against strangers are not admissible. *Fontaine Moreau* 111 more commonly, on

11 C L R 530. Ordinarily a statement of opinion made by the Judge in a previous judgment not *inter partes* is no evidence in a subsequent case. *Harnath v Mohanlal*, A. I. R 1929 Lah 123-10 L L J 519. Under section 13 a judgment is relevant if its existence is a transaction under clause (a) or its existence be considered an instance under clause (b). *Tripu Khan v Bhopal* 2 C W N 501 504. On this point there is some conflict of opinion and it is better to treat the decisions of different tribunals under separate headings.

English Cases. — *W v W* 1 App Cas 135; *Bland* non repairs of and judgments for the recovery of prescriptive tolls (*City of London v Mather* 181, *Laybourn v Crisp*, 4 M & W 320) are admissible as relevant facts.

when the right to the land, the way, or the toll respectively is in question. **S.**
Wills. Ex 61.

Calcutta Cases. A judgment in a former suit brought by other parties

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arose in 1880 in *Gwyn Lall v Fetteh Lall*, 6 C 171, which was a suit to recover

possession of the land covered by right, and alleges that B was passed, the former judgment would be right, see *Sooromonee D Krishna Behari v Brojeswar*, 2 Evidence as at present administered in England, it would equally be considered conclusive, and, if not conclusive, at least as cogent evidence in the subsequent suit. Was it intended by the Evidence Act to declare such judgment as this irrelevant? But it would be irrelevant unless it be relevant either under s 11 or s 13. It is not relevant under s 40, because its existence does not by law prevent the Court from taking cognizance of the second case. Under the circumstances, I apprehend it would be relevant.

at least in some cases not being admissible under ss 41 and 42, but relevant under some other provision of the Evidence Act. It is not relevant under s 13, but it is relevant under s 11, as being a fact in issue in the first suit, and as being a fact in issue in the second suit. It is to be highly relevant in these reasons.

However the Full Bench in *Guyy Lal v Fateh Lal Ramcooma Nath v Br Brojendra Nath* was followed in *Srigobind*, 24 C 330; see also the case of *Surender Nath v the Full Bench, McDonell* and have contended before us that the Evidence Act, and that the *Guyy Lal v Fateh* seems to be a full Bench decision.

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It seems to us that the question raised before us is of considerable importance, and one which often arises in our Courts, and we therefore think it necessary to refer the following question to a Full Bench: Whether under the Evidence Act, a judgment in a previous suit, in which the parties were not arrayed as plaintiff and defendant, but in which the parties were not arrayed as plaintiff and defendant, is relevant in a subsequent suit in which the parties are arrayed as plaintiff and defendant, if the judgment in the previous suit was a judgment in which the parties were not arrayed as plaintiff and defendant, but in which the parties were not arrayed as plaintiff and defendant.

the circumstances stated, the judgment in the previous case is evidence or not " S. 1. But again the Wilson, O K the question think, concluded by the two Full Bench cases, *Gujju Lal v Fattch Lal supra* and *Brojo Behari Mitter v Kedar Nath Mo undin*, 12 C 580 (F B)" The Full Bench neither discussed the question nor tried to distinguish the cases referred to in the order of reference *Mitter* I however dissented from the view taken by the Full Bench

The question again arose in a suit for rent in which the amount of land held by the defendant was questioned, and it was contended that the land must be measured with a *hath* of 21½ inches and not one of 18 inches, as claimed by the plaintiff Zamindar. Certain decrees obtained by the Zamindar against other tenants in the same pergunnah in suits in which 18 inches had been taken as the *hath* were tendered in evidence in support of the plaintiff's contention that the customary *hath* in the pergunnah was one of 18 inches. In that case such decrees were admissible in evidence under the provisions of s 13 of the Evidence Act, as they furnished evidence of particular instances in which a custom was claimed. Of course such decrees and judgments are clearly admissible under s 42 of the Evidence Act as being judgments and decrees which relate to matters of a public nature relevant to the enquiries, i.e. the measurement of the *hath* in the pergunnah. But the Court admitted the judgments under s 13 of the Evidence Act *Jianutulla v Romoni Kant*, 15 C 233

In *Jianutulla Sheikh v Inn Khan*, 21 C 693 it was held that a decree for possession made by a Court under s 9 of the Specific Relief Act (I of 1877) in a suit beyond the pecuniary limits of that Court's jurisdiction, although not *res judicata*, is some evidence of dispossession by the defendant in a subsequent suit against the same defendants to recover mesne profits. In delivering the judgment the Court observed at p 697. "It was argued for the respondent, on the authority of *Gujju Lal v Fattch Lal*, 6 C 171 (F B), *Brojo Behari v Kedar Nath*, 12 C 580, and *Sunder Nath v Brojo Nath*, 13 C 352 (F B) that the decree, if not conclusive evidence is not evidence at all; but the decrees which it was sought to put in evidence in those cases were not *inter partes*. In *Madhu Sudan Saha Mundal v Brae*, 16 C 300, the Full Court held that an *ex parte*, decree for arrears of rent did not of rent *res judicata*, but the ques-

The case of *Run Bahadur v Luc* although not conclusive evidence

There the survivor of two brothers, claiming the whole estate by survivorship, brought a suit in the Court of the Subordinate Judge against the widow of the deceased brother who claimed her husband's share as her separate estate and the question was whether the brothers were joint or separate in estate. The decision of a Munsif in a rent suit between the same parties was put in to show that the brothers were separate. The Judicial Committee held that the judgment was

ad as evidence to which some when the question again came up

Terju Khan v Rajam Mohun

it was whether a judgment in

a previous suit by a co-sharer of the plaintiff for the recovery of possession of two thirds is admissible in evidence in the plaintiff's suit against the same defendants for the recovery of possession of the remaining third share of the same property. Mr Justice Bajorjee in referring the case to the Full Bench observed at pp 524—528. If the cases of *Gujju Lal v Fattch Lal* 6 C 171 (F B) and *Sunder Nath v Brojo Nath* 13 C 352 (F B) upon the authority of which the lower Appellate Court has held the judgments tendered in evidence for the defendants to be inadmissible are good law the first ground urged before us must fail. But if the cases have in effect been overruled by the decisions of the Privy Council in *Ram Rungia v Ram Narayan* 22 C 243—247 I A 60 and *Bhutto Kunwar v Kesho Persad* 24 I A 10—11 C W N 202 then the question arises whether the judgments referred to are admissible in evidence. In the two cases relied upon by the lower Appellate Court namely *Gujju Lal v Fattch Lal*, 6 C 171 and *Sunder Nath v Brojo Nath* 13 C 352 it was held by this Court that a former judgment which is not a judgment *in rem* nor one relating to matters of a public nature, is not admissible

in evidence in a subsequent suit either as *res judicata* or as proof of the particular point decided, unless between the same parties or those claiming under them. But in the case of *Ram Ranjan Chakrabarti v. Ram Narain Singh*, 23 C 533=22 I A 60, it was held that a judgment passed in a suit to which the plaintiff plaintiff as evidence showing the rent *Pershad*, 24 I A 10=1 C W N

speaking of judgment in a former suit against one of the defendants *Bacha Teuani*, observe 'this decision is not conclusive against *Bacha Teuani*, if the suit is not between the same parties as the present suit' but their Lordships agreed once against him. These in effect over ruled the being so the question

as to the relevancy of the judgment, that is, the circumstance that a particular judgment was passed, is clearly a fact within the meaning assigned to the term in section 13. Next as to relevancy of the judgment in suit no 732 of 1887 under section 13. The meaning of the the meaning of the the judgment took

the meaning of the term as used in the section. The judgment therefore is, in my opinion, relevant under section 13. If such judgments were not relevant under either of the two sections 11 and 13, they could not be admissible in evidence above evidence (see *Tay* bound by proceedings to which he was a stranger and on a conduct of which

evidence being left to the Court to determine. And in the second place the reason stated above, though it is a good reason for excluding from consideration as against a stranger, the evidence offered by a stranger as far as it is the opinion of a Court upon matter stranger could have had no

Pal v Broja Nath Pal, have been referred to, I feel bound to express my opinion that having regard to the recent observations of the Privy Council in the case of *Ram*

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In *Abinash Chandra Chatterjee v Paresh Nath Ghosh*, 9 C W N 402 the Court agreed with the view taken by the Full Bench in *Tepu Khan v Rajan*, a quite 44 the e judg- ed for

It is well settled that although a judgment not *inter partes* may be used in evidence in certain circumstances, as a fact or as a relevant fact, of possibly as a transaction, (*Ram Ranjan v Ramnaram* 22 C 593; *Ditto v Kesho Pershad* 24 I A. 24=1 C W N 265, *Dinomoni v Brojo Mohini* 29 I A 24=6 C W N 386, *Tepu Khan v Rajan*, 25 C 52=2 C W N 501; *Malcomson v O'Dea*, 10 H L C 593 and *Bristow v Cormican*, 3 App Cas 641) the recitals in the judgment The principle is from their sumed to be dence for or istence, date rendered, in is opposed to judgment of therein and

the first ground must prevail

1933 A 1 R Cal 240-56 C L J

in this connection we cannot over- 113 I Under

correction of the previous decision but the fact that there had been a decision that is established by the production of the judgment This is clear from the decisions of the Judicial Committee in *Ram Ranjan v Ram Narain*, 22 I A 60=22 C 593; *Ditto Kunua v Kesho Persad* 24 I A 10=19 A 277, *Dinomoni v Brojo Mohini*, 29 I A 24=29 C 187, *Ramprokash v Anand* 43 I A 73=43 C 707=24 C L J 116, and *Natal Lau Co v Good L R 2 P C 121* and of the House of Lords in *Malcomson v O'Dea*, 10 H L C 593 and *Bristow v Cormican*, 3 App Case 641 This fundamental distinction was not fully appreciated in the Court below, and references were made to the

ness ment B). inter it is a previous judgment under section 11 or section 13 in certain circumstances may be "The cases so contemplated

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considered that the subject matters in the two suits were not identical. It is difficult to understand how it can be said that the subject matters in the two suits were different. The amounts claimed were no doubt different and the claimants were not the same. But the real dispute in the two suits was as to what the amount of rent was. Their lordships of the Judicial Committee in *Ram Ranjan v Ram Narain* 22 C 533 at p 542 held that the judgment in a previous suit would be evidence for the purpose of showing what the amount of the rent was. It is to be observed also that in a case that was decided in this Court subsequent to the decision in *Abdul Ali v Raj Chandra Das*, 10 C W N 1081, namely in the case of *Dyom Kesh v Jagadishwar*, 22 C W N 304=40 Ind Ca 44, it was held that a decree obtained by a co-sharer landlord is admissible in evidence as to the rate of rent in a subsequent suit for rent brought by another co-sharer landlord. On a consideration, therefore, of authorities on the point and specially of the observations of their lordships of the Judicial Committee in *Ram Ranjan v Ram Narain* I am of opinion that the learned subordinate Judge was wrong in law when he held that the decree in the previous suit was inadmissible in evidence. In my opinion the decree was admissible, and that being so the case must go back to the lower appellate Court to have the appeal reheard. It should be noted in this connection that in this case as well as in the case reported in 22 C W N 304 the co-sharer landlord plaintiff relied on the previous decree of his co-sharer landlord against the tenant defendant who was also a party to the previous suit. But in *Kanto Mohun Mullick v Jadab Chandra Khara* 4 I R 1929 Cal 353 which was decided by another Bench of the Calcutta High Court on the previous day and in which it appears the plaintiffs appellants were the same as in the case reported in 1928 A I R Cal 355, it was held that a decree obtained by a co-sharer landlord in a previous suit was not admissible in evidence as to rate of rent in a subsequent suit for rent by another co-sharer landlord. But in that case the distinguishing feature was that the tenants respondents wanted to use the previous decrees obtained by the plaintiffs co-sharer landlords against the plaintiff. In delivering the judgment *Uffer J* said "On the merits it has been argued by the learned advocate for the appellant that the lower appellate Court has committed an error in law in deciding the appeal on its admissible evidence. It is said that Exs A, C and D are decrees which were obtained by plaintiffs co-shares against the defendants, and as the plaintiff who represents the estate of the late Bibu Manik Lal Seal was not a party to the suit in which the decrees were not *inter partes* and consequently are not admissible in evidence. Reliance has been placed in support of this contention on two decisions of this Court in the case of *Abdul Ali v Raj Chandra Das* 10 C W N 1081 and *Pren Chand Vanlal v Official Trustee of Bengal* 27 C W N 56 of the notes portion. The first two decisions support the appellant's case. The last decision which takes the contrary view, was an *ex parte* decision in an appeal in which the respondents were not represented. The learned advocate for the respondent argued that having regard to the decision of the Judicial Committee in the case of *Ram Ranjan v Ram Narain* 22 C 233=22 I A 60 such decrees by co-sharer landlords, as were admitted and acted upon by the learned Additional District Judge in this case could be treated as evidence, however weak the value of such evidence might be. But the distinction between *Ram Ranjan v Ram Narain* and the present case lies in the fact that the observations of the Judicial Committee were limited to cases where the subject matter of the previous judgment was identical with the subject matter of the suit in which those judgments were sought to be offered as evidence and their lordships held that under s 13, Evidence Act such judgments could be treated as evidence of a transaction within the meaning of that section. Here the suit by the co-sharer was in respect of his own share of the rent in the previous suit to which the present plaintiffs were not parties. Consequently the decrees A, C and D did not refer to the same subject matter to which the present suit relates. That was a distinction which was noticed in the Full Bench case in *Tepu Khan v Jagann Mohan Das* 25 C 522=2 C W N 501 (F B) and the majority of the Full Bench held that, where the subject matter of the previous judgments was not identical with the subject matter of the suit in which such judgments were sought to be introduced as evidence the earlier judgments could not be held admissible."

In *Abdul Ali v Bychantra*, 10 C W N 1051, although the plaintiff landlord wanted to use the decree of his co-sharer landlord against the same tenant defendant, it was disallowed by the High Court on the ground "that if such

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decrees for rent were obtained by a co sharer or co sharers for his or their share of the rent they are neither conclusive between the Plaintiff and the *rayat* Defendant, nor are they admissible in evidence between them, the subject matter

a *pro forma* Defendant but which decree was obtained more than a year after the decision of the suit in question

Ex parte decrees for rent obtained by a landlord against the heirs of a tenant and satisfied by the latter are evidence of the existence of the tenancy at the date of these decrees *Anukul Chandra v Kamala Kanta Roy*, 67 Ind Cas 787 A decree obtained by a two auna co-sharer for enhancement of rent of his share is admissible in evidence in a subsequent suit for enhancement of rent by other co-sharers *Sarat Soondary Dabia v Anund Mohun*, 5 C. 273=4 C L R 448

Bombay cases The first Bombay case in which this point arose was the case of *Narany v. Dipa Umed*, 3 B 3 In that case *Hestrop C J* said at p 5 "Under the law as it stood before the Indian Evidence Act (1 of 1872) came into force, those decrees were conclusive, in as much as the right to the *churda hak* was established by them as the foundation on which the arrears claimed in the suits in which those decrees were made, were recovered by the plaintiffs in those suits—*Soorjomonee Dayee v Sudanand Mohapatra*, 12 B L R 304 P C, *Arishna Behari Roy, v Brojeswari Choudranee* 2 I A 283 If not conclusive since the Evidence Act (1 of 1872) came into force, those decisions are, at least, admissible in evidence under section 13 of that enactment for the purpose of

of it will be very different where it was given in a suit to which the person against whom it is used was not a

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Judge adopted the view taken by majority of the full bench in *Gujra Lal v*

cases almost, if not quite, conclusive,
e, etc." But
Sargent C J
the learned

1 B 591 at p 599 *Ranade J* in trying

"The real question at issue was
if the partition deed of 1895 Though

the decision in the former suit will not estop the respondents defendants from contesting the claim as being *res judicata*, still the record and the judgment in that case, showing the conduct of the parties, and the admissions would be admissible evidence under section 13 The interpretation placed upon the

6 C 171 seems not to
as is questioned in
ctor of *Gorakhpur v*
such judgments from

are judgments not *in rem*, or where they relate to public matters, judgments *inter partes* have been always held not to be *res judicata*, but they cannot be

wholly excluded for other purposes in so far as they explain the nature of possession, or throw light on the motives or conduct of parties or identify property. The cases show that such judgments may have very high value as evidence and may even shift the burden of proof—*Neamat Ali v. Goro Das*, 22 W. R. 365. In a subsequent case it was said: "The judgments thus rejected were not *inter partes* but were in suits brought by other creditors against the same defendants in which the existence of the partnership claimed in this suit was asserted with success. The admissibility of such judgments would, apart from authority, be a question of some difficulty but it appears to me that the present case cannot fairly be distinguished from that of *Lalshman Goward Sher v. Anrit Gopal*." Born L. R. 356. 4 B. 591 is only heard and decided by *Paras and Rana* L. J. who dealt most exhaustively with this question. Per *Jenkins C. J.* in *Gowindji Sher v. Chhota Lal* L. J., Born L. R. 471. Assuming that to be so I think it right to point out that for a judgment to be admissible, it is not in all cases necessary that it should be either a judgment *inter partes* or a judgment in rem as will appear from the characterizations of the Privy Council in the cases of *Pam Panyan v. Ram Narain*, 3 C. 33 and *Bitto Kumar v. Kesho Pershad*, 24 I. A. 10-19 A. 277 (P. C.) and the remarks thereon in *Ispu Khan v. Rajani Mohun Das*, 3 C. 522. Speaking generally it may be said in this connection that though a judgment not *inter partes* may not be proof of facts there stated, it is a fact itself for the purpose of explaining the character in which possession of the estate has been enjoyed and matters of that class. Per *Jenkins C. J.* in *Ganesh Dharmji v. Dhundray*, 5 Born L. R. 230. The Plaintiff, a Mahomedan, brought a suit against his brother brother's wife and the widow of a deceased brother to recover possession of a house on the strength of a registered sale deed procured to the plaintiff by his deceased father. Subsequent to the sale to the plaintiff, certain mortgagees of the father brought a suit on the mortgage against the plaintiff his father and mother. In the said suit the sale to plaintiff was held to be a sham transaction and the plaintiff had to pay off the mortgage. In the suit brought by the plaintiff for the recovery of the house on the strength of the sale deed the defendant relied on the judgment in the suit on the mortgage to show that the sale was a colourable transaction. The first Court allowed the claim but the Judge in appeal dismissed it on the ground that the purchase by the plaintiff from his father was not proved to be *bona fide*. On second appeal by the plaintiff a question having arisen as to the admissibility in evidence of the judgment in the suit on the mortgage *Russell A. C. J.* said: "We have had addressed to us very lengthy arguments upon the question of whether that judgment is admissible at all or not and in my opinion it is impossible to hold that the judgment in this case comes within either the word transaction in section 13 or particular instances in that section. But although this is so the proceedings in that suit would come within the words particular instances in which the right was claimed for I think that we are bound by the decision of Sir Charles Sargent in *Panchhodas v. Bapu Nathar*, 10 B. 439 (417) where he says that 'rights and customs in section 13 must be understood as comprehending all rights and customs recognized by law and therefore including a right of ownership. Further, for my part I cannot distinguish the present case from the case of *Lakshman v. Anrit* supra, which was followed in *Gowindji Chhotalal* supra and see also the case of *Dharmidhar v. Dhundray*, 5 Born L. R. 230 a decision of the Chief Justice and Mr. Justice Batty. It appears to me, therefore, that proceedings in the suit of 1886 should be admitted as relevant evidence in the present suit for it must be remembered that the present plaintiff and the defendants either by themselves or their predecessors were parties to that suit of 1886. In the same case *Beman J.* observed: 'The question is whether this judgment not being *inter partes* is admissible and if so, what is its precise probative value? I should add that the plaintiff alleges that the sale was made to him by his father who was the judgment debtor in the suit of 1886. The relevancy of judgments of Courts of Justice is regulated by sections 40-43, Indian Evidence Act. Section 40 merely enacts that the existence of any judgment, order or decree which by the provisions of section 13 Civil Procedure Code, constitutes *res judicata* is a relevant fact. Section 41 without attempting any precise or exhaustive definition aims at and probably does let in all judgments in rem proper. Section 42 provides that judgments orders or decrees other than those mentioned in section 41, are relevant if they relate to matters of a public nature relevant to the enquiry. Section 43 declares all judgments, orders decrees other

than those specified in sections 40, 41, 42, to be irrelevant unless the existence of the judgment is itself a fact in issue, or is relevant under some other section of the Act It is not contended that the fact of the judgment is itself a fact in issue, but it is contended that the existence of the judgment is relevant under some other provision of the Act. In order to bring it in, a defendant has

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It certainly is not a fact in issue, but it is contended that it is relevant under section 13. To satisfy the requirements of that section the question must be

served the purpose. What class of cases the section was intended to meet is as plain as possible not only from its language but from the illustrations. And those are cases in which the right or custom in question is regarded as capable of survey and report
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been given

the Court should or should not decree it. I confess I do not find it easy to understand how that language can without absurdity be applied to such a case as this. Let us substitute it for the illustration "The question is whether a sale-deed is fraudulent, [that the same sale-deed and particular instar genuine, but other per which is created by proof or disproof by particular instances of assertion and denial, and is therefore plainly and essentially distinguishable from all the rights which are denoted in section 13. The . . .

decisive in being whether that the 'custom' has since been dissented from and at present it must be conceded that of authority favours the extension of the term 'right', to include any and every right known to the law. Against that opinion, might well be advanced the fact that the Courts have been most particular

conclusive but it is still conclusive of its own subject-matter. It takes the judgment *qua* judgment as relevant to the extent of its subject-matter and contents, then *cadit questio*, for in that judgment it was held that the sale-deed is relevant must, I think, be of the

the leading cases it is not conclusive while relevant it is not be to the integrity of the judgment, namely that no matter what its subject offered a I suppose conclusive, it can only judge or not judgment, whether

that adopting the most comprehensive view, and allowing to rights the possible meaning, judgments brought in under section 43 and section 13 must either 'transactions' or instances. All the best authorities, I think agree that contents, certainly in not such simplest and most convenient instance, namely the assertion of the right. So limited, the

admissible only as the simplest proof of a transaction, or an instance. It cannot be taken than it is held to be habitually improper reason. Under which he slight on that a parties, for

purposes of section 13, cannot be allowed to use its contents *qua* judgment virtually thereby converting it into a *res judicata*. That is the distinction which I have set myself to bring out clearly and I hope simply and intelligibly." *Mahamad v. Hasan*, 31 II 143. In a suit for damages for malicious prosecution, the following it as mages v. Rai of the Court ntirely contrary to that Court's decree. The judgment although not *inter partes* is a relevant fact under section 42 of the Evidence Act and under section 13 is also a very important piece of evidence. *In re Enya Sidhya*, A I R 1927 Bom 654=29 Bom L R 715=102 Ind Cas 546.

Allahabad cases. In the *Allahabad High Court* the question was fully discussed in the case of the *Collector of Gorakhpur v. Palak Dhar Singh*, 12 A 1

death F brought a suit against D, whom the Collector as manager of the Court of Wards had accepted as the minor son of K, and against the Collector as

Uthman v. Humam Suami v. Apparu, certain person was or was not the heir nor a fact within the meaning of s 13. *Sargent O J. and Mr. Justice Nanabhai* B 439, that the majority of the Full Bench of the Calcutta High Court in *Gujju Lal Fatteh Lal*, 6 C 171, put too narrow a construction on the word 'right' in s 13 and that 'right' there includes not only incorporeal rights but a right of ownership. There are no words in s 13 which could not be applied to a right of ownership, but it is difficult to see what could, within the meaning of s 13, clause (a), be a 'transaction by which the right' of a man to have it declared that he is not or the meaning word 'right' is same. In my view, may be a right or custom

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3. Legislature in framing s 13 that a party to a suit could not give evidence of particular instances in which a custom, for example, was exercised or recognised, but that the other party to the suit had recognised or had exercised such party could not give evidence without showing that the former suit was *inter partes*. For the reasons already stated I am of opinion that the record of the previous suit in which the same case *Straight* in the judgments in which they were action took place they are the best evidence. *Garth O. J* remarks, (in 6 O 171) 'by a somewhat proper expression in connection with such a matter, thus — "what has been said at the bar is certain" parties in judicial opinion the suit of "transaction" in w Singh was asserted and recognised, and the judgments and decrees of 1874 are the best evidence of that transaction I should also have no difficulty, if it were necessary to do so, in holding that the defendant is entitled to put forward the suit of 1873 as an 'instance' in which the right of which I have spoken was claimed and recognised As I have remarked before, the question is not as to the existence of the judgments and decrees of 1874 as a fact in issue or a relevant fact under some other provision of the Evidence Act, but whether evidence" is stated by *Gajju Lal* of the Statute (I of 1872) was that a judgment such as that of *Mr Justice Turner* and my brother *Brodhurst* of 1874 would be admitted in evidence" Before this case, in *Shadal Khan v Aminullah Kahn*, 4 A 92 at p 96, *Duthoit J* said "The 6 O 171 and rity set up a cases in which a similar of the Evidence Act. *Ind Cas* 142 In a suit for foreclosure one of the defendants contended that he was a minor at the date of executing the mortgage, and so not competent to enter into a contract In judgments in proof of the defen Held that the judgments were not passed not being instances in which Musammal Dulari, though not conclusively show the conduct of parties or particular instances made by the parties or their predecessors in title or to identify property or to show how it had been previously dealt with *Gobinda Krishna v Abdul Qayyum*, 25 A 546—A W. N. 1903, 137 The author applied Code to set aside it to be relied on s 153 A Penal *Kali Charan v* 85—A. I. R. 1927

Madras Cases. In *Subramanayan v Parmaswaran*, 11 M 116 123 the Madras High Court concurred with the majority of the Full Bench of the Calcutta High Court. So also in *Ramaswami v Appavu*, 12 M 11 where a suit was brought by the trustee of a temple to recover from the owners of certain lands in certain villages money claimed under an alleged right as due to the temple and where judgments in other suits under the same right had been decreed were held relevant under s 13 of the Evidence Act in which the right claimed had been ascertained that such judgments not being 'transactions' or 'facts', they are not admissible under s 13 of the Evidence Act. The matter of a public nature within the meaning of s 42 of the same Act, and that the Act, and that the but the judgments in that case; the question for determination in the previous suits was whether payments then claimed, and which are in contest in the present suit, were claimable as of right, and in one case whether they are so claimable from a particular class of persons, viz Christians; and it appears to us that, when a right of the character now in question is at issue, such judgments are admissible in evidence as evidence of particular instances in which the right or custom was claimed and in which its exercise was disputed asserted or departed from, and was further dealt with under the same Act. there is evidence of such villages—that from those who now reside in a large number of villages in the vicinity of the temple (see *Exhibit F*) the payment claimed is demanded as of right, and—that such payments have been made after suits from time to time brought and determined in reference to the liability of persons occupying lands in these villages, and this being so, we are further of opinion that the decisions in the former suits are decisions which relate to 'matters of a public nature' within the meaning of s 42 of the same Act. from that claimed a of the Evidence Act the finding is not only made but also alleged claim app claim upon evidence of custom in the sense of payments extending over a long series of years the existence of a right may, in connection with other circumstances possibly be inferred and the dismissal of the appellants suits for the reasons stated are inadmissible as evidence

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nger by Ammalayyanger w suits brought by him in 1836 layyanager then (deceased) as Varadayyanger, the adopt It has been objected on be are inadmissible as evidence

As pointed out by this Court in *Durga v. Durga* 11 M 116 Copies of judgments and decrees in reference to the decision of the majority in *Gijju Lal v. Fatteh Lal* 6 C 111 *na v. Avulla*, 15 M 19 (23) the object for which it was sought to use the former judgment in *Gijju Lal v. Fatteh Lal* 6 C 171 was to show that in another suit against another defendant the plaintiff had obtained an adjudication in his favour on the same right and it was held that the opinion expressed in the former judgment was not a relevant fact within the meaning of the Evidence Act. The case is clearly different where the previous judgment is produced not in order to prove an adjudication between third parties but in order to prove a statement made by a predecessor in title of the party against whom the document is sought to be used. *Cf. Parbutty Dass v. Purno Chunder Singh* 9 C 586 and *Tanar Konda* 15 M 378. Such is the case here and we have no doubt that the judgments in question are relevant under section 35 of the Evidence Act. A judgment is relevant under section 13 of the Indian Evidence Act only as an instance of an assertion of a right against third parties. The remarks in the judgment cannot be treated as evidence. They are the mere opinion of a person who is not before the Court. *v. Humara* 15 M 11. A judgment is not binding on an individual. Evidence Act. It judgments not inter partes will be admissible under section 13 of the Evidence Act as afford instances of a local custom or usage being recognised. *Sundaram Aiyar v. Theesilaram* 40 Ind Cas 159. Section 43 says that judgments, orders or decrees in sections 40, 41 and 42 are irrelevant order or decree is a fact in issue or is a fact (e.g. section 13) *Secretary of State v. Subraya Karanth* 18 M L T 504-2 L W 1175-1191. 67 Ind Cas 971-44 M 778-41 M L 6 (F B). The fact that the ancestor of a man failed in a contested suit to prove the relationship of his line with the deceased fifty years ago when such an issue was much more susceptible of proof than it is now is evidence against the existence of the right of that line to claim as heirs of the deceased within the meaning of s. 13 of the Evidence Act. *Secretary of State v. Subraya Karanth* 18 M L T 504-2 L W 1175-1191. M W N 962. In *Natesu Gramani v. Venkatarama Reddi* 30 M 50 the question was whether water in poramboke lands belonging to mirasdars can be used to be Sircar water and taxed as such. "Very little evidence was tendered on either side. The zamindar called the Karnam who said that the poramboke were the property of the zamindar but did not speak to any act done in assertion of his ownership. The defendants on the other hand relied on a judgment of the District Munsif of Chingleput in original suits Nos 468 to 473 of 1835 as to the property of the mirasdars to recover possession of certain poramboke in the village in which it was held that the waste lands in this village are the property of the mirasdars. We think the judgment was evidence against the zamindar in the present suit under section 13 of the Indian Evidence Act." In *Seetha Pathi v. Venkanna* 45 M 332-66 Ind Cas 280 at p. 284. A mirasdar *Sasri J.* said "I think the correct principle has been laid down by *Kach Nath Pal v. Jagat Kishore Acharyee* 20 C W N 643-93. It is that although a judgment not recited in the judgment tries

Oudh cases The question for decision was whether the appellant was the legitimate daughter of one K and R. The respondent contended that R was not the legally married wife of K and in proof of it produced a compromise and another person by which R obtained only a small sum and the decree passed in pursuance of the Evidence Act. *Parbutty Dass v. Purno Chunder Singh* 9 C 586 and *Tanar Konda* 15 M 378. Such is the case here and we have no doubt that the judgments in question are relevant under section 35 of the Evidence Act. A judgment is relevant under section 13 of the Indian Evidence Act only as an instance of an assertion of a right against third parties. The remarks in the judgment cannot be treated as evidence. They are the mere opinion of a person who is not before the Court. *v. Humara* 15 M 11. A judgment is not binding on an individual. Evidence Act. It judgments not inter partes will be admissible under section 13 of the Evidence Act as afford instances of a local custom or usage being recognised. *Sundaram Aiyar v. Theesilaram* 40 Ind Cas 159. Section 43 says that judgments, orders or decrees in sections 40, 41 and 42 are irrelevant order or decree is a fact in issue or is a fact (e.g. section 13) *Secretary of State v. Subraya Karanth* 18 M L T 504-2 L W 1175-1191. 67 Ind Cas 971-44 M 778-41 M L 6 (F B). The fact that the ancestor of a man failed in a contested suit to prove the relationship of his line with the deceased fifty years ago when such an issue was much more susceptible of proof than it is now is evidence against the existence of the right of that line to claim as heirs of the deceased within the meaning of s. 13 of the Evidence Act. *Secretary of State v. Subraya Karanth* 18 M L T 504-2 L W 1175-1191. M W N 962. In *Natesu Gramani v. Venkatarama Reddi* 30 M 50 the question was whether water in poramboke lands belonging to mirasdars can be used to be Sircar water and taxed as such. "Very little evidence was tendered on either side. The zamindar called the Karnam who said that the poramboke were the property of the zamindar but did not speak to any act done in assertion of his ownership. The defendants on the other hand relied on a judgment of the District Munsif of Chingleput in original suits Nos 468 to 473 of 1835 as to the property of the mirasdars to recover possession of certain poramboke in the village in which it was held that the waste lands in this village are the property of the mirasdars. We think the judgment was evidence against the zamindar in the present suit under section 13 of the Indian Evidence Act." In *Seetha Pathi v. Venkanna* 45 M 332-66 Ind Cas 280 at p. 284. A mirasdar *Sasri J.* said "I think the correct principle has been laid down by *Kach Nath Pal v. Jagat Kishore Acharyee* 20 C W N 643-93. It is that although a judgment not recited in the judgment tries

admissible in evidence under section 13 of the Evidence Act to show the fact that the judgment was passed, and, therefore, it is necessary evidence of the following facts, who the parties to the previous suit were, what the land in dispute was; and who was declared entitled to retain possession. For this purpose, and to this extent, it is admissible. *Mohammad, 65 Ind. Cas 398-8 O 1*

whether a certain person is a legitimately born son, application for mutation with regard to revenue paying properties would be admissible under ss 13 and 50 of the Evidence Act. *re ld be re Cts 46* case in which a member of the family had brought a similar suit for possession and obtained a decree was held admissible and relevant on the question of the

and the W. N. 73 Judgments relating to a particular right, although not *inter partes* but dealing with the same question are clearly admissible under s 13 of the Evidence Act. *How Koley, v. Bhabu Ch. D. et al 2 O W N 645-97 Ind Cas 252-A 1 R set S.*

suit against the appellants for possession of some lands in a village on the allegation that they had acquired title to the land in suit as well as the other land of the village by adverse possession. They filed a judgment in a suit brought by their father for a declaration of his title to the lands of that village, the title being based upon mortgages alleged to have become irredeemable. The decision was that he was entitled to 22 bighas and the rest of the claim was dismissed. In the course of that judgment the Court recorded an opinion that the plaintiff was proved to be in possession of the whole land now in suit but dismissed the claim except as to 22 bighas on the ground that the plaintiff though in possession had not proved title. The judgment was *inter partes*. Held that the question of possession of the land with regard to which the suit was dismissed was not *res judicata*. A bare expression of opinion in a judgment upon a question of possession not given effect to by the decree is not a recognition of a right within the meaning of section 13 of the Evidence Act and is not admissible in proof of possession either at the date of the judgment or at any other time. *Karuna v Gobind, 7 Ind Cas 122*

Patna cases Judgments not between parties to the suit pronounced by a

mined on the facts of the case, and that the property attached to the quest
 1928 Pat
 Section 1
Jhingur

to the gods of *Dharmasala* to
 A decree having been made in
 defendant for
 held that the
 Evidence Act,
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 finding that a particular person was not of sound mind based on the letter of a
 medical man is not admissible, either under s 13 or section 43 of the Evidence
 Act, in a subsequent suit to prove that the person, whose mental condition is in
 question, was not of a sound mind where the previous suit was not between the
 same parties and no formal deposition on oath of the medical men was recorded
Sher Mahammal v. Fattah, 6 P R. 1902.

Nagpur Cases A Judgment though not *inter partes* may be admissible as
 evidence of title *Yeshevan v. Daulat*, 89 Ind Cas 663. Under section 13
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 either recognised or
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"Where a judgment was not in
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ships of the Privy Council in *Uthay Narayan v. Kesho Prasad*, their Lordships
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of that fact in another case. It is urged that many Courts of India have decided the question under consideration in the affirmative. If this is the case the pronouncement in *Gopika Raman v Atal Singh*, *supra*, shows that the decisions are incorrect. I remark however, that in the rulings brought to the notice of the Bench either there is doubt whether there is decision of the question or the references to this question are in the nature of *obiter dicta*. Such is the nature in *Baleshwar Bagarti v Bhagirathi Dass*, 35 C. 701 at p. 716 and *Secy of State v Ahmed* at p. 801 of 44 Mad. In the *Madras* case the question whether the decision in the previous suit was evidence was not referred to the Full Bench. In *Inder Singh v Fattch Singh*, 1 Lah 540-59 Ind Cas 734, the question was emphatically answered in order to prove the existence of right property was dealt with in section 11 or 13 in so far as they or conduct of part ancestors and also embody an authoritative statement of the facts which the investigation then held before the Court brought to light, such judgments have very high evidentiary value and may even shift the burden of proof. *Gopal v Sitaram*, 97 Ind Cas 694-9 N L J 215.

Privy Council Cases. Concerning the effect of previous judgments their Lordships of the Judicial Committee of the Privy Council decided cases on

R 338,) that the decree in a former suit was not a judgment *in rem*, but a judgment *inter partes*.

A zemindar claimed the proprietary right and possession of *mouzas* within the limits of his estate, and it was held that the decree in the former suit was not a judgment *in rem*, but a judgment *inter partes*.

was one of the year 1817, and another of 1813, to which the zemindar's predecessor

am of opinion that the documents produced by the defendants may be accepted as evidence in this case, as showing ancient possession, and that the title on which the defendants now rely was openly asserted as early as 1195, B. S., corresponding to 1783 A. D. and at subsequent dates irrespective of the findings come to in those decrees. The orders passed in these decrees themselves would

3. not be evidence against plaintiff's title; but they may be accepted to show ancient possession an-
 years ago' The 'As regards the admissibility
 of the judgments to we observe that the lower
 Appellate Court has only used those judgments as evidence that there was litigation.

It uses those
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for rent of the *mouzas* now in question was given at the rate of Rs 35 per
annum, against the plaintiff. Taken, with the other
 that although
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sion at and prior to that date, now nearly 80 years ago. Taken, with the other
 evidence in the case, the respondents have thus established possession at a date

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in dispute was, and who was declared entitled to retain possession for this
 purpose and to this extent such orders are admissible in evidence for and against
 any one, when

Dinoman Chor
v. Abhal, 40 C

In a previous suit by H, a co-sharer of the plaintiff against the defendant
 to which the plaintiff was no party, H had recovered a decree for possession
 of H's share. Subsequently a partition of the property was made by
 deed between H, defendant, and plaintiff to work out the decree but without
 expressly referring to it. Held, that the decree was not conclusive in plaintiff's
 suit to recover his share from the defendant and might, had it stood alone be

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Gopika Ramani v. Anai Singh, A 1 R 1931 P C 33 (102). A judgment of the
partes holding that a partition of a certain estate was proved in only admi-
 sible under the provisions of ss 13 and 43 as establishing a particular transac-
 tion in which the partition of the estate was asserted and recognised. The
 reasons upon which the judgment is founded are no part of the transaction and
 cannot be so regarded nor can any finding of fact there come to, other than
 the transaction itself, be relevant to prove partition in a subsequent suit.
Gobinda v. Sham Lal, A 1 R 1931 P C 89=1931 M W N 435=35 C
 W. N. 521

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 v. *Shil* S. 1
 115, *Nizam* v

<i>Abdul, A I R 1930 S</i>	<i>Beuat, S.</i>
<i>7 W R 210; Nallathal</i>	<i>Jhanda</i>
<i>10 A 58; Indra v</i>	<i>C 233;</i>
<i>Harnabh v Mandil, 27</i>	<i>v Bai</i>
<i>Santok, 20 II 53; Dalgi</i>	

in evidence of a transaction the parties are often apt to refer to the recitals therein as relevant evidence and the distinction between the deed as a transaction and the recitals contained in the deed is frequently overlooked. In the case of *Duarka Nath Bishu v Makunda Lall Choudhury* 5 C L J 55, which was a case in which a deed of sale and a mortgage deed though not inter partes containing recitals that a particular land belongs to a particular *houla*, was sought to be admitted in a suit in which the question was whether the land belonged to that *houla* or not, so far as can be made out of the facts from the report of the case, they were documents executed whose share the Plaintiff's father purporting to rely upon the case *Vythilinga v Venkata Chala*, 16 N

section 11(b) and section 13 of the Evidence Act, and observed that they may be very weak evidence or even of no weight at all, but they could not be

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observed "We know of no between persons who have no

power to bind a person whose right is sought thereby to affect can be admitted

where the Court observed "It is argued that these documents are not admissible in evidence and the Courts below were not competent to take them as

3. of the parties to the suit was mentioned as owner of the boundary land but recent decisions have finally settled the point. At one time it was attempted to make such documents admissible in evidence under section 11 clause (2) of the Evidence Act.

rest on section

Act. It is not

opinion that a document between strangers to the suit in which mention is made of one of the parties or their predecessors as holding the land lying on the boundaries of the lands belonging to the executants of the documents is not admissible in evidence. See also *Brojo Mohan v Gaya Prosad*, 30 C W N 761; *Damodar v Jadunath*, 91 Ind Cas 449, *Kumuda v Dilsook*, 45 C L J 133, *Abdul Karim v Chhalla*, 31 Ind Cas 688 (c), *Hakim Ali v Amril*, 108 Ind Cas 264, *Abdul Ghani v Faquir Mahammad*, A I R 1929 Lah 78=111 Ind Cas 261, *Lajpat Rai v Faiz Ahmad*, A I R 1927 Lah 448=8 Lah 651, *Sarat Chandra v Saralabala*, 105 Ind Cas 61. The case of *Imril Chamar v Sirdhari Pandey*, 15 C L J 7=17 C W N 108, which laid down that recital of boundaries in the lease was admissible against a person not a party took the contrary view. There have been later decisions which have not accepted this later view and the trend of the recent decisions is not to admit evidence which have been offered in the case and the reception of which evidence is objected to either under section 13 of the Indian Evidence Act or under

in *Kumuda Kumari v Dilsook*, 45 C L J 133, *Radha Nath Banerji v Jadu Nath v Sarbeswar Nag*, 29 C W N 469. A person cannot be made admissible in evidence on the basis of the decision of the Privy Council in *Leherbar*, 49 I A. 36=41.

I am not prepared to differ from this decision. A document may also be admissible under section 13 if it contains a recital of the word 'right' in section 13 is not confined to an incorporeal right. See also *Fazlul Ali v Zafar Ali*, 46 Ind Cas 119, where the Privy Council followed an earlier decision.

three aspects. The first is, where the executant of a document is called as a witness and the document is executed by him, it is admissible in evidence. The second aspect of the question arises where the executants are alive and do not give their evidence in the case. In such cases there is a strong body of opinion that such documents are not admissible either under section 11 or 13 of the Evidence Act. This has not been done in the present case.

any such documents are not admissible. That such documents, if they have been held to be admissible, there is no question that under the English law a statement in such documents would be admissible. It is unnecessary to cite any English case other than the leading case of *Hight v Ridgway*, 10 East 109. Whether such evidence is admissible under the Evidence Act was considered in favour of its admissibility in several cases, the Privy Council in *Sharmappa v Sharmappa*, 10 East 109, and the Privy Council in *our Court*.

6 C W N 232=14 C L J 467. S.

in the case of *Naiwar v Alkhu*, 11 A.followed in this Court in *Imrit**Chamar v Sirdhars* 15 C L J 9=17 C W N 108 and in the case of *Ambar**Ali v Lutfi Ali*, 45 C 159=25 C L J 619 " See also *Abdul Rahim v Janabali*,A I R 1923 Cal 299, *Promotha v Bijoy* A. I R 1927 Cal 234, but see*Promatha v Krishna* 28 C W N 1093; *Kumud Kumari v Dilsook*, 45 C L J.138, *Ghulam v Kalim* A I R 1928 Lah 428=10 Lah L J. 370 *Trimbak**v Ganesh*, A. I R 1923 Nag 22In *Kiran Chandra v Srinath Chakravarti*, 31 C W N 135, the plaintiffs

sought for possession of a certain parcel of land, the title of which was

vested in the plaintiffs by a deed of rights as

declared on three

deeds by descendants

the title

deed on which the defendant's claim was based as purchasers at an execution

sale and the third showed that delivery of possession under the purchase was

made by the first

the

descendants of the original grantee as rent-free *brahmottar* land, and the other

two documents are connected with the title of the defendants One of them is

in fact the title deed upon which the defendant's claim was based as purchasers

at an execution sale The other document shows that delivery of possession

under that purchase was taken "

Where in a suit between two persons the question is whether or not the

adjoining piece of land is *nazul* land, the recitals made by successive vendors of

one of these persons whereby they purported to transfer the house with all the

rights and appurtenances

thereof

are not evidence of title

but are evidence of possession

and of the fact that the

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officer in the discharge of his official duties and therefore furnish strong evidence of the authenticity of the facts stated therein *Harihar Partap v Bisheshwar Baksh*, 3 Luck 326=5 O W N 299=109 Ind Cas 422=A I R 1928 Oudh 307, *Wasiq Ali v Athar Ali*, 110 Ind Cas 4=A I R 1928 Oudh 409 Although an entry in the *uajib-ul-arz* is a means conclusive particularly not parties thereto *Syed Tojam*

752=A I R 1926 All 43 An entry as to a custom recorded in a *uajib ul-arz* against the authenticity of which nothing is shown, is of great importance *Chaudhury Abdul v Ali Tahira Danoo*, 13 O L J 167=3 O W N 357=89 Ind Cas 51=A I R 1926 Oudh 377 A *uajib-ul-arz* being part of a Revenue record is of greater authority than a *runajam* which is of general application and is not drawn up in respect of individual villages *Gurbaksh v Partapa*, 2 Lab 316=(1922) Lab 232=66 Ind Cas 133 In a suit for pre-emption, the plaintiff in proof of the custom produced an extract from the *uajib ul arz* of 1872, which was headed *dustur-i-haq-i-shafa* and provided that a co-sharer who

Cas 810

Draft record of right The draft record of right cannot be used as evidence of the presumption of the correctness of the entry made therein but the draft record is admissible for the purpose of showing what was the entry made in the earlier proceedings before the publication *Hardeo v Kapil*, 108 Ind Cas 417=A I R 1928 Pat 353

Order of a President of District Board A recitation in the orders of a President of a Union Board is not admissible under s 35 or 13 in evidence unless such president has been examined with regard to that recitation *Doraisami v Kannappa Chetti*, A I R 1931 Mad, 487

Road Cess papers An entry in a road cess return in which a former proprietor of an estate admitted the existence of a *lakheraj*, although not binding on the auction purchaser of the estate at a revenue sale, is evidence under section 13 of the Evidence Act *Monmohun v Adicault*, 19 Ind Cas 549 Under the meaning of the word *plaintiff* *Manray*,

under section 13 of the Evidence Act to show the fact in only one way, and to support to

where they can by other evidence be sufficiently connected with those facts. *Starkie's Evidence*, Vol. I. c. 67. The existence of a document of execution of S. 7

said: "Ancient documents . . . purporting on the face of them to show

They are admitted in such cases as forming part of every legal transfer of title and possession by act of parties Care is first taken to ascertain their "at the documents come

any presumption or
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act which they accompany; and where long-continued enjoyment, and user of a right, has been proved, extending as far back as the duration of human life will permit, a deed or writing which is consistent with such usage and enjoyment, and expl
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presumption as to the existence of the right according to that deed." *Starkie's Ev.* pp. 67, 68.

Admissible evidence—Illustrative cases. In a dispute relating to the

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(1915) M W N 300. In *Giris Chandra v Ku* the purchasers of a tenant's tenure, a plot made of land under section 13. *Jogesh* a suit for partition between the widow of a deceased and a particular plot of coparcener land belonged to her husband such statement is clearly admissible evidence. In a suit for partition of the land, the recital of the will was foreseen by the institution of the plaintiffs. *Nita*

Inadmissible evidence—Illustrative cases Statements made in conveyance or mortgage that property is limited by certain boundaries are not admissible against person not party to the deed either under section 11 or under section 13 of the Evidence Act. *Abdulla v Kunya Behari*, 12 Ind Cas 149 = 14 C L J 467 = 16 C W N 252. In the absence of proof been executed in accordance with the provisions of ss 13 of the Evidence Act. *Panda v Sundar Nar* possession of certain lands as plaintiff's *nishkar brohmattur*, on behalf of the plaintiff, the will of the deceased. The recital of the *brohmattur* title held not admissible under s 13 of the Evidence Act. *Satindra Kumar v Krishna Kumari*, 36 Ind Cas 300 = 13 of the Evidence Act, is of no avail where the transactions were in respect of land other than the disputed land as there was not any transaction or particular of the land, recognised, asserted or proved. Certified copies of statements made in the presence of the parties and as evidence in 11 M or 11 M or 11 M used in a case that the *hebanama* was not admissible in evidence under s 31(7) read with s 13(a) of the Evidence Act. *Bansi Singh v Mir Amir Ali*, 11 C W N 703. Recitals of the claims contained in possessory orders passed under section 145 of the Criminal Pro Code, whether *inter partes* or not are not admissible in evidence to prove title under section 13 of the Evidence Act. *Ram Sunder v Haribala* 37 Ind Cas 911.

14 Facts showing the existence of any state of mind, such

Facts showing existence of state of mind, or of body, or bodily feeling, as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling, are relevant, when the existence of any such state of mind or body or bodily feeling is in issue or relevant.

**Explanation 1*—A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally, but in reference to the particular matter in question.

**Explanation 2*—But where, upon the trial of a person accused of an offence, the previous commission by the accused of an offence is relevant within the meaning of this section, the previous conviction of such person shall also be a relevant fact.†

Illustrations

(a) A is accused of receiving stolen goods knowing them to be stolen. It is proved that he was in possession of a particular stolen article.

The fact that, at the same time he was in possession of many other stolen articles is relevant, as tending to show that he knew each and all of the articles of which he was in possession to be stolen.

‡(b) A is accused of fraudulently delivering to another person a counterfeit coin which, at the time when he delivered it, he knew to be counterfeit.

The fact that, at the time of its delivery, A was possessed of a number of other pieces of counterfeit coin is relevant.

The fact that A had been previously convicted of delivering to another person a counterfeit coin which he knew to be counterfeit is relevant.

Y and Z, and that they had

(d) The question is, whether A, the acceptor of a bill of exchange, knew that the name of the payee was fictitious.

person

(e) A is accused of defaming B by publishing an imputation intended to harm the reputation of B.

The imputation will on the part of A be relevant as showing reputation by

The facts that there was no previous quarrel between A and B, and that A was not insolvent, are relevant as showing

supposed to be solvent relevant, as showing

(g) A is sued by B, the owner, by the order of C, a contractor.

A's defence is that B's contract was with C. The fact that A paid C for the work in question is relevant, as proving that A did, in good faith, make over to C the management of the work in question, so that C was in a position to contract with B on C's own account, and not as agent for A.

the place where A was, is relevant, as showing that A did not in good faith believe that the real owner of the property could not be found.

by : : : : : 10 a. 14, s. 1 (f)

by : : : : : (b) to s.

The fact that A knew, or had reason to believe, that the notice was given fraudulently by C, who had heard of the loss of the property and wished to set up a false claim to it, is relevant as showing that the fact that A knew of the notice did not disprove A's good faith.

(1) A is charged with the crime of _____ him. In order to show A's intent the fact _____ by be proved _____

(j) A is charged with threatening letters previously sent by A to B may be proved, as showing the intention of the letters

(h) The question is, whether A has been guilty of cruelty towards B his wife

Expressions of their feelings towards each other shortly before or after the

facts A's death was caused by poison
ring his illness as to his symptoms are relevant

(m) The question is, what was the state of his health at the time and the state of his health at or near the time in

(n) A sues B for negligence in providing him with a carriage for hire not reasonably fit for use, whereby A was injured

The fact that B's attention was drawn on other occasions to the defect of that particular carriage is relevant

The fact that B was habitually negligent about the carriages which he let to hire is irrelevant

(c) A is tried for the murder of B by intentionally shooting him dead. The fact that A on other occasions shot at B is relevant as showing his intention to shoot B.

The fact that A was in the habit of shooting at people with intent to murder them is irrelevant

(p) A is tried for a crime
The fact that he said something indicating an intention to commit that particular crime is relevant

The fact that he said something indicating a general disposition to commit crimes of that class is irrelevant

Scope of the section 'Section 14 seems to me to apply to that class of cases which is discussed in Taylor on Evidence 6th Ed ss 318 to 322,—that is to say, cases where a particular act is more or less criminal or culpable, according to the state of mind or feeling of the person who does it, as, for instance in act of manslaughter or of murder, or in cases of malice on where malice

similar coins in his possession, or had passed such coins before or after the

But I think we have no right to prove that a

for which he is on trial, in other words, evidence of such collateral offense

cannot be received as substantive evidence of the offence on trial, though S. 1

reduced to legal certainty by a conviction) to prove the existence of another

missible to prove the main fact or the connection of the parties therewith, is receivable, after evidence *abunde* on the points has been given, to show the state of mind of the parties with regard to such fact; in other words, evidence of similar facts may be received to prove a party's knowledge of the nature of the main fact or transaction or his intent thereto. In general, whenever it is neces-

riety, and the acts tendered must also have been proximate in point of time to that in question. It is plain that the principles thus formulated are of no assistance to the prosecution. *Amrita v King Emperor*, 19 C W N 676 (692), see

received from the mother on representation of their desire to adopt it, and whose

18 L J M C 215—*Corliss Cas 99* See also *R v Rhodes*, (1899) 1 Q B 47 where it was held that such evidence was admissible even when such acts were subsequent to the transaction in question, if they show a connected or entire scheme or system of operation. "The matter may be roughly stated thus: connected conduct on other occasions is never admissible to prove the act in question."—other state of mind. The rule.

With regard to criminal charges

Bra J summarised the law as follows—

A careful examination of the cases where evidence of this kind has been admitted shows that they may be grouped under the three heads—(1) where the prosecution seeks to prove a system or course of conduct, (2) where the prosecution seeks to rebut a suggestion on the part of the prisoner of accident or by the prisoner
ales v Kerr (1908) 1 All ER 1111

2 I he had contracted barber's itch, owing to dirty materials. Evidence was allowed to be given that he had contracted such a complaint at the same shop, in order to show that the defendant

This ing of of actual facts *Prithvi v Emperor* 86 Ind Cas 970=29 C W 674 When the intention of the defendant is to show that he had contracted such a complaint at the same shop, in order to show that the defendant

ed simply evidence is particular in nature may have 5, see also *Prithvi* 1, 232 In *Key v* evidence is a thing to have been intentional by showing that it formed one of a series of similar occurrences. *On Ex 126*

or any of such a thing though principle is admitted. In nature may have 5, see also *Prithvi* 1, 232 In *Key v* evidence is a thing to have been intentional by showing that it formed one of a series of similar occurrences. *On Ex 126*

mistake It is not conclusive for a man may be many times under a similar mistake or may be many times dupe of another, but it is less likely he should be so oftener than once, and every circumstance which shows he was not under a mistake on any one of these occasions strengthens the presumption that he was not on the first and this is amply borne out by authorities. Where the crime charged is receiving stolen goods the possession of counterfeit money, or the like, the knowledge of the accused person becomes one of the material facts in issue, and other acts of similar nature are admissible. Thus in *Com v Russell*

156 Mass. 196-30 N. E. 763, *Baker J* said "The admission of such evidence is necessary, because guilt is evidence and can rarely be proved. Similarly in *Id.* "It seems clear upon principle that when the fact that the prisoner has done the thing charged is proved and the only remaining question is whether at the time he did it he had guilty knowledge of the quality of his act, or acted under a mistake, evidence of the class recited must be admissible. See also *R v Bleasdale*, 2 C & K 765 *R v Hoag*, 1 C & P 364, *L v Lloyd*, 7 C & P 318, *R v Bholu*, 23 A 124. Such evidence which is more often resorted

to the jury not to show that because the defendant has committed one crime therefore he would be likely to commit another but to establish the *animus* of the act and rebut by anticipation the obvious defence of ignorance, accident, mistake or other innocent state of mind. *Walsh v All Gen of N S Wales*, (1894) A C 57, *R v Bond*, (1906) 2 K B 390, *P v Armstrong* (1922) 2 K B 555, *Phip Ev* 16"

States of mind or bodily feeling, how proved. Facts are either physical or psychological. Physical facts can be perceived by senses whereas the facts which are psychological can only be subject matter of consciousness. These psychological facts are also called internal facts. These are thoughts and feelings, love, hatred, anger, intention, will, wish, knowledge, opinion, are all perceived by the person who feels them. When it is affirmed that a man is

affirmed that a man has a given intention, the matter affirmed is one which he, and he only, can perceive; when it is affirmed that a man is sitting or standing,

1. *Alabama* 20 C 11 App 463. These facts cannot be perceived by senses. But nevertheless it can be testified by the party himself or can be proved by presumptive evidence. It is the law in *Alabama* in the United States that a person whether it may be, other witness has been eye

on false representations, or the gift, or to any other state of testify to it. *Greene Ev* § 398

14. testimony, or any other whatever, to the fact of a person's intent or motive, is of course receivable only on the assumption that the intent or motive is a fact permissible to be proved under the substantive law involved in the case. This assumption conditions the admissibility of all evidence and of this sort in particular. Here 's intent or motive is not Wignmore § 581. But when a very little credit. *Phip Ex 51, Whart's 505*

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Two other questions arise in this connection, namely, (1) whether a person may testify to another person's intent or state of mind in general, this involves the principle of the adequacy of the sources of knowledge; (2) whether a person's testimony to another's intent or meaning by reason of the Opinion Rule. The evidence on the first ground is based on directly see or hear, or feel the state of another person's state of mind, hence such testimony is based on conjectural and therefore on inadequate data. "This argument," says Prof. Wigmore, is flimsy enough, and it proves too much for if valid it would forbid the jury to find a verdict upon the supposed state of a person's mind. If they are required and allowed to find such a fact, it is not too much to hear such testimony from a witness who has observed the person exhibiting in his conduct the operation of his mind." Wigmore § 661, see also

"The Law of Evidence" by J. H. Wigmore, 2d ed., Vol. 1, § 661, cited in the Federal Act, 31 Geo.

ly stated by
it has been
own breath,
argument,

it A man's intentions may be manifested known, may be sworn to with as much witness undertakes to swear in a thing of ill value is at what it is worth' As regards the second point i.e. exclusion of such evidence by virtue of Opinion Rule, it must be borne in mind that in ordinary human dealings, the formation and expression of estimates as to another's mental state is constant and necessary. There is no good reason why testimony about it, based on personal observation of the c. the Opinion Rule is c re-state to the jury to convey the imprec Frost's Trial, 22 H. Watson's Trial, 32 H of Thanet's Trial, 27.

So apart from the operation of the Opinion Rule, it is settled that where there is a question whether a person said or did something, the fact that he said or did something of the same sort on different occasion may be proved if it shows the existence on the occasion in question of any intention, knowledge, good faith, malice or other state of mind or of any state of body or bodily feeling, the existence of which is in issue or in or is deemed to be relevant to the issue, but such acts or words may not be proved merely in order to show that the person in question was likely on the occasion in question to say or do what is in issue. *Ex Art 11.* The Court can require a material fact in issue or a person immediately after the occurrence of his state of mind, but where else said to the accused, the better statement must be proved by direct oral evidence.

evidence of a person who heard is under section 60 of the Evidence Act *Kakar Singh v. Emperor* 81 Ind. C. 717 S.

of
or
which we may infer the moving cause In point of time, conduct is closely associated with it

(2) *External facts* (prospectant) pointing forward to the probable coming into existence of the quality, for example, the victim's gold, as pointing forward to the defendant's probable desire to rob him, or the reputation of A's insolency, as pointing forward to the probable coming into existence of the quality.

retrospectant indication, and in various forms, namely *prior or subsequent*. Thus to prove the existence of the quality, the fact that the person was seen to be in possession of the gold, is a retrospectant indication, and in various forms, namely *prior or subsequent*.

also
(1)
to the
existence of the quality.

States of mind, knowledge
States of mind, knowledge, intention, motive, and purpose.

In an instance, where there is a question of fraud, malice is intention, or negligence *Cun Ev* 120

Intention meaning, of Motive is that which induces a person to act in a certain way. Intention must be a mental condition termed 'intention' is manifest in action. It determines the nature of an act. It may be dependent on surrounding circumstances, or to causes beyond the person must have a motive, though it may not be discovered. So every sane person must have a motive, or not, unless his action is accidental or involuntary.

Motive is important. A man's motive is stolen. The intention is to steal, although the motive—to save a state of mind. It is difficult to conceive that the intention can be good. In a great many instances motive and intention are so closely related, motive being parent of the intention, that it matters little of which we speak. But still it is desirable to know the motive.

Intention is the act which the law declares to be a crime? In the latter case the plea could generally be a good one. In the former case it would always be bad. It would only mean that he had formed a wrong opinion as to the legal aspect of the act.

1. conduct or as to the consequences to himself that might flow from it. For instance, a man is charged with killing a person by firing a gun at him. He says that he did not intend to kill him. If he means that the gun went off by accident, this is a good defence independent of s 80 of the Penal Code, as it shows that he never fired the gun. If he means that he fired at the man to frighten him, and did not believe the gun would carry so far, this, if a reasonable belief, would negative the criminal intention necessary under section 299 but would be no answer to a charge under s 301A which involves no intent on to injure. If he means that he fired at him mistaking him for another person whom he had no right to kill this is no defence whatever, as it is merely a description of the offence defined by s 201. If he means that he fired at him in his house at night, believing him to be a burglar, this would be a good defence under s 79, as it shows that he has committed no offence. If he means that he fired at him, intending to wound but not intending to kill him this again would be no defence, if the natural result of hitting the man would be to kill him (s 299). It is not necessary to say that he expected merely to say that he expected the particular instance for his conviction.

Theory of evidencing intent To prove intent, as a generic notion of criminal volition or wilfulness including the various non innocent mental states accompanying different criminal acts, there is employed an entirely different

possibility of such an abnormal cause and points out the cause as probably a more natural and usual one, i. e. a deliberate discharge at A. In short, similar results do not usually occur through abnormal causes; and the recurrence of

fact of the prisoner having done the thing charged is proved, and only remaining question is whether at the time he did it he had a guilty knowledge of the quality of his act or acted under a mistake, evidence of the class received must be admissible. It tends to show that he was pursuing a course of similar mistake, or may be so often under a mistake that he was not

on the last.

4 criminal intention to harm B's reputation by the particular publication a question. Here previous ill feeling shows motive of the publication. See also illustration (j). So also where the charge is of breaking and entering into a house with intent to steal obviously 'intent' there signifies 'design' or 'plan' and whatever would otherwise be receivable to show design would also be here receivable—in particular the conduct throwing light on the design of the person's entrance. This is further illustrated by illustration (i). So on a charge of uttering counterfeit note knowing them to be spurious knowledge is an ingredient of the criminal intent and whatever evidence would be otherwise separable and proof.

more of these as ingredients in forms no separate title of proof for each of the ingredients is to be proved in the way proper to itself. *Hymore* § 112. There which is distinct from any of those above different evidence. This is the element of negative of inadvertent accident (*Wile Section 15*). The accused in a case of forgery and conspiracy had previously given evidence in a Court as to the genuineness of the document. *Held* that though the statement could not be

Ali v Emperor, A I R 1929 Cal 539

Intention—Presumption from act. Every person is presumed to intend the natural and ordinary consequences of his act. If the tendency of the publication was injurious to the plaintiff the law will assume that the defendant by publishing it intended to produce the injury which it was calculated to effect. *Haare v Wilson* 9 B & C 643. So it often occurs in human experience that the mere fact that a particular act has been done affords the best evidence of the

weak and enter a presumption from his punishment of the was to be found which money or strong evidence. *Id.* 69 In 18— ng O J expressed intention as to be gathered from his acts. A man must be held to have intended the natural and reasonable consequences of his act. That is one of the fundamental principles.

Where a man does an consequences, you are *Donough Cir* 100 *Young J* in *Ha rat G*! the same case *Mukherji* of the rule of English *Principles*

law that a man must be presumed to intend of his act to the Indian criminal Penal Code.

repetition. Yet in order to satisfy this demand, it is at least necessary that prior acts should be similar. Since it is the improbability of a like result being repeated by mere chance that carries probative weight the essence of this probability is erroneous a bill cause occur own

favour in the same year and in the same book of accounts go to exclude the explanation of casual error, and leave deliberate intent as the more probable explanation. In short, there must be a similarity in the various instances in

order to give them probative value,—is indeed the general logical canon requires

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It is hopeless to attempt
or too much depends on
inciple Wigmore § 302

ve intent the strength of the
on a given person's connec-
ssible to negative accident
or inadvertence, and to infer deliberate human intent, without forming any
Thus, if A's cellar window is found
morning after a high wind, he may
force of the wind blew the glass in; but
again finds a window broken in the
yelled the night before, he gives up the
ation, and concludes that a
cause of the breakage, although
of the doer. It is thus clear
the like—may be negated by

anonymous instances of the previous occurrence of the same or a similar thing.
After assuming or proving the accused's connection with the deed charged, then,
to negative innocent intent, resort is had to the anonymous instances; and they
may have equal force for that purpose, whether they are connected with the
defendant or not. This mode of proof is not infrequently resorted to. The
only limitation upon this mode of proof is that the defendant's doing of the
act in issue must be shown by other evidence at some stage of the trial, and the
anonymous instances should not be received until the trial Court is satisfied
with the amount of evidence introduced or pledged for showing that connection.
Wigmore § 303

Theory of Evidencing Design or System. When the very doing of the
act charged, is still to be proved, one of the evidential facts receivable is the
person's design or plan to do it. This in turn may be evidenced by conduct
of sundry sorts as well as by direct evidence of the design. But where the
conduct offered consists merely in
that something more is required
evidencing intent. The object is
intent at the time of the act charged, but to prove a pre-existing design, system,
plan, or scheme, directed forwards to the doing of that act. In the former
plan, or scheme, directed forwards to the doing of that act. In the former

features that the various acts are naturally to be explained as evidence of
Thus, where the
alone is in issue,
It tend to negative
ed—as, where the
id the object is to
plan of working off a quantity of counter-
in this instance, the fact of two previous
a quite significant. In *Balke v*

4. *Assurance Co L R 4 C P D 91, 106 Lindley M R* said; "I agree, that in order to prove that A has committed a fraud on B it is neither sufficient nor even relevant to prove that A committed fraud upon C D and E Stopping there, I admit that proposition But let it be shown that the fraud on B is one of a class of other transactions having common features, then I disagree altogether with that proposition The answer to the objection that evidence of frauds on other persons cannot be admitted is that this transaction is one of a class that there are features in common, the features in common being a false

like to the evidence is that given by testimony in cases the act charged is assumed as done and the mind asks only for something that will negative innocent intent, and the mere prior occurrence of an act similar in its gross features—i.e. the same doer, and the same sort of act but not necessarily the same mode of acting nor the same sufferer—may suffice for that purpose But when the very act is the object of proof, and is desired to be inferred suggest a grade of similarity error in where o

are to be observed in the use of this class of evidence of design (1) Anonymous acts are not available, as they are for evidencing intent, for the whole purpose of the evidence is to fix a design upon the accused, as making it likely that he carried it out and thus that it was he who did the act charged. (2) The object being to argue to the act charged from a design or plan to do it the prior acts are received to show that system, since, however, it may require a number of acts and circumstances to furnish the desired mass of conduct illustrating this design or system, and since the production of only parts or fragments of it would in effect violate the principle and remain in evidence merely as affecting the accused's character the trial Court must pass upon the offer beforehand, to see whether if offered in its entirety it satisfies the proper test and is sufficient to go to the jury, and must, if the offer is sanctioned, require an assurance that it will be forthcoming in its entirety *Wigmore § 304*

not of being an are The
the precisely identical, but
modes of evidencing these mental states that feature is most nearly expressed by the term *consciousness*, i.e. presence in the mind of an impression as to a given fact Thus a person's knowledge of a city's streets may be inferred from his conduct in finding his way through them unerringly; his consciousness of guilt may be inferred from his conduct in fleeing from arrest; his belief in a

or future action, consciousness when thought of as bearing on past action, and knowledge when thought of in connection with the reality of external objects
Wigmore § 300

External circumstances as evidencing knowledge, belief, or consciousness There are, in a broad analysis four kinds of circumstances (events or things) which may point forward to the probability that a given person received a given mental impression (i.e. obtained knowledge, formed a belief, or was made conscious);

307, *Maule J.* said "If a person were charged with having wilfully poisoned another, and it were a question whether he knew a certain white powder to be poison, evidence would be admissible to show that he knew what the powder was because he had at 3 Cox Cr 517, with the intent of by such means was offered to have stated on other occasions that he had obtained money by the same means that are stated to have been used in this case, is it not a fair inference to make to the jury that his object was to obtain money here?" *Sargent Ballantine*, for the accused said in reply obtain money at this particular

his intention was on the second occasion, a proof of knowledge and that of intention whether on this occasion he did an act with the object One step in the proof would be to show that a certain result would follow; and if it can be proved out of his own mouth that he was aware that such a result would be produced, it is one ingredient in the necessary proof that he contemplated it was that he attempted to procure abortion, the same or without it, if it could be before and that he knew that evidence against him Or if, had been used by the prisoner to show that he knew the

Intention and Drunkenness Involuntary drunkenness, by operation of s 85 of the Penal Code, places a man exactly in the same position as if his aberration of intellect arose from any of the usual forms of unsoundness of mind would have de, *Maynes* his address intend the observe that it were so drink is the occasion of a large proportion of the crime which is committed but, although of its constituent elements considering whether he formed

1 Code drunkenness if it is volu unkenness does not, of course, palliate any accounts as throwing light on the ques n *R v Ram Sahai*, (1864) W R 609 No 24 This section was in accordance with the English law as obtained at that time In *R v Monkhouse*, 4 Cox C C 55, *Colridge J.* said: "Drunkenness is ordinarily neither a defence nor excuse for a crime, and where it is available to prove it, and it is not able, unless the intoxication from committing the act forming any specific intention son B, *R v Thomas*, C

the law assumes a particular that cannot be that this

mind, he would not be allowed to plead that through intoxication he imagined that his life was in danger. But where it is incumbent on the prosecution to establish the circumstances or instance, if it is to be such, the necessity to be assumed, though it might be inferred, from the mere fact of passing the coin. Suppose the fact to be established that the man had several good rupees in his pocket, it would have to be made that he had the means to be clearly admissible

to show that he was in a hurry to the coin, and I can see no reason to be admissible for the purpose about just as much as drunkenness. In England recently the liability of a person for voluntary intoxications

has been decided. Till doct self rend p 897; see also *R v Davies*, 14 Cox Cr. C 563. In *R v Meade*, (1909) 1 K B 895=78 L J K B 476, the Court said "It is not expedient to confer upon voluntary drunkenness a wider immunity than the partial immunity it has enjoyed since 1819. The presumption that every one intends the natural consequences of his acts, may be rebutted in the case of a man who is drunk by showing his mind to have been so affected by the drink that he was incapable of knowing it. If proved, the presumption is rebutted. The language rule, and it did not murder to man slaughter or a drunken man cited in *Roscoe*.

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r. R

Beard,

criminal charge

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that the defendant moved on of the offence charged, that the defendant

city, though it may establish a more ready tendency to some violent passion (than if defendant were sober), does not rebut the presumption of the existence of an intent to produce the natural consequences of his acts. *Roscoe, Cr Ev 1152*

Dealer with a Partnership. Modes available to one who has (1) exposure to see it, (2) as the first

receive evidence of the advertisement in the Gazette, but that unless it were proved that the party had seen it, the evidence would be of little avail . . . without proof that evidence was received was a case where a person . . . inserted a notice in a provincial Sunday paper, and the Court held that it was admissible in evidence because it was probable that the party had seen it, since he took in the paper and the advertisement related to him. See also *Le Loeu v. Richard* 1 Stark

Prosecution without probable cause Where in an action for malicious prosecution or defamation, or for false arrest, the issue arises whether the prosecutor had reasonable grounds and acted in good faith, a bad reputation of a plaintiff is a circumstance bearing on this state of mind, and is admissible. *Vide, Fabrigas v. Mostyn*, 20 How St Tr 94; *Rodriguez v. Tadmire*, 2 Esp 731, *Downing v. Butcher*, 3 Mo & Rob 374; *Wigmore* § 253

wheth . . . The question is
insol . . . knew that he was
bearing post mark before it, and continuing refusals to lend him money, are bankruptcy, but
admissible (after the fact of his insolvency has been proved independently) to show his knowledge of the matters referred to, but not the truth of the facts. *Vacher v. Cocks*, M & M 353, *Thomas v. Cornmel*, 4 M & W. 267, *Phip Ev* 68
Execution of a document will imply . . . Cooper
20 Ch D 611; *Phip Ev* 4th Ed 127
will be implied where it is a party's duty
D 329, *Phip Ev* 4th Ed 128 On a question whether a captain of a ship knew
that it was

of the case, upon a legal presumption, so strong that it cannot be allowed to be rebutted, that the knowledge must exist, though it may not have been . . . T P. Act 2nd
to an agent is
of notice is

Whatever puts a party on enquiry, amounts in law to notice, provided the facts by the

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Greenshields, 9 Moo P. C. 18; *Mancharj v. Hongoseoo*, 6 B H. C R 59; *Ilakeem v Beejoy*, 22 W R 8; *Jugul Kirsore v Kartic*, 21 C 116; *Bhikhi v Udit*, 25 A 366; *Kondiba v Nana*, 34 I A 138

whether registration is sufficient
 Court mere registration does not
 W N 11, *Monindra v Troylockho*,
 n by Chief Justice Sir Arthur Collins
 Court in Shan Man Mull v Madras
 Bombay and Allahabad High Courts
Chenoasapa, 9 B 427, *Chintaman v*
 A L

has been set at rest by the decision of the P
Khedampal, 25 C W. N 49-48 C 1 (P C)
 cannot in all cases be imputed from the mere fact of registration of a document
 Whether registration is or is not notice in itself depends upon the facts and
 circumstances of each case, upon the degree of care and caution which an
 ordinarily prudent man would necessarily take for the protection of his own
 interest by search into the registers kept under the Registration Act *Ibid*, but
 now see Act XX of 1929 s 4

Knowledge— is obviously im-
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 collateral may be proved, if they show good faith or prudence or the knowledge
 or information on which a person has acted when such fact is in issue These
 instances occur most frequently in cases of assignments for the benefit of
 creditors, the good faith of the holder of a bill or note, and of vendors and
 agents
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 The

illustration (r) is based on the case of *Sheen v Bumpstead*, 2 H. & C. 100-32
 L J Ex 271 In that case which was an action brought against the defendant
 for false representation as to the trustworthiness of W, the plaintiff as part of
 the representation had

the state of mind of the defendant at the time he made the representation
 A plaintiff may
 ive evidence a
 however, prove
 ose the plaintiff
 was insolvent,
 or and obvious
 remark to the jury that the defendant must have known what was the common
 after the plaintiff

is not that strong evidence—morally at least—from which the jury may infer that what was the common opinion of trade shared by the defendant and that in making faith" *Not Ev* 136, *Woodroffe Ev* 193

examples of good faith Illustration (g) in dicta on the case of *the Chartier*, 1 Com B 13 In that case *Maule J* observed "The evidence was material and was properly admitted It intended to show that the defendant was not seeking to evade payments of goods ordered for his benefit but that he had actually paid the person with whom alone he had contracted It showed that the defendant conducted himself like a party who was dealing with Gas as principal and not as an agent for the benefit of the person with whom he was dealing" *circumstances surrounding*

to support it is then a vital part of the proof to rebut the presumption of fraud *Deus v Cornish*, 20 Ark 33 Illustration (h) is based on the leading case *R v Thurborn* 1 Den Cr C R 387 In that case *Parker B* said "The rule of law on this subject seems to be that if a man finds goods that have been actually lost or are reasonably supposed by law to have been lost and appropriates them with intent to take the entire dominion over them really believing when he takes them that the owner cannot be found, it is not larceny But if he takes them with the like intent though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny In such a case the question of whether the person is guilty of larceny is to be determined by evidence of his previous acquaintance with the ownership of the particular chattel, the place where it is found, and the circumstances in which it is found, and whether it be apparent, in other words, whether the person is presumed that the goods are his, or whether he can conclude that he took it, — the mere taking it up to

previous acquaintance with the ownership of the particular chattel, the place where it is found, and the circumstances in which it is found, and whether it be apparent, in other words, whether the person is presumed that the goods are his, or whether he can conclude that he took it, — the mere taking it up to

he had reasonable ground to fear violence and to show that he acted in self defence *R v Hopkins* 10 Cox Cr 229 In *Allison v United States*, 160 U S 203 Chief Justice Fuller said "Here the threats were recent and were communicated, and were admissible in evidence as relevant to the question whether defendant had reasonable cause to apprehend an attack fatal to life or fraught with great bodily injury, and hence was justified in acting on a hostile demonstration and one of much less pronounced character than if such threats had not preceded it. They were relevant because indicating cause of apprehension of danger and reason for promptness to repel attack, but they could not be taken as evidence of a design to kill."

prosecution as son threatened with an actual killing in the absence of any inference was that the consistent inference could not be drawn from the evidence that the defendant was guilty of the crime charged *Long C J* in *Thomas v*

territory 4 N M 150 a New Mexico case where he said "If there is even slight evidence to indicate that the act of killing was done under a present reasonable apprehension to himself of great bodily harm, prior threats should not be excluded" Evidence of communicated threats is intended to shed light upon the mental attitude of the prisoner toward the deceased when homicide was committed

of the good which he had believed at a certain

time is worth very little without some kind of confirmation from external conditions. *Derry v Peel* 11 App Cas 337. In each case good faith as defined by the Indian Penal Code should be considered with reference to the general circumstances and the capacity and intelligence of the person whose conduct is in question. *Bhatia v Mulji* 12 B 377 (393), *Emperor v Abdul*, 31 B 293 (293), *Arfan Ali v Emperor* 41 C 66, *Davey v Cory* (1901) A C 477.

In a case where an accused is charged with murder, he can assert that he has committed the crime in self defence. In such a case the state of his mind at the time of the killing becomes a material fact. An important element in determining his justification is his belief—in an impending attack by the deceased. So reasonable fear of such an attack rejects the conclusion of malice. And the character of the deceased for violence has much to do in determining the reasonableness or unreasonableness of his belief.

Negligence whether proved by habit. Negligence is in one aspect the not doing of a particular act but in another and more correct aspect it is the doing of one act in a manner which amounts to negligence in that some other

act
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engineer and fireman, had some times passed the crossing during the preceding year without those precautions observed. It would seem to be axiomatic that a man is likely to do or not to do a thing, or to do it or not to do it in a particular way, as he is in the habit of doing or not doing it. But this must be understood of acts which are done or omitted to be done without any particular intent or purpose to injure any one, if it is intentional.

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any intention whatever and through mere

give these signals on that occasion we think the enquiry was properly made as to what had not particular evidence

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If negligence can be inferred from repair of machine high way or the like after the con which negligence reason

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again, by fencing or covering, or at any rate making safe the particular thing from which it arose. That, however, is no evidence of, and I protest against it being put forward as evidence of negligence. A place may be left for a hundred years unfenced, when at last some one falls down it, the owner like a sensible and humane man, then puts up a fence; and upon this the argument is that he has been guilty of negligence, and shows that he thought the fence was necessary because he put it up. This is both unfair and unjust. It is making the good feeling and right principle of a man evidence against him."

Ill-will, malice, etc. The term ill-will as used in the Act, is not the exact equivalent of the term the criminal intention.

In a case of defamation

the libel. If for any reason this presumption is rebutted, it becomes necessary for the person charged to show actual malice. In *Hellditch v Hellditch* said: "It is for the defendant to prove that if the defendant does so the burden of the plaintiff; but unless the defendant shows actual malice." By the expression the criminal intention but a more positive mental

Roscoe Ev. 880, see also *R v Mason*, 8 Cr A R 121 (1912)

one

Given

a person is upon trial are constantly received as evidence against him, as

itself is evidential as an independent circumstance to show the act. So also where an emotion of hostility at a specific time is shown, the existence in the same person of

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of each case,

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(1) a

for

time of uttering the defamation charged, other utterances of the defendant may

be offered, and the question arises whether and on what terms they are admissible. The probative value of other utterances as showing malice at the time charged rests on a double argument (A) that the other utterance indicates malice at the time of utterance, and (B) that malice then indicates malice at the time charged. *Higmore* §§ 103, 396 401. In *Barrett v Long*, 3 H. L. C. 395 (414) *Parke B.* said "We are all of opinion that under such a plea the publication of previous libel on the plaintiff by the defendant is admissible evidence to show that the defendant wrote the libel in question with actual malice against the plaintiff. A long practice of libelling the plaintiff may show in the most satisfactory manner that he is a person who is not to be trusted."

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practice, the more or less
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The length of
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Peake N. P. 25. In *Meek v. Turner*, 11 H. L. C. 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

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Good will The term 'good will' is peculiar to the Act, and there is no equivalent for it in the English law, nor is used at all, except in a different sense. The answer to a charge of 'express malice' would probably be the absence of express malice or some sort of defence that implied it. This moreover, seems to be the meaning of the last clause of the illustration. *Donough Pt 123*

State of body or bodily feeling etc. This section also provides for the admission of evidence regarding the state of body when that is in issue or relevant. It would be in issue in all crimes of violence, or 'offences affecting the human body,' within the meaning of the Penal Code. It would be relevant in all questions of insanity, legitimacy, life insurance, inheritance, and identity of persons. *Donough Cr Pt 127* Illustration (l) shows how persons' expressions of feeling towards each other at or about any particular time may be used to show what those feelings were. (i) and (m) show the same thing in regard to states of body. *Cum Li 131* So whenever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings, made at the time in question, are also original evidence. If they were the natural language of the affection, whether of body or mind, they furnish satisfactory evidence, and often the only proof, of its existence. And the question whether they are real or feigned, is for the jury to determine. *Greenl Li § 162 (a)* cited in *Taylor § 580*. Thus the representations by a sick person of the nature and effects of malady under which he is labouring are receivable as original evidence whether they may be made to the medical attendant, or to any other person, though the former are naturally entitled to greater weight than the latter, in as much as a physician is far more capable than a man unacquainted with the symptoms of diseases, of forming a correct judgment respecting the accuracy of the statement. *Arson v Annand, 6 East 188*, *R v Blandy, 18 How St Tr 1185*, *Grey v Young, 4 M C 51*; *Gilchrist v Dale, 8 Watts, 35*, cited in *Taylor § 580*. Illustration (m) is based on *Arson v Kinnaird, 6 East 188*. So also answers of patients to enquiries made by medical men and others are evidence of their state of health provided they are confined to contemporaneous symptoms and are not in the nature of a narrative as to how, or by whom such symptoms were caused. *Gardner Passage Case Le March, 169*, *R v Nicholas, 2 C & K 246*, *R v Gloster, 16 Cox 471*, *R v Andridge, 9 C & P 471*. The reason for the admission of such evidence is thus given by *Melish L J*: "Wherever it is material to prove the state of a person's mind, or what was passing in it, and what were his intentions there you may prove what he said, because that is the only means by which you can find out what his intentions were." *Syden v St Leonards L R 1 P D 134*. This use of such statement is often spoken of as admissible under the *res gestae* notion or as 'original' evidence, and is an exception to the Hearsay Rule. But this seems clearly unsound. There is one sort of evidence of mental condition which is in truth merely indirect or circumstantial, and therefore not subject to the Hearsay Rule, e.g. where the sharpening of a knife on the morning before a homicide is taken as evidence of a design to kill, or where the repeated infliction of blows indicates malice or where running away is taken as indicating fear. But where a distinct assertion, in the form of words, predicating a mental state is offered,—as "I have a pain in my side" or "I have the intention of going out of town," or "I do this for such and such a reason,"—this language is no less an assertion of the existence of a fact than an assertion of any other sort of fact; in the neat phrase of *Bowen L J*: "The state of a man's mind is as much a fact as the state of the digestion," and therefore such assertions, being taken on the credit of the declarant as testimonial evidence of the fact asserted, are met by the Hearsay Rule. To admit them, then is to make an exception to the Hearsay Rule. The different kinds of facts that may be the subject of such assertions may be roughly grouped as follows:—(1) assertions of pain, or other physical condition; (2) assertions of plan, design, intention, (3) assertions of feeling, emotion, motive, reason; (4) sundry assertions by a testator. *Greenl Ev § 162 a*, *Wigmore §§ 1714 to 1740*. It is usually said that such declarations are receivable though they form the only proof of the given condition (*Tay § 500*), but this has been doubted and it has been considered to be the *manifested condition* and not the *verbal statement* which is the true *res gestae* to be explained. (*Thayer, 15 Jr L. T. 141—143*) *Phip Pt Int Cr p 51*. Mr. Cunningham thinks that statements in illustration

as to the circumstances in which he came to be poisoned should be admissible

On L. v. pp 121-122

Such Statements are exceptions to Hearsay Rule It has already been stated that such statements are exceptions to the Hearsay Rule. It presents itself in a

on the consideration that, though the person's testimony on the stand may still be both actually and conveniently practicable yet the probability of their receiving from him testimony which shall be in value equal or superior to certain hearsay statements is small, thus, while there is hardly a necessity in the strict sense that

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possible to obtain by circumstantial evidence (chiefly of conduct) some knowledge of a human being's internal state of pain, emotion, motive, design, and the like; but in directness, amount, and value, this source of evidence must usually be decidedly inferior to the person's own contemporary assertions of those conditions. It might be argued, however that the person's own statements on the stand would amply satisfy the need for his testimonial evidence. The answer is that statements of this sort on the stand where there is ample opportunity for

deliberate misrepresentation

or testing it by

at times when

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of evidence in

death, insanity

test; and this has not been questioned. *Wigmore* § 1714; see also section 21

clause (2)

In *Mason v Kinnaird*, 6 East, 195, which appears as an illustration (m) of section 14 Lord Ellenborough in admitting such statements observed "A witness has been received to relate that which has always been received from patients to explain,—her own account of the cause of her being in bed at an unreasonable hour with the appearance of being ill. What were the complaints, what the symptoms, what the conduct of the parties themselves at the time, are always received in evidence upon such inquiries, and must be resorted to from the very nature of the thing.

The declaration was upon the subject of her own health at the time which is a fact of which her own declaration is evidence, and that too made unawares before she could contrive any answer for her own advantage and that of her husband, and therefore falling within the principle of the case in *Skinner* to which I have alluded" (The case referred to by him was *Thompson v Treason*, 42) So "the evidence is admitted on the presumption arising from experience, that when a man does an act his contemporaneous declarations are true, unless there be some reason for misrepresenting

"Wherever the bodily

proved, the usual

evidence. These expressions are the natural reflexes of what it might be im-

explanatory or cor-

rection of justice

upon which the

act. "Anything in

nature of narration must be excluded" *Per Swayer J in Insurance Co*

Mosley, 8 Wall, 397 So "such declarations made with no apparent motive

misstatement, may be better evidence of the maker's state of mind at the time than the subsequent testimony for the same purpose" *Per Holmes J in Elmer v Fessenden*, 151 Mass 359

State of body In *Annesley v Anglessea*, 17 St Tr. 1139, where the question was whether the claimant was the vast amount of evidence was gone condition of *Lady Altham*, during

shortly before the claimant's birth in a belief to that effect cessation, a question d to be the heir to a son of *Lady Jane*

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Staunton, Not Tr, where four prisoners were charged with conspiring to cause the death of a woman of weak intellect by a slow process evidence was admitted regarding her bodily state at various intervals down to the date of her death "The object of his evidence" said *Hankins J* "is to show that those who were about her and saw her from week to condition to which she was being re physical strength of a person may be peculiarly capable or peculiarly incapable of doing the act in question. *Goodtitle v Braham*, 4 J R 498

Owner of vicious animals "Whoever" says *Lord Denman* "keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is *prima facie* liable in an action on the case at the suit of any person attacked and injured by it"

Johnson, 36 L J. C 1 (the knowledge of the f the animal is relevant '36 Particular acts of viciousness are also relevant, for the same reason Vide illustration (c) So l to show the owner's knowledge P 3, see also *Thomas v Morgan*, *Hudson v. Robert*, 11 Ex 697,

Receiving stolen property—Proof of knowledge The act of possession in this class of cases (except rarely) concealed, and the question is as to the possession other times view of the her possession be each f the stolen character of warned the defendant

it may be assumed that the receipt of st likely to result in a warning, chiefly bec up and reclaim them, but also in part because a purchase not made in an offer

in the transactions, &c that the same person comes to dispose of the st *Higmore* § 311 ing stolen goods edged, within five l brought in the

defendant by the same person was admitted "guilty knowledge" See also *R v Davis*, 6 C. & Rob 524=1 Cox Cr 12, illustration (a) C 264 such evidence was held inadmissible. judgment said: "Here the evidence merely went to show that the prisoner was in possession of other property which had been stolen in December, and not that he had received such property knowing it to be stolen. Now the mere possession of stolen property is evidence, *prima facie*, not of receiving, but of stealing; and to admit such evidence in the prosecutor, in order to make out that a prisoner knowledge, what had been stolen in March, December previous stolen some other property from another place and belonging to other person" The result of *R v Oddy*, was a legislative change of the law in 1871 by Stat 34 & 35 Vict C 112 By section 19 of that Act "evidence may be given that there was found in the possession of such person property stolen within the preceding period of twelve months for the other purpose of proving that such person knew the property for which he is indicted to be stolen" But illustration (a) to the section makes no reservation as to ownership or time, so that it would seem that though the stolen property belonged to other persons than the prosecutor, and without

Jones, 14 Cox Cr 3

Forgery and Counterfeiting The Chief form of offence connected with forged and other counterfeit documents or money are (1) making the false

the inference of knowledge from such particular transactions, it would not make the evidence inadmissible" See also *R v Ball*, R & M 132; *R v Ball*, 1 Camp 324, *R v Millard*, R & R 245; *R v Phillips*, 1 Lew Cr C 105, *R v Smith*, 4 C & P 411, *R v Forbes*, 7 C & P 224, *R v Ball*, 7 C & P 429 In *R v Frost*, Dears Cr C 456, to prove a guilty uttering on December, 12, an uttering of a similar piece on December 11 was shown, see also *R v Goodwin*, 10 Cox Cr 531 In *R v Whaley*, 3 Leach 985, Thompson J. observed "As to the cases put by the prisoner's counsel of uttering bad money,

the knowledge of possession
30; *Blake v Albion Life*

Insurance Society, 4 C. L. D 100, 24 N. W. 2d 201. In *Mason's Case*,

10 Cr App 169, which was a case of uttering a forged deed, evidence of possession of two other sets of forged deeds a fortnight and five months later was admitted. See also *R. v Fowler*, 24 L J M C 134. The possession of other forged or counterfeit documents is a different way to show knowledge. The mere fact of possession is not relevant to show knowledge of the fact that the document is a forgery. *g a*
knowledge of the fact that the document is a forgery. *rel*
wrapped in paper or counterfeit paper is kept. *also*
found, and thus the prior knowledge applies equally to the article in question. *Wigmore* § 311

Illustration (d) The case of *Gibson v. Hunter*
2 H Bl 286 H drew a bill on G and indorsed in F's name, in order to show that G knew this particular bill as a fictitious bill, and the fact of the former instance of such bills with irregularities and suspicious circumstances of such a nature that they must have made G aware of the fictitiousness of F's name, and it was admitted

Illustrations (1) and (2) These are illustrations of intention. The case in (1) is that of *R Robinson*, 2 East P C 111. *Ev* 137. The difference intent to kill, (o) of murder outright as *pl. v. r.* other acts of the de establishing the crime negative innocent intent and *was to* establish the crime *afford* and the like) No fixed *ther* not must bear, it *ame*

defence was accident. The fact of the accident was
and concealed himself beside the road ahead and then firing again at the same
person, was received to prove intent

Explanation I Illustrations (a), (v) and (p) refer to Explanation I. The rejection of general facts rests on the ground that the collateral matter has been too remote, if, indeed, there was any connection with the *factum probandum*. *Nort. Ev* 139. The meaning of this explanation is that the state of mind to be proved must be, not merely a general tendency or disposition towards conduct of a similar description to that in question, but a condition of thought and feeling having distinct and immediate reference to the matter which is under consideration. The fact that a man is generally dishonest, generally malicious, does not bear with sufficient on or as to any particular ing his conduct what is yes and state of mind with immediate reference to that particular occasion or matter. Illustrations (a) and (b) make the knowledge necessary with guilty probability of

to see why it may be

should be irrelevant in an enquiry as to his negligence in this respect on any particular occasion. Surely the evidence of habit would have some probative value. The same view has been taken by the Bombay High Court in regard to the second illustration, cl (c). It has been observed that on the issue of whether A actually shot B or not the fact that he had previously shot at him would have some probative force. So too would proof of a general malignity of disposition by evidence that 'A was in the habit of shooting at people with intent to murder them, yet this evidence is excluded, even as proof of A's intention, either as too remotely connected with the particular intention in issue, or as raising collateral questions which could not be resolved in the case' per *West J* in *Reg v Prabhudas*, 11 B H C II 90 at p 92.

"It is presumed that if evidence of 'habit' is not admissible as a 'state of mind' under section 14, it might be admissible as 'conduct' under s 8. Habit after all is only previous conduct which is provided for in section 8"—*Donough* *Cir Ev 2nd Ed* p 133.

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regularity of action, there can be no doubt that this fixed sequence of acts tends strongly to show the occurrence of a given instance. But in the ordinary affairs of life a habit or custom seldom has such an invariable regularity. Hence, it is easy to see why in a given instance something that may be loosely called habit

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that arise in

connection with such evidence, both of them, however, depending on other exclusionary rules. (1) The idea of habit is sometimes difficult to distinguish from that of character—for example where negligent habit is charged, and if it is interpreted in the

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difficulty
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another or more correct aspect, it is the doing of one act in a manner which amounts to negligence in that some other act is omitted which ought to have

if careful action *Joy v*
difficulties here seem to be
ever be anything more

than casual or occasional. If it is, are we not really predicating a careless

well founded, and that such evidence is often of probative value and is not attended by the inconveniences of character evidence *Wigmore* § 97

By s two verbal alterations were made in the original explanation and it was numbered as 'Explanation 1'. The Explanation 2, is new. This amendment was made by the Calcutta High Court in the case 14 C 721 (F B). In that case whether in the trial of a person charged with property, evidence could be given of the fact of the accused having been previously convicted of an offence, the Full Bench decided on the 20th July 1897, that

the accused person has been previously convicted of an offence, but the fact that he has a bad character is not relevant. This section does not apply to cases in which the bad character of any person is in itself a fact in issue. By Act III of 1891, the said section has been amended in such a way as to render the previous conviction of an accused person irrelevant when it is sought to prove the conviction with the object merely of showing that the accused is a man of bad character and is therefore more likely to have committed the offence with which he is charged. The fact that a person has been previously convicted of an offence has of itself little probative force to establish the fact that he has committed another offence and it is not expedient to admit evidence which can only prejudice the accused. *Statement of Objects and Reasons of Act III of 1891*. The result of this amendment of the law is that the rule as to the relevancy of a previous conviction is to be contained in section 43 of the Act. The existence of the judgment convicting the accused is only relevant if the fact of the conviction is a fact in issue or is relevant under some provisions of the Act. Explanation 2 has been added to section 43 so as to allow a previous conviction to be proved in order to show a guilty knowledge or intention. *Statement of Objects and Reasons of Act III of 1891*. As having regard to the character of the offence under s 400 I P Code, previous convictions of disrepute are relevant under s 14 of the Evidence Act so convictions previous to the time specified in the charge or to the framing of the charge

Section 43 (a) of the Indian Prevention of Corruption Act, 1947, provides that the evidence that the accused was previously convicted of similar offence is admissible in evidence if the accused was previously convicted of a similar offence. *Aloomiya* 25 B 139 the appellants were convicted, under section 431 of the Indian Penal Code of belonging to a gang of persons associated for the purpose of committing thefts. The question was whether evidence of previous convictions of some of the accused of theft was admissible for the purpose of proving association for that purpose and bad character. In rejecting the evidence the Court observed: "It is sufficient to add in reference to the case now before us that the character of the accused was not in issue." *King Em* Court observed that the evidence of previous convictions was not admissible. The question for purpose of proving association for that purpose and bad character was always been admitted, it would seem that of such

* In page 725 of I. C. this explanation is not given after section 54 although in the Act this explanation is given after section 14

more cogent than those for isolated thefts. Such evidence must of course be weighed. A single instance of theft for instance would count for little, or nothing. There to show habit, against the *Empress v. Nal* four unreported such evidence".

S.

bad character, is inadmissible under section 14 of the Evidence Act. *Emperor v. Hajj Sher Mahomed*, 45 B 958—75 Ind Cas 67—25 Bom L R 214. The reason for admitting such evidence is thus given by *Faulcett J.* in 46 B 958 "Such evidence clearly falls under section 14 of the Indian Evidence Act, but it is a disposition on the part of the accused to commit the offence named."

doubt produce evidence description to that in question, but not of the exact description in issue. A person may be a habitual surreptitious night thief, but this goes very little way towards showing that he has a disposition towards dishonesty of bad character which is excluded by See also *Public Prosecutor v. Dongre* 1001—9 Cr L J 567, *Emperor v. Del* *Emperor v. Pachu Das*, 47 C 671, (is being tried for the offence of belonging to a gang of thieves, evidence that he was previously convicted of dishonesty is relevant and admissible. But if the conviction took place long before the second prosecution no weight can be attached to such evidence for the purpose of proving that the accused has a habit of committing thefts. *Moti Ram v. Emperor*, 29 Ind Cas 127—A I R 1925 Bom course that the guilt 144. But purpose of affecting the punishment imposed. *Queen Empress v. Nga Ian*, (U B R 1892—1896) Vol I, 62.

Seditious speeches—Intention. Where certain speeches form the subject

in respect of the speech *nam v. Emperor*, 32 M 3 14 of the Evidence Act,

question is one of the intention of the accused in publishing these articles. Did they intend to excite in the public mind a feeling of hostility or enmity to the government of certain government in

or it may be proved action with what such on another or other

conspiracy as to a diary kept by her, that she kept it to show to her husband was admitted to evidence her feelings towards her husband. But in *Walton v. Webster*, 7 C & P. 193, letters by a wife, offered to show her happiness with her husband, —

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do not prove it, but wherever it is material to prove the state of a person's mind, you may prove and out what
Fr. 442, *Wilde J*

in itself a material fact of which such statements are the fair exponents. But where those declarations are touched to prove the fact that he had declared and embodied those intentions in a certain will they have no other title to confidence than the statements of any other person who had seen the will and could speak to its contents. In this aspect they become mere hearsay. See also *Keen v Keen*, L R 3 P & D 107; *Wigmore* §§ 1718 1722, 1729, 1730, 1735, 1736

ably, defeated. We do not mean to say that fraud can be established by any less proof, or by any different kind of proof from what is required to establish any other disputed questions of fact, or that circumstances of mere suspicion which lead to no certain result should be taken as sufficient proof of fraud, or

some bearing in proving fraudulent intention by negating the probability of good under ordinary good f produc invol consid transfers are male, (3)
On the whole, while se may vary in each case
I. L. A.—36

here no fixed rule can be laid down *Vide Wigmore* § 333. The fraudulent intent of the transferor may be indicated by other circumstances not of the above sort,—such as the debtor's remaining in possession after the mortgage or sale, the pendency of suits at the time of the sale and other circumstances suggesting their own significance and not raising any difficulty of principle *Wigmore* § 33.

Illustrative Cases—Admissible Evidence A writing made some time after the committing of an offence under section 124 I P Code is admissible in evidence under s 14 of the Evidence Act *Emperor v Phillip*, 30 Bom L R 315=108 Ind Cas 30=29 Cr L J 320=A I R 1928 Bom 78. Former judgment more than 25 years old and convicting accused of dacoity is admissible in a case under s 401 I P Code for showing criminal tendency to commit theft and not habit of committing theft *Motiram v Emperor*, 69 Ind Cas 29=A I R 1925 Bom 193, see also *Bonar v Emperor*, 38 C 408=15 C W N 461, *Emperor v Naba Kumar* 1 C W N 146; *Emperor v Haji Sher Mahomed* 25 Bom L R 214=75 Ind Cas 67. In a trial for an offence under ss 235 and 243 I P Code of being in possession of counterfeit coins and instruments and materials for counterfeiting coin, evidence of the possession by the accused of counterfeit coins and instruments for their manufacture at his house in another district is admissible *Mysr Gossain v Emperor*, 61 Ind Cas 647=22 Cr L J 407. On a charge against the accused of cheating by falsely representing that they were the servants of a wealthy lady and were entrusted to act on her behalf in the arrangements for loans, to be made to her, she possessed, and thereby acted in connection with the transaction.

complain prove the A 273 charged a him, or a series of similar acts committed by of such other acts, whether previous or subsequent to the frauds charged against the accused is relevant for the purpose of showing whether or not the intention of the accused was honest or fraudulent *Gurdhara v Emperor* 209 P L R 1914. In cases where the other evidence has established association for purposes of habitually committing theft, evidence of previous convictions whether for offences against property or for bad livelihood is admissible, not as evidence of character but as evidence of habit and of such evidence, convictions for bad livelihood would be more cogent than those for isolated thefts *Bonar v Emperor*, 9 Ind Cas 455=15 C W N 461=38 C 408.

Illustrative Cases—Inadmissible Evidence Where the accused is charged under s 409, Penal Code, for embezzling three specific sums *Held*, that evidence of collateral offences in respect of other sums was not admissible *Fritchard v Emperor*, A I R 1928 Lah 382. Where in a particular trial under section 420, I P Code evidence was let in with regard to a previous act of fraud which was alleged to have been committed by the accused person on the witness who spoke to the fact that on a particular occasion he was cheated by the accused in respect of a certain sum *Held*, that the evidence was clearly inadmissible in law and it cannot be brought in with the aid of s 14 or 15 of the Evidence Act *Golul v Emperor*, 29 C W N 483=36 Ind Cas 970=26 Cr L J 906, see also *It v Abdul Wahid* 31 A 94. In a case of murder by administering sweetmeats the facts that the accused offered sweetmeats to boys and poisoned one of them is not evidence under section 14 of the Evidence Act *Kashu Ram v Emperor*, 73 Ind Cas 262=G N L J 144. In a prosecution under section 209 of the Penal Code for having knowingly made a false claim in a suit against certain persons, evidence relating to other suits brought by the accused against other persons may be admissible against the accused under sections 14 and 15 of the Evidence Act, for the purpose of showing ill will or animus of the accused, and as systematic cause of fraud or a systematic series of fraudulent claims and for the purpose of rebutting the defence that the particular suit was brought in good faith or any suggestion that it was brought under some mistake or misapprehension. But evidence relating to similar suits brought by the accused against other persons is not admissible against the accused if it is not instituted by the accused or a conspiracy between

them Evidence which goes merely to the character or disposition of the accused
as a person likely to have committed the offence is generally inadmissible against
not become inad-
accused of other
N 491=19 Cr.
was charged with
was in excess of
tion evidence was

produced t
was inadm
Evidence
Cas 781=1912 M
of instances of acts of
acts of misconduct
The defendant can

justify the libel as true in substance and in fact by proving its truth, not the
truth of other acts and occasions having nothing to do with the act in question,
unless it is intended to show that those acts were parts of the habitual and
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restrain
having
dence to
the rule

being that a man must be taken to have intended the reasonable and natural
consequences of his own act Unnav Jauala 35 C 31 Where in a prosecu
tion under s 304 I P Code it was
taken part in a similar occurrence just p
rash driving of his motor car certain

Bom L R 324=A I R 1030 Bom 157

15 When there is a question whether an act was accidental
or intentional, * (or done with a particular
Facts bearing on knowledge or intention), the fact that such
question whether act was accidental or intentional act formed part of a series of similar occur-
reences, in each of which the person doing
the act was concerned, is relevant.

Illustrations

(a) A is accused of burning down his house in order to obtain money for

each of which he
fires A received
ng to show that

to make entries in a book showing the amounts received by him He makes
an entry showing that on a particular occasion he received less than he really
did receive

The question is, whether this false entry was accidental or intentional

The facts that other entries made by A in the same book are false, and that
the false entry is in each case in favour of A, are relevant.

*These words in s 15 were inserted by the Indian Evidence Act 1872 Amend-
ment Act, 1891 (3 of 1891), s 2

(c) A is accused.

The question is,

The facts that,

counterfeit rupees to C, D and E are relevant, is showing that the delivery to B was not accidental

Scope of the section. Section 15 of the Evidence Act is an application of the general rule laid down in section 14 *Imperator v. Debendra*, 36 C 573-13 C W N 973=9 C L J 610. It lays down that where there is a question, whether an act was accidental or intentional or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences in each of which the person doing the act was concerned, is relevant. It is wrong to say that this section only deals with bracketed words were added by s. 2. It is overlooked in construing section 15.

Panchu Das 21 C W N 501 at p 525 & L. But in the same case *Mookerjee J* took a different view. At page 516 he observed "There was no room for any hypothesis that the death of the woman, whoever might have caused it, was either accidental or unintentional. The medical evidence makes it incontestable that the act amounted to deliberate murder. No question consequently arises whether the act was accidental or intentional or was done with a particular knowledge or intention. In so far as the charge of theft was concerned, there was also no question, whether the act was accidental or intentional or was done with a particular knowledge or intention." *Fletcher J* agreed with *Mookerjee J* in that case. According to *Sanderson C J* also this section has no application where there is no question of an act being accidental or intentional. So evidence of other crimes is admissible if it bears upon the question whether the act alleged to constitute the crime charged in the indictment were designed or accidental. *Per Lord Harschell in Makin v. The Gen of New South Wales* 75 L J K B 693=(1906) 2 K B 339, see also *R v. Bond*, (1906) 2 K B 389, *R v. Heesom*, 14 Cox 40, *R v. Stephens*, 16 Cox 387, *R v. Armstrong* (1932) 1 K B 555. In *Gumicant v. Emperor*, 88 Ind Cis 723=18 N L R 35, which was a case under ss 467, 471, and 193 of the Indian Penal Code in respect of a receipt of Rs 4,200 discharging a debt, the complainant were allowed in the lower Court to file certain certified copies intended to prove that four different documents namely (1) a will, (2) a receipt, (3) a deed of lease, and (4) another receipt written by the accused K were suspected to be false documents and were not acted upon by Court. As regards the admissibility of these documents the Court observed. "There was no question here whether the writing, attestation, or production of the receipt for Rs 4,200 was accidental or intentional. Each was admittedly an intentional

Decided is whether knowledge or intention in such acts be let in of the kind of *Crown*, 12 P R. I had been charged under s. 420 I P Code, for having received from the two complainants certain sums of money on false pretences that he had been authorised to recruit unskilled labour for the Government of Africa and that on no account of a false pretence he would be able to do so. The Court held that the evidence was relevant and that the accused was not allowed

to show that in the course of this recruiting business the accused had defrauded other persons from whom he had received sums of money on false pretences of a similar kind

In general whenever it is necessary to rebut, even by anticipation, the defence of accident, mistake or other innocent condition of mind, evidence that the defendant has

same specific kind as th

Aurita Lal v. Emperor,

systematic act mentioned here should not be confused with design or system. (Vide p 236.)

'Section 14 provides that facts showing the existence of any state of mind, such as intention or knowledge, are relevant when the existence of any such state of mind is in issue or relevant and section 15 provides specifically for allowing evidence of similar occurrence in each of which the person doing the act was concerned, whenever there is a question whether the act is done with a particular knowledge or intention' *Per Lancel J in Emperor v. Harwan*

valji, A I R 1926 Bom 231=50 B 174-38 Bom L R 115 This section
 amendment is
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Reg v
 charge of

obtaining money on false pretence-

In that case *Lord Coleridge, C. J* said
 the fact that the prisoner has done the
 remaining question is, whether at the time
 he guilty of his act, or acted under a
 ved must be admissible' This amendment

seems to have been overlooked by *Jacob J in Emperor v. Ahmija Hussain*,
 28 B 129=5 Bom L R 805, where he states that this section invites
 consideration of the question of intention only as opposed to accident.
Woodroffe's Ev 8th Ed p 208 This case probably goes further than
 any other case, and the amendment which has been proposed of section 15
 seems to provide sufficiently for the class of cases in which the peculiar
 nature of the offence makes this question the crucial test' In *Reg v. Ollis*
 60 L J Q B 918 *Bruce J* stated the law to be as follows "A line of
 cases has established the rule that when it becomes material to establish that
 an act charged in the indictment and proved to have been done, was intentional
 and not accidental, evidence is admissible of similar acts done by the same

Person (Reg v. Gray, 11 &
 313), of false pretences
 I Q B 83), of coming
 ie, 1 Bos & P N R 92
 er dit by fraud (*Reg*
 as necessary to negative

prisoner at the time of the offence charged against him, and, therefore negat¹ accident or mistake on his part in the last occasion'

Of course, such evidence is not admissible merely for the purpose of showing that the character of the accused was such that he was a person likely to commit the acts of cheating with which he is charged. That is a totally different question and the distinction between the two classes of cases is well brought out by *Channel J in Fee v. Fisher*, 26 L. J. R. 122: "The principle" said the learned Judge 'was perfectly clear and if attended to the difficulty disappeared. That principle was, that the prosecution must not prove facts

was of bad character and therefore charged it was admitted that it showed that he, in a charge of embezzlement, in mistake, evidence could be given

to show other instances of the same kind, because such evidence tended to show that he was not making a mistake on the occasion charged. Whenever it could be shown that the question involved was whether there was a mistake or whether there was a system evidence might be given although it proved other offence that the prisoner's actions were systematic and fraudulent.

In *Reg v. Rhodes* 68 L. J. Q. B. 83—(1899) 1 Q. B. 77 the prisoner was indicted for obtaining eggs by false pretences and it was proved that he had falsely represented by advertisement in news papers that he was carrying on a bona fide Dairyman's business. Evidence was admitted that subsequent to the transaction in question he had obtained eggs from other persons by means of similar advertisements and the Court for the consideration of Crown Cases Reserved held that such evidence had been properly admitted. In delivering the judgment of the Court, Lord Russell J. observed "It seems to me quite clear that if the transactions with *Elston* and *Chambers* had taken place before that with *Boys* and at a period not too remote the evidence of *Elston* and *Chambers* would have been admissible against the prisoner. Is that evidence admissible although the transactions were subsequent to the offence charged? That depends as it seems to me on the question whether or not the case put forward for the prosecution was that the prisoner was not carrying on a real business but that the business in which he was engaged was from first to last a bogus or show business. If the prosecution merely alleged isolated transactions of a fraudulent character against the prisoner with no connection between them I should certainly say that evidence of transactions which took place after the offence charged was not admissible more especially if such transactions took place two months after the offence. But here as I have said, the charge to be made out was that of carrying on a bogus business and on the whole, I think the evidence was admissible on the ground that it showed part of a scheme to defraud persons by

In the same case it can only be shown do not see how way If the offence charged would have been

immediately after the complaint or if they formed part of the same system of fraud I think it can make no difference. The only difficulty in the case is, I think, the long interval of time that elapsed between the act charged and the other acts. Very often the only *reus* between such transactions is the proximity in point of time. That however, is not the case here, and had there been no other connecting link, I should certainly have thought that the transaction two months after was at any rate too remote. But when it appears that the

in any other prior to the fear that they if they were of the same the only difficulty in the case is, I think, the long interval of time that elapsed between the act charged and the other acts. Very often the only reus between such transactions is the proximity in point of time. That however, is not the case here, and had there been no other connecting link, I should certainly have thought that the transaction two months after was at any rate too remote. But when it appears that the in and that if the charge was the evil act

becomes admissible

So to come under this section it must be established that the act forms part of the

some common had its own *Per Mookerjee* nces
 "whether they were evidence or not depends upon whether they were evidence of similar transactions" *Per Reading C J* in *Rex v Baird*, 84 L J K B 1785 To admit evidence under this head, however, the other acts tendered must be of the same specific kind as that in question and not of a different proximate in point of time
 3 C W N 676 at p 692; see
 v *Rhodes*, (1899) 1 B 77

Section 15 of the Evidence Act covers both previous and subsequent similar occurrences *Raghunath v Emperor*, 22 C W N 494-46 Ind C 18 696-19 Cr. L J 776

In a case of cheating, it is open to the prosecution to show that the acts charged against the accused were parts of a series of similar acts committed by him or in which he was concerned, at or about the time in question *Girdhari v Emperor*, 26 P W R 1910 Cr; see also *Emperor v Debendra* 86 C 573-18 C W. N 973-9 C L J 610, but see *Gokul v Emperor* 29 C W N 483-29 Cr L J 906-86 Ind Cas 970 In the case of *Blake v Albion Life Assurance Co*, 1 L R C P D 97 at p 166 *Lord Lindley* observed, "Nothing could, at first sight, seem more appearance of fraud; that the transaction precluded from doing

answer to the objection that evidence of frauds on other persons cannot be admitted in that this transaction is one of a class, that there are features in common, the features in common being the false pretence and a knowledge of it that
 5 L J
 1 cases

in my opinion, that the case which the prosecution seeks to prove is that the prisoner has in his mind a scheme or plan, say for obtaining money by fraud, and the other acts, of which evidence is sought to be given, when proved will show the existence of the plan, and, therefore the guilty mind of prisoner"

Evidence of the commission by the accused of previous or subsequent offences—General Principle of In *Malak v All Gen of New South Wales*, 75 L J K B 693, 703, 710 712=(1906) 2 K B 389, 409, 414 417, *Lord Chancellor*, *Lord Herschell*, said "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused had been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a per on likely from his criminal conduct or character to have committed the offence for which he is being tried On the other hand, the mere fact that the evidence adduced tends to show the commission of issue before th whether the ac were designed or accidental, or to rebut a defence which would be otherwise open to the accused" In *Rex v Do d*, 75 L J K B 693=(1906) 2 K B 389, *Mr. Justice Darling* and *Mr Justice Bray* called attention to the fact that *Lord Herschell's* last words quoted above must have been intended to apply only to a defence which is really in issue, and that the words of the *Lord Chancellor* should be read with that limitation *Per Banks J* in *Rex v Patten* (1913) 11 K B 163-82 L J K B 1670 In *Rex v Bon l*, *supra*, *Mr.*

Cox 2111 On an indictment for murder by poison of S, evidence was admitted of the fact that S had been given arsenic, and that he had been given it; and it was also proved that S had been given it of the arsenic was also given to S and L. *See also 14 Cox 40*, see also *R v Flannagan*, 15 Cox 403, where Brett J took a similar view. *2 Russ Cr L 2112* In *R v Armstrong* (1922) 2 K B 555=91 L J K B 504, where the accused was charged with the murder of his wife by administering arsenic to a person with arsenic, the defence sought to rebut the defence kept by the accused. *1191=12 Cr L J*

Causing death by other means On the trial for the murder of an infant, it was proved that the prisoners had alleged that they had received only one child to nurse before, and had given it to a woman who had taken the child, with whose murder they were charged, for the payment of £3. It was also proved that other infants had been received upon payment of sums inadequate to maintain them, and that the bodies of several infants were found to that of the infant in question in the house occupied by the prisoners. On appeal, the court was divided 3 to 2 as to the issue and was rightly divided. *(1894) A C 57, 2 Russ Cr 2112* Appellant was charged with the murder of a woman with whom he lived and with whom he had gone through a form of marriage. She was found drowned in her bath. Evidence was admitted that

defendant, by his cross-examination of prosecutor, had endeavoured to show that the gun might have gone off the first time by accident

he charged the jury that the evidence does not show that the defendant was innocent of innocent ground for representation. The jury test the common sense of which the evidence is the basis. The circumstances are equally as the report of the prosecution.

been made innocently, we may assume that any given one might have been innocent, but cannot concede this when we notice the recurrence.

pawn-broker upon a ring by the false pretence that it was a diamond ring. Evidence was admitted that two days before the transaction in question the prisoner had obtained an advance from a pawn broker upon a chain which he represented to be a gold chain, but which was not so, and had endeavoured to obtain from other pawn brokers a diamond ring, but

Francis, 43 L. J. M.

411=50 L. J. M. C. 11.

pretences. He was employed by his master to take order but not to receive moneys, and he was proved to have obtained the specific sum from B by representing that he was authorised by his master to receive it. Evidence of his having, within a week afterwards, obtained another sum from another person by a similar false pretence, such obtaining not being mentioned in the indictment in any way, is not admissible for the purpose of proving the intent when he committed the acts charged in the indictment. *Reg v Holt*, 50 L. J. M. C. 11. In *R v Simson*, 12 Cox C. C. 804, an order to be given of quality, for a book :

orders of the same sort was received to show the intent

In *R v Saunders*, 1 Q. B. D. 19, which was a case of false pretences by advertising to give work and requesting money by mail to pay for the preliminary instructions, the fact that a number of other persons have been induced afterwards by him in the same way to forward money on such advertisements was received to show intent. In *R v Smith*, 20 Cox C. C. 804, the charge was

The accused
Evidence of his
intent of M was

convicted on an
purchasing a
and The fraud

evidence to show his intention. By the first transaction the prisoner obtained a

actions and we are of opinion that neither of those cases was of a similar character, and that the evidence of those two transactions was not admissible

Setting fire to 1
Gray, 4 F. & F. 1102
in a note to this case
this case in *R v Stan*
doubts its authority. The

fire had originated near the kitchen, where the accused stayed as servant

evidence is not without prece lent and authority, more over, not o
Donellan for the murder of *Sir Theodosius Broughton* by administering him
some poison, evidence was given that a certain tree which hung over a deep
and dangerous brook near a spot where *Sir Theodosius* was accustomed to
fish had been swn almost in two by some unknown person. This was proved to
show that some one entertained a design against the life of *Sir Theodosius*
for he was accustomed to stand on the tree while engaged in fishing, and the
natural presumption was that whoever cut the tree did so with the design of
precipitating the deceased into the water. Those facts were given in evidence on
the trial of *Donellan* for murdering *Sir Theodosius* afterwards and were received
though quite unconnected with the prisoner, in order to show that some one
entertained a design on his life and that the probability was that he had not
come to a natural death. Of course the accused doing the act complained
of must be proved by other evidence direct or circumstantial. See also the
observation of *Telang J* in *R v Jayaram*, 16 B 414, where he expresses the view
that such evidence is admissible. Here the principle recognised is that the
recurrence of a similar fire may tend decidedly to negative innocent intent even
though the author of the other fires is not shown, thus the prosecution having
negruived innocent intent in the present fire by whomsoever set, the accused
may be shown to have kindled it. On an indictment for setting fire to a rick
of straw it appeared that the rick had been set on fire by the prisoner having

previous day it
evidence and
that circumstance

receivable. In many cases it is an important question whether a thing was done
accidentally or wilfully. It is only by the conduct of the prisoner that a

admitted that on the same day articles were found on the at four in the
in different parts of the house

Embezzlement Illustration (b) is founded on *R v Richardson* 2 F & F
348. On an indictment for embezzlement where the entries of sums were correct
but the castings up incorrect a series of similar errors in casting up were

but only by way
did the act of which he was accused but innocently and without fraud
that the entry was a mistake; but the probability of such mistake would be

greatly lessened by proof that other false entries of the same kind had been made at or about the same time by the same person " S.

Extortion and black-mail In *R v Cooper*, 3 Cox Cr 517, the prisoner was charged for feloniously accusing H C S of an assault with intent to commit an unnatural offence, with the intent to extort money. *Cresswell J* held that evidence of declarations of the prisoner on a former occasion, on coming off guard, that he had obtained money from a gentleman by threatening to take him to the guard house, and accuse him of an unnatural crime, was admissible. The evidence was not offered by way of proving simply that the prisoner had been guilty of the same crime before. The question was whether on this occasion he did an act with the design of effecting a certain object. One step in the proof was to shew that he would be likely to know that a certain result would follow, and if it could be proved a result would be produced, it was contemplated it. Russ C argument as here applied, seemed somewhat forced, such knowledge being a matter of common understanding and not needing to be proved. It is clear, however, that the intent argument is entirely applicable; i.e. the doing of similar acts at other times tends to negative the supposition that the demand on the occasion charged was made in good faith (for example with a genuine desire to obtain compensation for supposed injuries). This use of such evidence is generally sanctioned. Vide *Barnard's Trial* 19 How St Tr 870, *R v Wink* 100th 4 C & P 444, *R v Egerton R & R* 375, *R v Boyle & Merchant* (1914) 3 K B 339, but see *R v McDonnell*, 5 Cox Cr 153, *Wignore* § 352, 2 Russ Cr 1168.

Rape with intent to defile. A variety of limiting limitation. There is some evidence to show that the purpose is to assault on another general desire to satisfy the test that is involved in this crime and no particular woman is essential for this. *Wignore* § 357. But mere liberties taken by the defendant. *R v Lloyd* 7 C & P 318. Commit rape the evidence of hit and having intercourse. *Rodley's Case* 9 Cr App.

ten years. It is shown that the purpose of subsequent evidence is to show the real nature of the case. It has repeatedly appeared in cases of this sort that a man by a threat of violence deters the child from complaining and thus acquires a species of influence over her by terror, which enables him to repeat the offence on subsequent occasions, and this seems to me to give a continuity to the transaction which makes such an evidence properly admissible.

Abortion In *R v Dale*, where an instrument or appliance is used which might be properly employed for innocent treatment of woman. *Charles J* ruled that it was not admissible to prove that the instrument was adapted to cause a miscarriage. *Charles J* ruled that it was not admissible to prove that the instrument was adapted to cause a miscarriage.

another woman three months later, to procure a miscarriage. It should only be admitted where the prisoner has suggested that the administration of the drug or the use of the instrument was legitimate or accidental on his part, and not where the defence is a denial of the act itself. And proof of only one other similar case, without any special connection with the case charged in the

5. certain mysterious is at liberty to ref not have had their to the conclusion evidence is not without prece lent and authority, moreover, for on the trial of *Donellan* for the murder of *Sir Theodosius Broughton* by administering him some poison, evidence was given that a certain tree which hung over a deep and dangerous brook near a spot where *Sir Theodosius* was accustomed to fish had been swan almost in two by show that some one entertained a for he was accustomed to stand on the natural presumption was that whor precipitating the deceased into the water the trial of *Donellan* for murdering *Sir Theodosius* afterwards, and were received though quite unconnected with the prisoner, in order to show that some one entertained a design on his life and that the probability was that he had not come to a natural death. Of course the accused's doing the act complained of must be proved by other evidence direct or circumstantial. See also the observation of *Teleng J* in *R v Jayaram*, 16 B 414, where he expresses the view that such evidence is admissible. Here the principle recognised is that the recurrence of a similar fire may tend decidedly to negative innocent intent even though the author of the other fires is not shown, thus, the prosecution having negatived innocent intent in the present fire by whomsoever set, the accused may be shown to have kindled it. On an indictment for setting fire to a rich of straw it appeared that the rich had been set on fire by the prisoner having fired a gun very near it. It was proposed to prove that the rich had been on

that circumstance does not render it inadmissible, if the evidence is otherwise both. In many cases it is an important question whether a thing was done in a civil case in which the issue arises and the foregoing principle is applicable. In almost everyone of the foregoing classes of cases there are instances of the application of the principles in civil litigation. The silent feature is the nature of the issue and the kind of evidence offered, not the period or the civil form of the proceeding. *Hignore* § 371

Copyright infringement. In Copyright infringement cases the defence often is that the passage in question is taken from a common source. But if the hypothesis of other sources is not available as an explanation where the same errors—either of fact or of—books. Accordingly the evidencing to a high degree by B from A. *Spiers v I* is unsatisfactory on the question whether the defendant did use the work in the family which the ordinary man used the plaintiff's

extensive copying of other passages not otherwise shown to have been copied. This argument is always open, and its use has constantly been sanctioned, there can merely be a question of its weight in a given instance. *Longman v Manchester*, 16 Ves Jr 269, *Wanman v Tejj*, 3 Russ 380, *Lewis v Julian* 2 Beav 6, *Hignore* § 373

ILLUSTRATIVE CASES

Illustrative cases—Admissible evidence. Accused were prosecuted for misappropriation by defalcation of accounts made in 1925 and 1926, evidence was adduced by the prosecution of similar acts done by the accused before 1911. *Held* that the evidence was admissible under section 15 to rebut the probable

Aka reported this matter to the municipality. The accused was charged under s 77 (2) of the Bombay District Municipal Act for introducing the said goods within the Octroi limits without paying dues. *Held* that the evidence that the accused had been connected with similar cases is the one under charge was inadmissible to show his knowledge and intention. *Emperor v. Haynam Lal*, A I R 1906 Bom 231-50 B 171-28 Bom L R 115. The accused on the 7th June 1909 administered *dl utura* poison to A and B both of whom died from the effects thereof and on the following day administered the same poison to C and D. The former got ill and recovered but the latter died. *Held* that the events which occurred or were said to have occurred on the 7th and 8th of June were relevant to the case of charge of murder of D as forming incidents in series of similar transactions occurring about the same time and tending to show system and intention and to negative the idea of accident. *Lala v. Emperor* 9 Ind Cr 731-32 P L R 1911 see also *Kasnam v. Emperor* 73 Ind Cr 262-6 N L J 141. Where in a trial upon a charge under section 399 of the Penal Code the accused pleaded that their presence at a particular spot, armed and in company, which in themselves show that one or more men

the accused were parties to a series of similar acts committed by him or in which he was concerned at or about the time in question. Evidence of such other acts whether previous or subsequent to the frauds charged against the accused is relevant for the purpose of showing whether or not the intention of the accused was honest or fraudulent. Evidence merely to prove that the accused person's character is such that he is likely to commit the act with which he is charged is not admissible. *Girdhari v. Emperor* 26 P W R 1910 Cr-6 Ind Cr 961. In a charge against the accused of cheating by falsely representing that he was the Dowry of an estate and could procure employment for the complainant and thereby obtaining a

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Illustrative Cases—Inadmissible evidence. Where the accused was charged under s 407 Penal Code for embezzling three specific sums *Held* that evidence of collateral offences in respect of other sums was not admissible. *Pritel and v. Emperor*, A I R 1928 Lah 382.

substance and in fact by proving its truth not the truth of other acts and occasions having nothing to do with the act in question, unless it is intended to show conduct
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1 review

but had falsely charged and got convicted some other persons as murderers *Gangaram v Emperor*, 62 Ind Cas 547=22 Bom L R 1274=23 Cr L J 529 Two persons A and B were tried on 21st July 1919 for the offence of murdering D a woman of the town, on the 10th December 1914 of conspiring to rob her, of theft of property from her house and for abetment of murder and theft At the trial the prosecution wanted to adduce evidence (1) of the association of the two accused, (2) of their association in cases spoken of by other women of the town in connection with the charges of theft which they made against them and generally of a series of incidents from 1911 to 1918 that they used to go about together under different names A taking B with him as his *durwan* and introducing himself as a Babu to rich prostitutes of the town and this being followed by their subsequent disappearance and discovery of loss of money and ornaments Held that the evidence was not admissible *Emperor v Panchu Das*, 24 C W N 501 (F B) In a case under s 49 of the I P Code the question of the guilt or innocence of the accused depends upon proof of actual facts and not upon the state of the accused's mind Therefore evidence as to any previous act of fraud (committed by the accused) is not admissible under any provision of the law *Gokul v Emperor* 29 C W N 483-2 (F L J 906=86 Ind Cas 970 (But see *Emperor v Delendra* 36 C J 3=14 C W N 923=9 C L J 610, and other English cases) In a trial of an accused person for giving false evidence in respect of an alleged forged document 'to judge of the intention and knowledge of the scribe and attesting witnesses by the opinion of other Judges on other documents written and attested by these persons in suits and proceedings to which they were not parties is a use of section 15 of the Evidence Act which was never intended by the Legislature *Gunnul v Emperor*, 38 Ind Cas 723=13 B L R 95

16 When there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact

Existence of course of business when relevant

Illustrations

(a) The question is, whether a particular letter was despatched The facts that it was the ordinary course of business for all letters put in a certain place to be carried to the post, and that that particular letter was put in that place are relevant

(b) The question is, whether a particular letter reached A The facts that it was posted in due course, and was not returned through the Dead Letter Office, are relevant

Principle Of the probative value of a person's habit or custom as showing the doing on a specific occasion of the act which is the subject of the habit or custom, there can be no doubt Every day's experience and reasoning make it clear enough *Higmore* § 92 Customs may, like any other facts or circumstances, be shown where their existence will increase or diminish the probability of an act having been done or not done, which act is the subject of contest *Per Hanlan J in Waller v Dixon* 6 Minn 503, 518, (Am) In another American case *Sargent C J* said, 'It would seem to be axiomatic that a man is likely to do or not to do a thing, or to do it or not to do it, in a particular way, according as he is in the habit of doing or not doing it' *State v Rail Pond*, 52 N H 523, 532 In *Watkins v O Neil*, 91 Mo 527=6 S. W. 25, (Am) evidence of a book keeper's custom of handing over collateral notes, to the teller, indicating that it was done in this instance was admitted The reason of such admission is thus given by *Sherwood J* It is really immaterial, under the authorities cited, whether he was able to do more than to verify his entries and prove his invariable custom These things being proven the presumption is therefrom that the usual course of business was followed in this instance Every one is presumed to govern and consequently that he acquiesces himself of his custom if it is established that one act is usual and another, the latter

being proved, the former will be presumed, for this is in accord with the experience of common life. It is simply the process of ascertaining one fact by inference of the notion of regularity of action, there can be no doubt that this fixed sequence of acts tends to show the occurrence of a given instance. But in the ordinary affairs of life a habit or

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circumstances of each case. *Wigmore* § 92

Scope of the section. In commercial transactions the presumption is that the usual course of business was followed by the parties thereto. *Henry v. Bensula*, 37 Fla. 609. "Where the maxim of *omnia praesumuntur rite et solemniter esse acta* (all acts are presumed to have been done rightly and regularly) is taken place on Tuesday, is strong evidence. C. & B. 973. So to prove any general course of

business or office, whether have been done there or will be followed in a particular public office, e.g. the Post Office. *Phipps v. L. 102*. There is no presumption that

is based on this case. particular letter. In must go further. Some the table in the counting poster, and he had said

of a "You from led the ques-

Loan Assn., 47 Pac. Rep. 13 (Wash.) it was said. "The evidence that a letter left at the Tremont House and addressed to H actually reached him is of the same

by post, it is *prima facie* proof, until the contrary be proved that the party to whom it is addressed received it in due course. See also *Sunderson v. Judge*, 2 H. Bl. 509, *Woodcock v. W. 104*, *Shingley v. Todhunter*, 7 C. & P. 680 (686), *Ab. v. Louren*, 1 Camp. 175, *Plumer's case*, 11 Q. B. 1, *Cas. 551*, *Household v. Grant*, 48 L. J. 1, *K. B. 177*, *Husford v. Levering*, 6 Wheat. 102. that it was delivered to a clerk, took all letters delivered

Camp 193, *Trotter v Mr Lean*, 13 Ch D 571; *Phay Es. 3rd Ed* 97, *Skidell v Garbett*, 7 Q B 816, *Ward v. Lonsborough*, 12 C B 252; *Percy Super Club v Whyte*, 106 L T Jo 303 But without any proof that it was properly addressed, stamped and posted, there is no presumption of its receipt. *Beck v German Ins Co* 68 Mo (Aps) 520 (U S). So where a person refuses a registered letter or notice he cannot afterwards plead ignorance of its content. *Lutf Ali v Panna Mohan*, 16 W R 223, *Jogendra v Dwarika Nath*, 15 C 631 *Gurish Chandra v Keshore Mohan* 21 C W N 319; *Louis Dreyfus v Humeau Das*, 50 Ind Crs 191

A telegram properly addressed is delivered to a telegraph company. The presumption is that it was received by the addressee. *Oregon Steam Co v Ol* 100 N Y 446, *Gerding v Hartin* 21 N Y S 636 To prove that a certain indorsement had been made on a (lost) licence entered at the custom house it is relevant to show that the course of the office was, not to permit the entry without such licence. *Butler v Illmit*, 1 Stark 222, *Purpion 3rd Ed* 97, *Taylor* § 153 A; *Ian Omeron v Douet*, 3 Camp 11, *Waddington v Roberts* L R 3 B 779

In an action against the acceptor of several bills of exchange which were made in November, 1850, and became due on February 5th and March 12 1851 the defence was that they were accepted by the defendant while an infant. It is proved that the defendant came of age on March 11th, 1851. The presumption is that all the bills were accepted before he attained his majority. *Roberts v Bethel*, 12 C B 779. The reason of this presumption is thus expressed by *Jessie C J*. 'There is nothing on the face of the bill to show when it was accepted. Why then is it that this evidence is sufficient? It is because it must be presumed that the bill has been accepted during its currency, and consequently before the commencement of the action, because it is the usual course of business to present bills for acceptance before the time for the payment of them has run out and within a usual time after the drawing of them. I decide this case upon this broad ground, that we are to presume, unless the contrary is shown that a bill of exchange has been accepted not on the day of its date, but within a reasonable time afterwards. It is not to be presumed that the acceptance took place after the maturity of the bill. That view disposes of the case as to all these bills—74 to 81 of them because they became due before the defendant attained the age of twenty one 75 to the 81st, because a reasonable time for its acceptance had elapsed before the defendant's majority. "And Maule J added "Although it is not usual to accept a bill on the day on which it is drawn, it is usual to do so at some early opportunity after that day. Therefore, where the drawer and acceptor are both living in the same town the presumption is that the bill is accepted shortly—within a few days—after it is drawn, it being manifestly the interest of the drawer to have a negotiable instrument made perfect as early a conveniently may be. The date of the bill, therefore though not evidence of the very date of the acceptance is a reasonable evidence of the acceptance having taken place within a short time after that day regard being had to the distance the bill will have to travel from the one party to the other. Upon the same principle upon which this presumption rests it may be presumed in this case that the bills were accepted before they arrived at maturity.' It is alleged in a bill for relief that a certain agreement was in writing. The presumption is that it was signed. *Hart v Hobson*, 1 Ser & Sin 553

Course of business meaning of—The expression "course of business" must mean the ordinary course of a professional vocation or mercantile transactions, or trade. *Angana v Bharmappa*, 23 H 63 (66). The usage in a private house, however methodical, cannot carry the same weight as the ordinary routine of office. *Rid*

Regularity in Public Office It has already been stated that the fixed method and systematic operation of the Government postal service have long been conceded to be evidence of the due delivery to the addressee of letters, notices, etc. duly placed for that purpose in the custody of the authorities. The only requisites to raise a presumption of due delivery are that the letters are duly stamped, addressed and posted. *Waller v Hynes*, Ry & M. 149, *Silberk v Garbett*, 7 Q B 816, *Perry Super Club v Whyte*, 106 L T Jo 303. This presumption is so universally conceded that the strength of the evidence of this kind has been even raised to a presumption (see illustration (j) to section 114, *Madhapath v Oti*,

10 L J Ch 39) Of course it is always open to show circumstances which would rebut that presumption. The requirement has given rise to the strength of this presumption is so great that provisions have been made in certain Statutes for the purpose of not allowing the presumption to be rebutted. *Indian* which exports much, 2

Camp 44 Taylor § 180 : An envelope produced bears the post mark and date of a certain office letter was mailed and sent at this time 15 Conn 206 (Am), Rollin 7 M & W 515, Langels v Thompson 2 Camp 623 R v Plumer R & R 264, Butler v Mountgarret, 6 Ir L R N S 77 Taylor, § 179

Course of business in private firms The habit of a private house doing business systematically a similar service being equally relevant the principle has been applied to an export of telegrams transmission g v Scott 112 of telegrams application of the course of business to of a notice or business followed further evidence

where is in the case of private business the system alleged to have been followed must be proved like all other facts The course of business of an individual firm may under the circumstances not appear sufficiently fixed to be of that probative value a) was placing posting 61, the house

to send circulars on every change in the firm was admitted In the course of his judgment Lord Hinger said That does not show that a particular person received a circular except upon the presumption that a jury may make upon the general habit In Woodcock v Houlsworth, 16 M & W 124 Parke B said

He has certainty or 1 H I C Labroel 3 account to a business case of injury at a highway evidence was admitted highway Hall v Bro 1 preceding month was admitted to show a specific sale In admitting such evidence the Court observed Where there is a question whether a particular act was done, the existence of any course of business according to which it was done is a receipt for rice was admitted 18 H N 73

In Lucas v Noziosheski 1 offered to the defendant

workmen Birch 3 Camp 10 which was ed over to his employer over the receipts daily was have been consigned to

In *Laughan v R Co* 63 N C 11 (1m) where the question was whether goods have been received by a railway company evidence of its custom to weigh and mark goods was received showing that they would have been found marked. In *Hine v Promeroy* 21 Viet 211, 214 (1m) the question was whether an attorney had directed a process server to take N and M as receptor. Evidence of his uniform course of business to give no instructions as to receptors was admitted as corroborative. In *Howard v Surridge*, L R C P 143, the question was whether the defendant's servant who had warranted a horse sold to the plaintiff had authority to do so. It was held that the probability of such authority, evidence was offered of a usage among horse dealers not to warrant under the circumstances.

Refusal of a registered letter. The use of a post mark in evidence involves at least three distinct principles. In the first place, the question arises, may it be inferred from the presence of what purports to be the official mark that the mark was genuinely affixed by an officer of the Post Office concerned? This is a question of authentication and may be answered in the affirmative, though there has been some fluctuation of judicial opinion on the subject. In the second place the question arises whether if the post mark be taken as genuine it is evidence that the cover bearing it was stamped on the date the impression bears. The answer is in the affirmative. In the third place, the post mark is evidence that the place or office mentioned therein was actually the place where it was affixed. The mere fact of a notice bearing a certain date is no proof that it must have been posted on the same date. An article posted and delivered may be inferred to have been delivered in due course of post. *Gobinda v Dwarika* 20 C L J 455 = 19 C W N 499.

Telegrams—Times of delivery. The documents kept by the Post Office showing the terms of receipt and delivery of telegrams are not admissible in evidence as public records in as much as they are kept only a short time and are not accessible to the public and are not the result of public enquiry and do not deal with a general public right but are merely kept for the purpose of regulating the pay and the work of the post office servants. *Heyne v Fiehl*, 110 L T 264 = 30 L R 190.

ILLUSTRATIVE CASES

Admissible evidence—Illustrative cases. A notice was sent by the plaintiff firm to the defendant firm by registered letter which was posted to the correct address of the latter, but was returned with the word 'refused' endorsed upon it by the Post Office. Held that under section 16 of the Evidence Act the presumption was that the letter had reached the hands of the defendant firm. *Louis Dreyfus & Co v Chumandis* 50 Ind Cas 190 = 2 S L R 147 see also *Jogendra v Dwarika* 10 C 691 *Balaram v Bali Pannabai* 11 Ind Cas 351 = 13 Bom L R 373. The question is whether a letter was sent on a given day. The post mark upon it is deemed to be a relevant fact. *R v Cunningham* 19 St 370 *Gobinda v Dwarika*, 20 C L J 455 = 15 C W N 499 = 26 Ind Cas 96. In a suit by one banking firm against another firm for the recovery of the balance of an account between them it was held with reference to the keeping of the firm's account books and their personal transaction to the principals that it was reasonable to presume that that which was the ordinary course was put used in that case. *Dwarika v Baboo* 6 M I A 83 (90).

Inadmissible evidence—Illustrative cases. An endorsement on the cover of a registered letter that the cover had been tendered to the addressee on a certain day and had been refused by him, is at best a record of the statement by the peon and would be admissible either under section 32(2) or section 33 of the Indian Evidence Act, if the requirements of those sections are fulfilled. If it be not admissible under sections 32(2) or section 33, in itself the events recorded therein by the peon must be proved by calling him as a witness. *Gobinda v Dwarika* 26 Ind Cas 96 = 20 C L J 455 = 19 C W N 499. To prove the facts that he had posted a letter written by A to B—evidence by or habitually copied all letters written by A then returned that afterwards, when A gave back, the witness or another told in the absence of A that he had returned to the clerk this is not admissible. *Toosey v Wall* 97 So also that the clerk proved that the letter

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ceive it (*Re London etc*
e also *Ram Dass v Official*
posted to H at Bristol,
is insufficient *Walter v.*

Haynes, Ry & M 149

ADMISSIONS.

17. An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.

Admission defined An admission is defined by *Stephen* to be "a statement, oral or written suggesting an inference as to any fact in issue or relevant or deemed to be relevant to any such fact, made by or on behalf of any party to any proceedings." *Step. Dir. Ev. Act* 15. "An admission" says

relevant fact made by a party to an action, or by a person deemed to be entitled to make such statement on his behalf. An admission is a relevant fact as against such party." *Solicitors' Journal* Vol XX p 894. The definition given in the section eliminates the implied statement as to the existence of a probative or *res gestae* fact arising from the acts of a party, "admission by conduct" so called. In English law the term admission, means any statement made out of the witness box by a party to the proceedings, whether civil or criminal, or by some person whose statements are binding on the party against his own interest. *Wills' Ev. 2nd Ed* 149. "In our law," says *Mr Taylor* "the term admission is usually

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admission been tendered in evidence to establish the charge of any misapplication of the money by the noble defendant, it would clearly have been rejected. The law was thus stated by *Lord Chancellor Erskine* "This first step in the proof" (namely, the r

in now on trial may be affected
it by the pay-master would in itself
convict him of a crime" *Lord*
Taylor § 721 citing *verbalium from*

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made by an accused person is an admission only, or amounts to a confession, no reference must always be made to the terms of the statement. Every statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, made by an accused person is an admission under s 17 and of the Evidence Act, which is provable against the person making it, and

6 In *Taughan v R Co* 63 N O 11 (1m) where the question was whether goods have been received by a railway company evidence of its customer to weigh and mark goods was received as showing that they would have been found marked. In *Hoult v Promeroy*, 21 Vict 211, 211 (1m) the question was whether an attorney had directed a process server to take N and M as receptors. Evidence of his uniform course of business to give no instructions as to receptors was admitted as corroborative. In *Houart v Sherwood*, L R C P 149, the question was whether the defendant's servant who had warranted a horse sold to the plaintiff had authority to do so. To show probable non-existence of such authority evidence was offered of a usage among horse dealers not to warrant under the circumstances.

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that the plaintiff had said to the defendant, "You always promised to marry S. 1 one, and you don't keep your word." The court held that this was "material evidence." *Steen* (1877) 2 C P D 265 (270), 1.

Admissions are statements, or assertions in words, and it is their inconsistency with the party's other assertions that discredits the latter. Hence conduct cannot

has been suggested that an affirmative fact diminishing present evidence, should be taken the stand as a witness and to his position in the case if he does not. So far as the suggestion emphasizes the truth that there is, in principle, no distinction between statements of a party and the other facts introduced by him to the tribunal, it seems sound and helpful. An admission however presents no necessary implication of inconsistency or other injury to the cause of the declarant. Undoubtedly former statements are frequently used to show inconsistency between the declarant's present position and one which he occupied at an earlier time. Such statements are not strictly speaking admissions. A former admission may be used to prove the truth of the fact stated. Such a statement may be used as a mere verbal act to show inconsistency. But such is not the only use which may be made of it. It may be used as true or as contradictory. Either party, in proving his own case may, instead of introducing evidence to a certain effect show that his adversary has unequivocally

Commonwealth v. L. v. S. 1-20 (24)

There are two kinds of admissions according to the first formal admission, which may be made by a party in his pleading, or by stipulation or by statement in open Court. Secondly there is a statement of a fact at some previous time inconsistent with a fact to be established at the time of trial a statement which, when of evidence direct or circumstantial, an inference or inferences as to the truth.

§ 64 As to the formal admissions little need be said. They simply fix the relation between the parties as to the facts. They help to define the issues concerning which evidence is to be heard but they are not in themselves evidence. As to the second kind of admissions, those which may be called evidential

lusiveness, that tantial evidence, case they are

may in themselves to carry conviction. *McNeeley v. L. v. S. 1-20*

Direct Admissions Direct and express admissions are practically the same. They are direct statements of main facts in issue. As regards this kind of admissions there is nothing to be said, except that to be available, the statements which constitute the admissions must be proved in the ordinary way. The form in which the admission is made is immaterial so that it amounts to a statement of fact, and is not a statement of opinion or promise. *Driscoll v. City of Taunton*, 160 Mass 486 (Am). The proof of a direct admission is usually by the introduction of testimony, oral or written, as to the language constituting the admission. The statement constituting the admission may be oral or written. Its form is immaterial. So, also, are the place and circumstances attending its making. It may have been heard by witness over a telephone. *Holfe v. Railway Co* 97 Mo 173-10 Am St Rept 331 (Am).

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Admissions are in the nature of circumstantial evidence. An indirect admission may be found in the statement of a witness, and for the

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the direct admission is the statement which by omission becomes evidence of some fact. When we go still further from the direct admission, we finally reach the field of admissions by conduct, or in what are frequently spoken of as implied admissions, and which are simply circumstantial evidence. According to *Bo* implied admissions are those which result from some act or failure to act of the party. *Bourne's Law Dict*. They may also arise from acquiescence. An implied admission is proved by introducing testimony as to such conduct as shows an acknowledgment of the truth of the fact in question. There are various cases of implied admissions strictly speaking. In most instances when actions or conduct are introduced as bearing upon the truth of a fact it is as circumstantial proof of the fact itself and not as proof of an admission. The term 'implied admission' is often an element of admission is frequent admissions by conduct are not included. An admission by conduct has been dealt with in section 8. Such admissions are admissible not as an exception to the Hearsay rule. They are usually original circumstantial evidence of the fact to which they relate. *Best Ev* 148 citing *West Chester v. McDure*, 67 Pa. St. 311 (Am). Presumptive nature of admission actions and representative evidence of fact" which treats as admissions by a party, statements made in his presence and denied by him provided the circumstances were such as to make a denial necessary. *Ibid*

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administered to a witness in order to impose an additional obligation on his conscience and so to add weight to his testimony, and he is cross examined to

But in occasional warrants are generally declarations of nothing in made against the person's interest. The simple and broad rule for receiving them is, in the language of Chief Baron Pollock, that if a party has chosen to talk about a particular matter his statement is evidence against himself (*Darby v Ouseley* 1 H & N 1) and the theory of their use seems to be that they are to a party what prior inconsistent statements are to a witness viz, a means of discrediting smaller or the plaintiff he saw after

attention to speak the truth confesses a crime, there is little human conduct are sufficient

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to get a prior statement of the party against the statement now advanced by him in his pleadings or through his witnesses, and thus discredit the present claim by its inconsistency with the former one. *Greenl Ev* § 169, see also *Phip Ev* p 221

Mr. Gulson while allowing that admissions are evidence of the truth of the fact admitted, considers them not to be exceptions to the Hearsay rule, because the inference of truth involved is independent of the personal credibility of the declarant, but regards them rather as relevant facts, evidentiary of the facts

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But even from this point of view, they have two kinds of probative value

"(a) One is the ordinary value of value depending on his capacity to bias or interest or lack of it, and so on satisfied, but that is a rule of law

probative value as those of any

they have additionally the same

Just as a witness testimony is discredited when it appears that on another occasion he has made a statement inconsistent with that testimony so also the party opponent is discredited when it appears that on some other occasion he has made a statement inconsistent with his present claim against him. The witness speaks in Court through his

his part includes the whole testimony relied on by him. The party opponent may be used against him as an admission, provided it exhibits

Indirect Admissions Indirect admissions are in the nature of circumstantial evidence. An illustration of indirect admission may be found in the following. A sues X for damage done by X's cattle on A's crop and for the purpose of showing an admission on the part of X that his cattle had caused the damage A offers the testimony of a witness to the effect that X had told him that he had offered A a certain amount of money to cover the damage, from

damages although not equivalent to a direct admission that the cattle caused damage, is nevertheless very nearly so. An illustration of an admission somewhat further removed in character from a direct admission is found in a case where A sued X for the loss of his sheep charging that X's dog had killed them and as a proof of the fact of the evidence that X had killed his any more sheep. In *Johnson v. Mc* the direct admission is the statement which by omission becomes evidence of some fact. When we go still further from the direct admission, we finally reach the field of admissions by conduct, or in what are frequently spoken of as implied admissions, in which are simply circumstantial evidence. According to *Bowyer* 'implied admissions are those which result from some act, or failure to act of the party. *Bowyer's Law Dict.* They may also arise from acquiescence. An implied admission is proved by introducing testimony as to such conduct which shows an acknowledgment of the truth of the fact in question. There are various cases of implied admissions strictly speaking. In most instances when action or conduct are introduced as bearing upon the truth of a fact, it is as circumstantial proof of the fact itself, and not as proof of an admission. The term 'implied admission' is often used to denote a statement which is really the element of an admission is frequent. Admissions by conduct are not included. An admission is a statement oral or documentary dealt with in section 8. Such admissions are subject to the Hearsay rule. They are usually of the kind which they relate. *Best Ev.* 148 c1

which treats as admissions by a party, statements made in his presence and not denied by him, provided the circumstances were such as to make a denial necessary. *Ibid*

may be the evidence. An extra-judicial admission for the purposes of the case on trial in the course of judicial proceedings in a court of record or in connection with a proceeding so classified as extra-judicial. *Chamberlayne v. W.* 3 L203

Principle on which admissions are received "Whatever a party says in evidence against himself, what a party himself admits to be true may be presumed to be so." *Per Parke B. in Slatterie v. Pooley*, 6 M & W 604, see also *R v. Turner*, (1910) 1 K B 346. 'Another class of evidence consists of admissions made on or after the trial, which are taken into consideration by the jury.

administered to a witness in order to impose an additional obligation of conscience, and so to add weight to his testimony, and he is cross-examined to

... statements of ...
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admissions do happen to state facts against interest, admissions are generally treated
as obnoxious to the Hearsay rule, and are only allowed as exceptions to it (*Vide*
Taylor Ev § 723) In such cases, as the statements are against the interest of the
persons making it, their trustworthiness is supposed to be guaranteed That this is a
mere local error of theory and in no sense represents a rule anywhere obtaining may

... been enforced for the use of a party's admissions (*Vide Woolway v Rowe*, 1 A. & E.
... ion of that
... e they are
... which is not
... it satisfies

... must contravene, to the knowledge
... interest In case of an admission,
... obative weight, it would not, however,
be essential to admissibility To secure that, it is sufficient that the statement
should be the voluntary act of the party and cover a probative or *res gestæ* fact.
(c) The declaration against interest is secondary ...
the declarant is shown to be dead, absent from
some other sufficient cause. The admission, o.
and is competent though the declarant be present
(d) An admission may be made at any time The declaration against interests is
incompetent if made *post litem motam*. (e) The admissibility of a declaration
against interest is governed by the rules of sound reason That of admission is
determined largely by procedure. *Chamlerlayne's Ev.* § 1235.

Admissions whether subject to rules of testimonial qualifications such
as personal knowledge, infancy, Opinion Rule etc.—“A primary use and
... claim by
... whether
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... that gives
... a party's
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... 277: R.
... r. *Taylor*
“whether oral or in writing, contain matters stated as mere hearsay, it may be ques-
tionable whether such matters can be received in evidence. If tendered against the
party making the statement, they are clearly entitled to very little weight, and unless
connected with a further admission, that he believes them to be true, they would seem,
like hearsay declarations against interest, to be inadmissible *Lord Trimbleton*
v. Kemmis 9 Cl. & F. in 780, 784” *Taylor* § 737 *Mr. Justice Chamber*, in the case of an

7. answer in Chancery, read against the party in a subsequent suit at law, thought this portion of it not admissible "for" he added, "it appears to me, that where one party reads a part of the answer of the other party in evidence, he makes the whole admissible only so far as to waive any objection to the competency of the testimony of the party making the answer, and that he does not thereby admit as evidence all the facts which may happen to have been stated by way of hearsay only in the course of the answer to a bill filed for a discovery. But where the answer is offered as the admission of the party against whom it is read, it seems reasonable that the whole admission should be read to the jury, for the purpose of showing under what impressions that admission was made though some parts of it be only stated from the hearsay and belief." *Greent, L.J.* § 203, *Taylor L.J.* § 737. But *Stephens J.* in *Kitchen v Robbins*, 29 Ga. 713 766 (*Am.*) expressed contrary view where he said "Are we to admit one good against a many unless founded on his personal knowledge? The admissions would not be true evidence which satisfies the party who is making them against his jury that they are true. And, if they are speaking from his personal knowledge, and if he will not make admissions against himself unless they are true. And if he makes them against his interest can be reasonably explained only on the supposition that he is constrained to do so by the force of evidence. The source from which a knowledge of fact is derived, is a circumstance for the jury to consider, in estimating the value of the evidence but that is all." See also *Wigmore* § 1053, *Bishop of Meath v Mar*, *Bulley v Bulley* L.R.Ch. App. apply when a party wants to use under clauses 1 to 3 of section 21. In such cases personal necessary. In *R v Wilker* 1 Cox 93 where the question was whether, an infant at the time of making a certain contract, an admission by A that R was so was received against him although founded on hearsay. See *R v Symonds*, 4 Cox 277 *Re Peston* 53 L.T. 766. As to statements by an agent containing hearsay or opinions, see *The Acton* 1 Speaks E. & A. 780, *The Salway*, 10 P.D. 137 cited in *Philp Ev* 196, 216.

On the same principle the admission of an infant party would be receivable. *O'Neill v Read*, 7 Ir. L.R. 434. See also *Dharamaji Vaman v Gurjar Shrinivas*, 10 B.H.C.R. 311. Theoretically, the admissions of a lunatic party would stand upon the same footing, although the weight to be given them might be nil. *Wigmore* § 1053. The opinion rule also does not limit the use of a party's admission. *Doe v Stell*, 3 Camp 115. But a bare statement that a party is informed without addition of his belief in the information will not amount to an admission. *Trumbletown v Kemmis* 9 C. & P. 780, *Roe v Ferras*, 2 B. & P. 584, *Philp Ev* 196.

Admission and confession distinguished.—Admission is usually applied to a civil transaction and to those matters in criminal cases which do not involve a criminal intent. While the term confession is usually used in Criminal Court as denoting an acknowledgment of guilt. The accused in a criminal case may make admissions, just as a party in a civil case, i.e. by saying things inconsistent with the present points of proof. Admissions in the sense of inconsistencies are not peculiar to civil cases. *Greent Ev* 170. Admission in a civil suit that a document is genuine cannot in a forgery case be regarded as confession at all. *Per Rankin C.J.* in *Ambar Ali v Emperor* A.I.R. 1929 Cal. 539. "A confession," says Prof. *Wigmore* "is one species of admissions namely, an admission consisting of a direct assertion, by the accused in a criminal case, of the main fact charged against him or of some fact essential to the charge." *Wigmore* § 1050, *Taylor Ev* § 724, *Steph Dig Art* a "species of admissions."

—A.I.R. 1927 Cal. 17. The admissions, it has not been defined in the Evidence Act. *Lal*, 6 A. 509 (539). But there is a distinction between an admission in the Evidence Act *R v Macdonald* 10 B.L.R. App. 21. *Empress v Jagrup* 7 A. 646, *Empress v Pandharinath*, 6 B. 34, *Empress v Meher Ali*, 15 C. 589, *Empress v Dabee Pershad*, 6 C. 530. *Empress v Nilmadhab*, 15 C. 595. A confession is only an

v Ram Chunder, 2 C. 341 (350) P C ; *See Dhiram v Narain*, 41 M L J 535. So also in admission in pleading cannot be dissected, and if it is made subject to a condition, it must either be accepted subject to that condition or not accepted at all *Vidya'Ady Mullu v Mulji Hirani*, 19 C W N 713—19 II 399 ; *Sanatini Ali v Chint Bibber*, 9 W R 100, *Sheik Surfaraz v Seetha Dhunno*, 16 W R 257, *Jalwanji v Burda Kani*, 22 W R 220, *Niamullopiah Khilim v Himmu Ali*, 22 W R 319, *Pattu Behree v Watson*, 9 W R 190, *Baikanthi nath v Chintia Mohan*, 1 B I R (N C) 133 ; *Ishin v Hiran* 11 W R, 525 ; *Taree v Dicks* 15 W R 421, *Shank Shurfuraz v Shank Dhunoo* 16 W R 357

"The chief difficulty in the application of the rule lies in determining when statements are so connected to, either as to form a whole within the meaning of the rule. The matter does not depend on the statements being contained in one single document but on the nature and degree of connection between them ; and it may be said that the rule embraces these two propositions : () When a party's admission is so qualified or explained by some other statement made by him at the same time that the latter is in fairness necessary to present the true intention and meaning of the former, then the party is entitled, if his admission is given in evidence against him to have the qualifying statement put in evidence as a part of the admission () when the admission of a party refers expressly or by implication to some antecedent statement either of himself or his opponent or of any third person then the statement so incorporated or referred to forms a part of the whole admission within the meaning of the rule" *Wills Ev 2nd Ed* 159. This rule will not generally justify a party in insisting that separate letters or documents, or even distinct and separate parts of entries in one or more collections of documents, as letter-books, court rolls, etc., shall all be put in evidence by the party producing and reading any one of them unless they are on the face of them connected with the one already in evidence, and they seem to be the rule whether the documents be of a public or private nature. Where any such separate entries or distinct parts are favourable to the opposite party, he must put them in evidence as part of his own case. Thus, though the defendant is entitled to have the whole of a particular entry in an account book read, he cannot insist upon reading distinct entries in different parts of the book unconnected with the one read *Cutt v Howard*, 3 Stark 6 ; *Remmie v Hall, Mannings*, N P Q Index 376 ; *Roscoe* N P 180. Where the plaintiff called for the production of the defendant's letter book, and read letters of the defendant from it, the defendant was not therefore permitted to read from it on his own behalf, other letters not referred to in the letters read by the plaintiff *Stange v Buchanan*, 16 Ad & E 598, *Roscoe* N P 180. So also the answers of a party given in the course of conversation should not be proved against him without also giving in evidence the questions which drew forth these answers *Pennel v Myer* 2 Moo & Rob 95, *Wills Ev 2nd Ed* 160. But this rule is not applicable where the party gives in evidence a statement made by his opponent in the course of conversation on some previous occasion *Prince v Samo*, 7 A & E 634, *Wills Ev 2nd Ed*. Distinct matters, however, though relevant to the case cannot be introduced *Davies v Morgan* 1 Cr & J 587.

This general principle, however, raises two sorts of questions, first whether the party offering the admissions must, as a preliminary condition put in the whole, or other parts, of the conversation, document, etc., secondly, whether the party whose statement it is may afterwards, by way of explanation, put in the remainder, or other parts, or other statements. It does not seem to be generally required that the party offering the admission must put in at the same time any more than that which he desires to use—whether a speech or conversation (*Eaton's Trial*, 23 How St Tr 1030, *R v Connell* 5 State Tr N S 1, 196) or a writing (*Corntiss's Trial*, 11 How St Tr 423, *Sizer v Burt*, 4 Din, 426) ; and so far as the portion it is allowed to be given is concerned, the substance is sufficient, without precise words, whether of an oral statement or a lost writing (*R v Limond*, 1 State Tr N S 785, 820, *Hardy's Trial*, 24 How St Tr 681). For the party against whom the admission is offered, he may, by way of explanation, put in only so much as is necessary for his purpose, i.e., to qualify or explain the portion put in against him *Price v Samon* 7 A & E 627 *Green's Ev* § 201. But the Court may believe a part and disregard the rest. The rule only requires that what is in favour of the party making the admission should be favourably and liberally considered and weighed with other evidence. Of

17. *Abbott C J* in *Queen's Case*, 2 B & B 287; *Thomson v Austin*, 2 Dougl & R 361; *Fletcher v Froggatt*, 2 C & P 566, *Cobbett v Grey*, 4 Ex R 729. So this is a well settled rule of law that the whole of a declaration or statement containing

Bholanath v Emperor 26 A L J 1331 = AIR 1929 All 1. In the United States the rule is thus laid down by Mr Justice Field in *Mutual Benefit Life Ins Co v Newton*, 11

which a party relies on to be taken as an admission with the qualifications which limit, modify

This rule, together with its reason, is thus

stated by Mr Best 'Where part of a document or statement is used as self-serving evidence against a party, he has a right to have the whole of it laid before the jury who may then consider and attach what weight they see fit to any self-serving statements it contains' Best § 520, see also *Berman v Woodbridge*, 2 Doug 788, per Lord Mansfield, *Smith v Blondev*, Ry & M 259, *Cray v Hall's*, cited in Ry & M 259, *White v Wier*, 11 Vass 610, see also *Sootan v Chand Bibee*, 9 W R 130, *Rajah Nilmoney v Rananagarh* 7 W R 29, *Shishu Shurufuraz v Shashu Dhunoo*, 16 W R 257, *Lallah Probhoo v Sheonath* W R 1864 Act 8 27, *Ishan v Haran* 11 W R 525, *Bata Jwa'a Das v Prant Das*, 34 C W V

Ind Cas 745 P C 'Where, taking the whole of the statement, completely avoided,

agent before delivering it jotted down upon it with his master's authority a note on a counter-claim which the defendant had against the plaintiffs, and the plaintiffs sought to give the account alone in evidence as an admission of the amount of their claim it was held by Lord Mansfield C J. that the whole document must be taken together, since the defendant's statement was made "all in one breath" and he never admitted the account as distinct and independent from the counter-claim *Randle v Blackburn* 5 Taunt 245. So also if part of a letter is offered as evidence, other explanatory parts may be offered, if a party is sought to be charged or affected by a letter received in evidence, his reply thereto is admissible, and where one party uses as evidence a number of a series of the letters written by the other party, the letter may introduce the entire series *Burr Jones* § 294. It is a well established principle of law that if a plaintiff wishes to rest his case solely on the admission of the defendant, he must accept the admission as a whole. It is not open to him to pick out some part of it as may be favourable to him and neglect the rest *Syed Ismail v Hamids Begum*, 2 Pat L T 658. If a Court takes into consideration an admission in a deed to bind a party the whole of the statement therein should be considered. Admissions must be taken

though a party cannot by admission make a statement which is not true, and it is not to be used as an admission against him, taken even if they operate in his favour

41 M L J 525 = (1921) M. W. N. 639. An admission must be deemed to be exhaustive. It must be read as it stands and it is not permissible to take one part of an admission and reject another part. *Bur Bahadur v Kaghbir*, 49 A 707 = 25 A L J 572 = 100 Ind Cas 1037 = AIR 1927 All 385. Ordinarily a Court is bound to take the whole of an admission, either, but a Court is not bound to give equal weight to all portions of it, *Rodha v Chunder Moner*, 9 W R 290, see also *Gowind Pershad v Chattrabhai*, 60 Ind Cas 138, *Shib Nath v Annada Prasad* 11 CL J 382, *Konwar Doregaiah*

v Ram Chunder, 2 C 341 (350) P C, *See Dharam v Narain*, 41 M L J 525. So also in admission in pleading cannot be dissected, and if it is made subject to a condition, it must either be accepted subject to that condition or not accepted at all. *Mutahay Muller v Mulji Haris*, 19 C W N 713—19 B 399, *Sanatin Ali v Chait Bibee* 9 W R 100, *Sheik Sufiyyas v Seith Dhumoo*, 16 W R 257, *Jaloonath v Bussat Kint*, 22 W R 220, *Niamuttooosh Khilim v Hirmu Ali* 22 W R 519, *Pattu Beharee v Watson*, 9 W R 190, *Baskintha-nath v Chintra Mohan*, 1 B L R (N C) 131, *Lahin v Haran* 11 W R 521, *Tarret v Durrani* 15 W R 421, *Shanth Shurfiyas v Shaikh Dhumoo* 16 W R 257.

"The chief difficulty in the application of the rule lies in determining when statements are so connected to, either as to form a whole with the meaning of the rule. The matter does not depend on the statements being contained in one single document but on the nature and degree of connection between them, and it may be said that the rule embraces these two propositions: (1) When a party's admission is so qualified or explained by some other statement made by him at the same time that the latter is in fairness necessary to present the true intention and meaning of the former, then the party is entitled, if his admission is given in evidence against him to have the qualifying statement put in evidence as a part of the admission. (2) When the admission of a party refers expressly or by implication to some antecedent statement either of himself or his opponent or of any third person then the statement so incorporated or referred to forms a part of the whole admission within the meaning of the rule." *Wills & Sons* 159. This rule will not generally justify a party in insisting that separate letters or documents, or even distinct and separate parts of entries in one or more collections of documents, as letter books, court rolls, etc., shall all be put in evidence by the party producing and reading any one of them unless they are on the face of them connected with the one already in evidence, and they seem to be the rule whether the documents be of a public or private nature. Where any such separate entries or distinct parts are favourable to the opposite party, he must put them in evidence as part of his own case. Thus, though the defendant is entitled to have the whole of a particular entry in an account book read, he cannot insist upon reading distinct entries in different parts of the book unconnected with the one read. *Catt v Howard*, 3 Stark 6, *Remmie v Hall, Manning*, N P Q Index 376; *Rosca* N P 180. Where the plaintiff called for the production of the defendant's letter book, and read letter of the defendant from it, the defendant was not therefore permitted to read from it on his own behalf, other letters not referred to in the letters read by the plaintiff. *Stargo v Buchanan*, 16 Ad & E 598, *Rosca* N P 180. So also the answers of a party given in the course of conversation should not be proved against him without also giving in evidence the questions which drew forth these answers. *Pennell v Myer* 2 Moo. & Rob 95, *Wills' Ev* 2nd Ed 160. But this rule is not applicable where the party gives in evidence a statement made by his opponent in the course of conversation on some previous occasion. *Prince v Samo*, 7 A & E 634, *Wills' Ev* 2nd Ed. Distinct matters, however, though relevant to the case cannot be introduced. *Davies v Morgan* 1 Cr & J 587.

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S. 17. course, the one offering admissions of this character is not bound by the statements which are favourable to the declarant. He may rebut such statements or show them to be erroneous. *Burr Jones Ev* § 293

Probative force. In treating of the probative force of admissions, it is necessary constantly to distinguish between those which are judicial and those which are extra judicial. The judicial admission is pre-eminently a matter of procedure, under the direct control of the ad and the force and effect of an admission of this are determined by procedural rules. On the other judicial admission is determined by logic. It is not assigned or established by a rule of procedure. Substantive Law goes no further in this connection than to determine that the existence of statement will be received as evidence of the fact asserted in it, either in an action at law or in a suit in equity. It will not, in this connection, be deemed material whether the extra judicial admissions were made before or after the suit was brought. They are rated entirely at their logical value. *Chamberlayne's Evidence* § 1236

Judicial and extra judicial contrasted in probative force. Logic may have its appropriate effect in case of the judicial admission when used as *probatio* rather than as *levamen probationis*. When used as proof, the more deliberate and, as it is said, solemn nature of the circumstances under which the judicial admission is made may confer upon it a probative force not characteristic of the average extra judicial admission. The former having been made in solemn form, in a court of justice constituting the foundation, or a part of the procedure in cases pending, in which the rights of the parties are stated, and by which the courts are called upon to pass judgment, and upon which they must solemnly decree the rights of the parties, are for those reasons entitled to greater consideration and weight than when casually or incautiously made, at a time and place, and under circumstances not calculated or intended to affect the rights or interests of others and, perhaps, unmindful of all the facts and circumstances of the case. *Chamberlayne's Ev* § 1236

Value and weight of extra judicial admissions. With all verbal admissions it may be observed that they ought to 1799 v
Lang 3 A & E 702, *Curtis v Hunt*, 1 C as it does in the mere reception of oration and mistake; the party himself either clearly expressed his own meaning or it. It frequently happens, also, that the wit of the expressions really used, gives an effect to the statement completely at variance with what the party actually did say. *Green* Ev § 200, *Taylor* § 561, *Earle v Picken*, 5 C & P 542 (n), *Re v Simons*, 6 C & P 540, *Williams v Williams*, 1 Hogg Consist 304, *Hope v Evans*, 1 Sm & M Ch 195. In a somewhat extended experience of jury trials, we have been compelled to the conclusion that the most unreliable of all evidence is that of the oral admissions of the party, and especially where they purport to have been made during the pendency of the action or after the parties were in a state of controversy. It is not uncommon for different witnesses of the same conversation to give precisely opposite accounts of it, and in some instances it will appear that the witnesses depose to the statements of one party as coming from the other, and it is not very uncommon to find witnesses of the best intentions repeating the declarations of the party in his own favour as the fullest admissions of the utter falsity of his claim. When we reflect upon the inaccuracy of many witnesses in the original comprehension of a conversation, their extreme liability to mingle subsequent facts and occurrences with the original transactions and the impossibility of recollecting the precise terms used by the party or of translating them by exact equivalents, we must conclude there is no substantial reliance upon this class of testimony. The fact, too, that in the final trial of open question of fact, both character, in the majority of cases, is to distrust its reliability. *Greenleaf's Evidence*, 12th Ed. IA 74 (79). Oral admissions are careless in his mode of testifying, that he does not accurately remember the statements, that he is willing to misconstrue them, or that the declarant was

misinformed, or did not clearly express his own meaning. *A fortiori*, where the admission is that of one deceased, the caution should deepen into suspicion, for reasons that are obvious and without corroboration is of little value. *Burr Jones* Ex § 295. In *Kennedy v Murray*, 170 Mo 674 (Am), the Court said: "Evidence of such declarations, if true, is admissible, but it never amounts to direct

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as contradicted are in
Hence it is obvious :
upon the circumstances under which they were made as shown by the testimony, as well as upon the degree of accuracy and truthfulness with which they are related, *Burr Jones* § 295. But where the admission is deliberately made and precisely identified, the evidence it affords is often of the most satisfactory nature. *Rigg v Cargemen*, 2 Wills, 395, *Grcent Ex* § 200, *Taylor* § 861. In such a case it is neither weak evidence, nor does it require corroboration. *Commonwealth v. Galligan*, 113 Mass 202. On the other hand, when a confession is so proved, they may have great inherent force as evidence. *Dicher v Fitchburg*, 22 Wis. 675.

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Mahomed, 65 l . . . Ind
Cas. 876, *Vir Singh v Marnam*, 1 Lib. 137-56 Ind Cas 191. A statement in a document should *prima facie* be accepted as true as against the explanation unless it can be shown by independent evidence to be false. *Ishad v Ali Kariman*, 22 C W. N 530-28 C L J 173-20 Bom L R 790 P. C. Unless admissions are contractual or unless they constitute an estoppel they are not conclusive, but are open to rebuttal or explanation, or they

were mistaken or were untrue, and is not estopped or concluded by them unless
her his condition. In such a case
as against that person (and those
it as to third parties he is not
ed *Denman* approved and adopt-
an, in re *Simpson*, 2 Ch D 72 at
p 89 and *Trinidad Asphaltic Company v Cornat*, (1896) A C 587 in effect
illustrate the same principle. *Ram v Chaudhuri*, 11 C W N 321 P C, *Gurish*
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Bindoo 20 W R 112, *Idoh* &
admission can be withdrawn
Muhammat v Husain 26 C B
Pershad v Thakur Dei, 23 In
Cas 26-A I R 1928 Lah 75

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that a statement previously made by him relative to a certain fact is a false statement, he ought to be asked in re-examination by the prosecution or at any rate by the Court why he made a statement which was false. The mere fact that at the

sumption *Junnu Lal v. M.*
175 Ind Ca 1027=1924 Lab
they are found untrue B.

Emperor, 7 Lab L J 259=6 Lab 437=90 Ind Cas 145=A I R 1905 Lab 418. The admission of a wife in a divorce proceeding unsupported by corroborative proof should be received with utmost circumspection and caution *L. v. L* 108 Ind Cas 416 (F B), *Ovi v. Ovi*, 91 Ind Cas 20=49 B 367. If a person admits a right, it is necessary implication that he also admits the legal consequences of that right *Guru Charan v. Surendra Kri* 10 22 Ind Cas 670=19 C W N 363. Where a guardian is appointed to a minor for purposes of litigation in order to look after his interest any admission made by the minor against his own interest is waste paper *Parlati v. Dharmraj*, 32 Ind Cas 368. A statement made by a person in his own favour is inadmissible in evidence on his behalf *Naqina Singh v. Sander* 24 P W R 1916=33 Ind Cas 487. Title by law cannot pass by admission when the statute requires a deed *Mathura v. Ramkuan*, 23 C W N 270=43 C 790=23 C L J 26=35 Ind Cas 305, see also *Jadunath v. Pyral* 4 C L J 22 16 C L J 436; 22 C L J 380, *India v. Dina* 6 L W 147=(1917) M W N 583=41 Ind Cas 505, *Balkishan v. Aarun*, 13 N L R 121, *Jyoti v. Jagannath*, 29 O C 18=38 Ind Cas 605. A purchaser cannot be prejudiced by admission subsequently made to the lender whose property has been sold

does not bind the parties *Beni v. Dudha Nath* 27 C 156 P C=26 I 1 10 4 C W N 274, *Duar v. Fati* 26 C 250=3 C W N 222.

Admissions are always evidence against the party who makes them but

marriage is a question merely of adjective law. Its probative value must depend on the facts. *Latima v. M. Jhandi*, A I R 1927 Sindh 20.

A person with liability still with regard to admissions & entries, against the producer's own pecuniary interest the law dispenses with all proof save that the book has been kept by or under the authority of the producer *Mathilal v. Pr* 96 Ind Cas 429=A I R 1926 Mad 955.

ability. *Rest Lt* § 528. So it is, in general, immaterial to whom the admission is made. Thus, an admission made to a stranger is as receivable as one made to an opponent; though it is said that an admission, in order to support an account stated, must have been made to the creditor or his agent, and an acknowledgment of debt made to a third person, neither agent nor privy to the creditor, will not defeat the Statute of Limitations, since it is not evidence of a promise of which he could not take advantage. (*Rest Lt* § 528, 11 B. 1. 11).

Rest Lt, 17 W. R. 990; *Rest Lt* § 1123; as are admissions made to himself in more solidary. (*Rest Lt* § 510), *Phipps v. Post* 191.

general, immaterial, *Rest Lt* 7th Ed.

of evidence, between direct admissions and those which are incidental or made in some other connection or involved in the admission of some other fact. *Green v. Lt* § 141. Frequently letters of a party are competent purely as admissions, and because some inference may be drawn from them unfavourable to the claim or defence of the writer. *Burr Jones v. Lt* § 269, *Sisal v. Prosser v. Monohur*, 23 W. R. 325. When letters of a party are in the nature of admissions, they are competent although written long before or after the commencement of the litigation, even though written to persons not parties to the litigation, on proof of their genuineness. *Burr Jones v. Lt* § 261. When letters are otherwise competent as admissions, they need not be signed or actually written by the party, provided they are sent by his direction. *Barlett v. Mayo*, 33 Me. 518. Except for the purpose of earlier reference, there would be no need to deal with other written admissions. The law is practically the same with regard to them as to letters, and is, that a

properly be used in a matter may relate

memo- randum written or authorized by a party may be offered as admissions against him like his oral statements. If self-serving in their character, it is immaterial in what form the document may appear. *Burr Jones* § 270. This rule has been applied to receipts (*Harrison v. Remington Paper Co.*, 140 Fed. 385, (Am)),

Gadian, 27, bills of lading, *acomber*

Paul, Ill 535, person

(Am)], making the admission (*Edward v. City of Watertown*, 59 Hun, 620), maps

(*Brigman v. Jennings* 1 Ld. Rumm. 734 *Huronath v. Picoath* 7 W. R. 249,

Craven, T. R. 48, rsh (Ky)

Doe v. 238], cit. *Van Vey*, Ald 606,

Graves, s in the an action

books o against its president (*Iney v. Chadsey* 7 R. J. 224) *Burr Jones v. Lt* § 270

admissions, evidence against 41) and, of course, equally

make them, against the party *emalds* 121 (Cal 74 (Am)).

of the defendant that the particulars contained in the entry were true. *Narain Coomar v. Ramkrishna*, 5 C. 861=6 C. L. R. 286. Similarly partnership books

S. 17.

of the several partners and to be

tri

d

controversies between the members of the firm

each member *Daji ibaji v Gound* 10 Bom L R 111. It may be with knowledge and consent, although the presumption may be rebutted by proof that the partner or party or against whom the entries are offered, have not

had access to the books

incorrect *Burn Jones*

the defendant under ss

Goundan 17 M 131

in affidavits or in answers to interrogatories in the same or former proceedings are also competent *Phip* 4th Ed p 215, *Fleet v Perrius* L R 3 Q B 536, *Hari v Prosunno* 22 W R 303; *Legal Remembrances v Motilal Ghose* 41 C 173, *Bhugwant v Lall Jha*, Marsh 48. Evidence given in Extra judicial proceedings by an accused person on his own behalf is an admission and is *prima facie* admissible. No particular formality is required to let it in as an

, 11 Ind Cas 50-29 Cr L J 962-1929 Sind 15

judicial admissions those contained in pleadings by reason not only of these presumed solemn contents, but with regard to the time at which they were made, their use in the action of which they form the basis, their use *dehors* that action, the chance of

imprint, in brief by the circumstances

not making them inadmissible

speak only from information and belief

in their pleadings, these pleadings may be offered in evidence

parties no admissions of the facts so alleged *Girish Chander v Shama Charn*

15 W R 437 *Austen v First* 2 G A App 91 (Am). A statement in the plaint

unchallenged and made by the plaintiff after his interest had been transferred

is in no way binding upon the transferee *Jahnomull v Saroda Prosal* 7 C

L J 604. The plaintiff may also rely upon the defendant's admission in the

Pleadings or Affidavits or Answers to Interrogatories *Tarinee v Duarka Nath* 15

W R 451, *Re Cohen* (1924) 2 Ch 515. But admissions contained in a state-

ment filed in plaintiff's name are not proof that they have been made by her,

Asmutloo v Alla Hafiz, 25 W R 125

to as evidence in plaintiff's favour

Radha Churn v Chunder Monee 9 W R

W R 519. But it does not bind his co-defendant *Lochman v Sansur*

395-A W N 1894, 138, *Azizullah Khan v Ahmad*, 7 A 353-A W N 1895,

54. So also admissions may be made in verified petitions *Girish v Shama*

15 W R 437, *Mohun v Chitto*, 21 W R 24, *Gour v Mohesh* 14 W R 451

An admission in a

1. An admission in

14 B L R App

(1893) 1 Ch 84

Akhoy, 19 C L J
Bibee v Achmal
J 188; *Pe Hoyle*

Conditions of Admissibility—Statement must be one of fact. The extra judicial statement of

as would apply to the

of all essential that

be one of fact: *ex affir*

While inference is a

admission may be a psychological one, *ex q*, belief *Ibid*

Admission on Matter of Law. Parties cannot by their admissions of law

be bound to offer to the court to adopt their view

1

from certain facts, his 'opinion' as it is frequently called are not present as for an admission except in cases where the declarant might, if present as a witness, have testified to the same inference or conclusion *Chamberlain's Ex*

§ 1293 An admission on
v. Sunler, A I R 1924 1 S.
 Nag 311; *R v. Furtie*, 81
 13 Cox 173; *R v. Lane*.
 I. R. 1923 Lab 779-113 Ind C 99; A I R. 1927 Lab 234; A I R 1926
 Outh 311, 92 Ind C 732 An erroneous admission by a counsel on a point
 of law is of no effect and does not preclude the party from claiming his legal
 rights in the App Hu 27 C L J
 147-15 Ind C 953; 109-1 A
 Sup 17; *Hem Parshil* *Johnston*,
 12 Hark (59 Gen) 155, *Asraf*
 14, 7 C L J 152; *Ramaram v. Khikim*, 11 C W N 310 So also an
 erroneous admission of the pleader of a party on a point of law cannot bind the
 party, *Dicir Bux v. Fakh* 3 C W N 222, see also *Kishori v. Rajmal*, 24 B
 360, *Narayan v. Venkta*, 29 B 403

Statements made under constraint or duress In regard to admissions
 made under circumstances of constraint, a distinction is taken between civil and
 criminal cases, and it has been considered, that on the trial of civil actions,
 admissions are receivable in evidence, provided the compulsion under which they
 are given is legal and the party was not imposed upon or under duress. Thus,
 in the trial of *Collector v. Lord Keith*, 11 sp 212, the testimony of the defendant,
 in which he admitted the

vindicate his conduct. In that case *Le Blanc J.*, remarked that the manner in
 utter of observation to the jury,
 issue, he was bound to receive
las v. Ramabanga, 106 P R
 extends also to answers volun-
 tarily given to the cross-examination asked, and to which the witness might
 successfully have objected. So the voluntary answers of a bankrupt before the
 commissioners are evidence in a subsequent action against the party himself,
 he whole examination was
 obtained by imposition
 led by *Lord Ellenborough*
 When such admissions
Stoddard v. De Fastel,

4 Camp 11, *Robson v. Alexander*, 1 M & P 118

Erroneous admission An erroneous admission may be withdrawn *Sita*
Ram v. Pir Baksh, A I R 1931 Lab 6, see also A I R 1923 All 575, A I R
 1928 Lab 726; 77 Ind C 875, 65 Ind C 368

Statement must be certain An admission must be certain, and consistent,
 definite and clearly proved. It must, in addition, be couched in language reason-
 ably capable, without forced or strained construction, to bear the interpretation
 placed on it. While conjectural and suppositious statements are excluded
 absolute precision is not demanded in case of a declaration offered as an admis-
 sion. A statement is not inadmissible because of a possibility of ambiguity
Chamberlayne's Lr 1295 A vague admission is not enough 83 Ind. C 9
 904-21 A L J 869

Statement must be voluntary It is further required not only that the
 statement should be one of fact but that it should have been voluntarily made
 by the declarant. A distinction should, upon principle, be drawn between the
 admission obtained by the use of duress, where the will is overpowered or con-
 trolled and

the bare custody of an officer is not sufficient to exclude a statement otherwise

S. 18 voluntary. Nor is it ground for rejecting the statement as not voluntary that it was given by the declarant as a witness in response to compulsory process whether in Court, before arbitrators, commissioners in bankruptcy, or in other judicial proceedings. As the only important matter is the fact that the declaration was made by a party, the circumstances under which he made it are of little regard as unimportant provided he knew what he was doing and desired to do it. *Chamberlayne's Li* § 1294

18. Statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards, under the circumstances of the case as expressly or impliedly authorized by him to make them, are admissions

Statements made by parties to suits suing or sued in a representative character, are not admissions, unless they were made while the party making them held that character

Statements made by—

(1) persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding, and who make the statement in their character of persons so interested, or

(2) persons from whom the parties to the suit have derived their interest in the subject-matter of the suit,

are admissions, if they are made during the continuance of the interest of the persons making the statements

Prima facie

Admission attaches primarily if not exclusively to a statement of fact, to its constituent quality in relation rather than to the relation existing between the statement and the fact. A statement competent as an admission may in many cases, be one in an independently relevant rather than an assertory capacity. Thus the offer of one accused of crime to plead guilty under certain conditions while receivable against the declarant, is plainly not within the operation of the Hearsay rule. Admission of this type are perhaps more

pre-eminently those of course, however, being made by the party as belonging to the person making them and they are offered in evidence by persons not parties to the suit, the admissibility of statements against the interest of the party

utterance, when made thus represents the party's own belief (*Vide* s 20). By adoption, the party may assent to a statement already uttered by another person, which thus becomes effectively the party's own admission. By privity of interest and by agency the party's rights may in the substantive law be affected by the acts of another person and thus the other person's admissions may equally be available evidentially. *Wignote* § 1070. In order that an admission may be who made it had one interest of section 18 of the Evidence Act 711; see also *Ya Sheng v Mann* 17, 5 W R 268

A general Procedural Requirement From the historical point of view, it seems clear that the practical development of the subject of admissions was materially affected by the existence of procedural rules now practically obsolete. These forbade a party to call his antagonist as a witness and thus confined a proponent, as to facts within the latter's knowledge, to such statements as he may have made with regard to them. But an earlier and more potent formative influence, whether the admissions were judicial or extra-judicial, has been that it demands good faith the Courts should. It is prescribed for his story. It punishes a party who attempts to deceive the Court by false The same principle en to talk about a *Darby v Ouseley*, is held to explain any statements he may have made in the matter *Chamberlayne's Ex* § 1234

Scope of the section This section deals with admissions in general. The

R 434 "No to a suit. The th admissions

made by nominal parties, e.g., consignees suing in the name of consignor. When the Court considers the admission of such a party fraudulent, it should be rejected at once. See notes to *Banerman v Radinus*, 3 Sm L C 363" *Not Ex* 143 Admissions under this section are only evidence against the persons

S. 18. making them. Under section 33, *infra*, the admissions there enumerated are evidence against all the world

In order to render the admission of one person receivable in evidence against another, it must relate to some matter in which either both were jointly interested or one was *dermatively* interested through the other; and a mere community of interest will not be sufficient. Thus, where two persons were in partnership and an action made by the only of co part

only of co part
Rau stone v Gandell, 15 M & W 304 *Phillips v Elaget*, 11 M & W 84 So,
of the contractors, nothing
bind the personal represen
12. Foultham v Hallis 10

sions of the executor bind the survivor. *Seater v. Lawson*, 4 B. & Ad. 356; *Hathaway v. Haskell*, 9 Pick. 24. Neither will the admissions of one tenant in common be receivable against his co-tenant, though both are parties on the same side of the suit. *Dan v. Brown*, 4 Cowen 183 (1821); *Taylor* § 751.

Where a party sues in a representative capacity—a trustee, executor, administrator, and only a statements admission in his personal representative capacity.

other words, in all these relations, substantive interest rather than form of record is regarded as the determining factor. One who is to receive the fruits of successful litigation procedure holds responsible for his statements in connection with its subjects matter. *Chamberlayne's Eq* § 1311. In the Court of Chancery, in England, evidences are not received of admissions or declarations of the parties, which are

For example, the admission. In an action by A against X for prosecuting a suit contrary to an agreement, to prove the prosecution of the suit by X, A offered admissions by X of the obtaining of the judgment and issue of execution. They were objected to, on the ground that they were not the best evidence, and that a certified copy of the judgment should be produced.

In *Smith v*
case of the admis
grounds. The al
belongs to parol evidence from other sources. A party's own statements and
admissions are, in all cases, admissible in evidence against him, though such
statements and admissions may involve what must necessarily be contained in
some writing, deed or record. Thus the statements of a party that certain land
y deed
as the
admit

against himself may reasonably be taken to be true.¹ A statement made by defendant in another suit may be used as an admission within the meaning of this section *Hirish v Prossimo*, 22 W R 303; *Mohun v Chuttoo*, 21 W R 34; *Lala v Diqambar*, 22 W R 304 N; *Forbes v Mahomed*, 14 W R 28 P C.

its simplest form when the admissions are made by one who is a party to the record and who is also a real party

if he made the statement. When the statement proven is between the parties to the transaction, it has always been the rule that one party could prove the

of the action. Such admissions, *prima facie*, conclusive against the party who

L. E. A.-41

S. 18. making them Under section 32, *infra*, the admissions there enumerated are evidence against all the world

In order to render the admission of one person receivable in evidence against another, it must relate to some matter in which he is directly interested or one was *dermatinely* interested through some other person of interest will not be sufficient. Thus, in *Wigmore* § 107, citing *Pendell v. Gubens*, 115 Atl 859; *Stevens v. Continental*, 97 N W 862; *Chipman v. R. Co.*, 12 Utah 8 (Am) and an action was brought against them as partners of a vessel, and admission made by the one, as to a matter which was not a subject of co-partnership, but

admission as executor or the like would not be receivable against them as representative in his personal capacity. A guardian so far as his powers place him in a representative capacity is subject to the same rules, but the function of a guardian *ad litem* begins to end with the litigation, and consequently his extra judicial admissions are not receivable at all. *Wigmore* § 107, citing *Pendell v. Gubens*, 115 Atl 859; *Stevens v. Continental*, 97 N W 862; *Chipman v. R. Co.*, 12 Utah 8 (Am)

Where procedure still permits as the real and beneficial party in

not that the declarations of the real

Smith v. Lyon, 3 Cramp 455, which of the owner on a charter contract. *Ellenborough L. C. J.* said "Although action is in the name of the master it is brought for the benefit of the owner, I am therefore of opinion that anything said by the latter is admissible evidence for the defendant." A share holder of a company is not the real party in legal interest, and his statements cannot be received as admissions of the corporation taken in England for

35

that of the representative, here it is of the party through whom he derives his right to sue. Thus, if an executor were to sue for a debt, the declaration of the deceased against him would be receivable. *Proctor v. Proctor*, 29 In the same

land held by him the declarations of the former owner of goods that he had sold them have been admitted against the lord of the manor who claimed them as heriot. *Evat v. Finch*, 1 Taunt. 141, *Nort. Ev* 148

has no beneficial interest in the issue of the litigation will not be permitted to affect by his admissions the substantial rights of one for whom he is acting

the previous assignment. *Henson v. Wild*, 2 Camp. 651. *Green Ev* § 172. S. 1
 "The modern prac
 has no interest in
 prejudice of
Bumstead, 99
 party is even 1
L. C. & D. Ry
Payne v. Rogers, Doug. 107.

A nominal party may be affected by the admission of a real party, who
 though not named in the record, has a substantial interest in the result. *Falcon*
v. Famous Players, (1926) 2 K B 171; *Leil v. Insly*, 16 East 113.

Seip fact
 to do law
 8 Scott. N. R. 830 I in
 authority to make such contract or a larger authority to make all falling within
 the class or description to which it belongs, or a general authority to make any;
 a relation existed between the parties
 for instance, that of partners, by which
 by law the agent of the other for all
 particular partnership whether general
 or special, or usually belonging to it, or the relation of husband and wife, in
 considers the husband to make his

agency may be created

in quoad hoc, precisely the same as a real authority given by the defendant to the
 agent. This representation may be made directly to the plaintiff, or made
 publicly, so that it may be inferred to have reached him and may be made by

of the case, as expressly or impliedly authorised by him to make them' leave it
 open to the Courts to deal with each case that arises upon its own merits
Field p. 44

The principal constitutes the agent his representative, in the transaction of
 certain business, whatever therefore, the agent does, in the lawful prosecution
 of that business, is the act of the principal whom he represents *Green Ev* §

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lines,
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 says
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S. 18.

as his mere instrument. So whatever contract for his principal or at the time, any act, within the scope of his authority, and in the course of a particular contract or transaction in which he is then engaged, is in legal effect, and by his principal, and admissible in evidence not merely because it is a deed that being made at the time is treated as the declaration the *res gestae*, a part of the if in fact made by himself own authority, and not accompanying the making of a contract or the doing of an act, in behalf of the transaction to which they are part of the *res gestae* and general rule of law, excludes statement by an agent of what not a part of the transaction.

The declarations by agents are original evidence and not hearsay, being regarded as verbal acts, they are receivable in evidence without calling the agent himself to prove them *Doe v. Hawkins*, 2 Q. B. 212; *Tay* § 602. They are the ultimate facts to be proved and not an admission of some other fact, and the only question is whether the declarations were made and relied upon. It often happens, however, that the declarations of an agent are admissible as part of the *res gestae* and that they form no part of any contract and contain no element of estoppel in which cases they are of course, open to explanation or may be shown to be incorrect, like admissions in general. *Burr Jones* § 22. The admission of an agent that he purchased as agent is evidence that the purchase was made by him in that capacity and not on his own account *Goreebollah v. M. R. G. D. Boyd* 2 W. R. 10, see also *Mohesh Lal v. Basant*, 6 C. 340 (352), *Gorindj v. Chhotu*, 2 Bom. L. R. 651; *Parameswara v. Tijaithen*, 20 Ind. Cas. 637.

Admission by agent—When receivable. The admission of an agent can not always be assimilated to the admission of the principal. The party's own admission, whenever made, may be given in evidence against him, but the admission or declaration of his agent binds him only when it is made during the transaction.

§ 1078 The b

in *Fairlie v*
in 1788 had set

some time before the true principle was defined and accepted *Ibid*, 100.
(1) As the case of *Fairlie v Hastings*, 10 Ves. 123 (1804) is of some importance as well as of interest the judgment of Sir William Grant, Master of the Rolls is given in extenso "The subject of this cause is a loan of money by the late plaintiff, Maharajah Nabokissen to the defendant Warren Hastings. As it is not by bill in equity that money lent is to be recovered, it is incumbent upon the Court for

sum by instalments; that a bond remain with a Cauntloo Baboo, an agent should be advanced, and then should

never received the bond, *Cauntloo Baboo* in *S.*
 real, and could not read any part
 evidence of declaration by *Gobind*
 is whether these declarations are
 the bill. Upon that question my opinion is, that these declarations do not come
 within the principle upon which they are supposed to be admissible. As a
 general proposition, what one man says, not upon oath, cannot be evidence
 against another man. The exception must arise out of some peculiarity of
 agent may, un-
 his agreement,
 be what consti-
 tutes the agreement of the principal, or the representations or statements may
 be the foundation of or the inducement to, the agreement. Therefore, if writing
 is not necessary by law, evidence must be admitted to prove that the agent did
 with regard to acts done, the words
 uently tend to determine their quality
 must be affected by the words. But
 except in one or the other of those ways, I do not know how what is said by an
 agent can be evidence against his principal. The mere assertion of a fact cannot
 amount to proof of it, though it may have some relation to the business in which
 the person making that assertion was employed as agent. For instance, if it
 was a material fact that there was the bond of the defendant in the hands of
Cauntloo Baboo, that fact would not be proved by the assertion that *Gobind*
Baboo supposing him an agent, had said there was for that is no fact,
 that is, no part of any agreement which *Gobind* *Baboo*, is making, or of
 any statement he is making, is inducement to an agreement. It is mere
 narration, communication to the witness in the court of conversation, and
 therefore
 dismissed
Loughborn
 agent to B, whatever A does
 agent of B, is admissible
 which he makes for B, and
 the agent's account of what

also *Kahl v.*
 C 335
 a penalty for selling short measures a witness was proceeding to state what was
 said to him by one *Peely* who managed the defendant's business, as to a sale
 about to take place. *Lord Ellenborough* admitted the evidence saying "Peely
 ness, what he
 t, or on another
 said respecting
 a sale of coals, then about to take place and respecting the deposition of the
 in the course of
 affect his master"
Railway Company
 master to a Police
 ys servants, were
 received as admissions against the company, the station master being the proper
 agent to make such statements. *Ibid* In that case *Cockburn C J* said "I

Archibald J said "Being in charge of the station at the time a felony was
 committed, it was his duty to put the police in motion. That being so, I think
 he was acting within the scope of his duty, that he had power to bind the

not by the declarations themselves even when accompanied by acts purporting to be acts of agency. *Montgomery v Leith*, 162 Al. 216 (Am). Unless and until the agency is so proved and the declarations, acts or admissions of the agent come within the rule laid down, the evidence is not admissible. Such proof need not be invariably introduced in the first instance, the order of proof being within the discretion of the Court. *Burr Jones* § 255; see also *Chamberlayne's Fe.* §§ 1333, 1339, *Emperor v. Rulbaram*, 19 Cr. L. J. 789. Declarations and acts are competent to prove agency if there is proof of former similar acts or declarations recognized or approved by the principal. *Burr Jones* § 255. Agency may also be proved by proving that the agent has acquired credit by acting in that capacity and that he has been recognized by the principal in other instances of a similar character to that in question. In *Watkins v Venee*, 2 Stark, 368, a guarantee signed by a son for his father was admitted as evidence upon three or four occasions. *House*, 1 Camp. *Whitefield v Brand*, 10 the general agent, *Ram Dinksh v Ashori Mohan*, 3 B L R A C J 273.

Agency may be either general or special, and it may be express as when it

and be an equivalent to an original authority; *Omnis ratihabitio retrotrahitur et mandato priori equibatur* (A subsequent ratification has a retrospective effect and is equivalent to prior command) So, where A and B were jointly interested in a quantity of oil, which A contracted to sell without B's authority, and B at first assented to the agreement on hearing of it, but afterwards made the contract binding upon him. The point to be regarded in this clause is no agency, as to which the Court must be satisfied, but that there was authority given sufficient to cover the particular statements relied on as admissions. Though the maxim is *qui facit per alium facit per se*, the identity ceases where the agent exceeds the scope of his authority, and his admissions in such a case will not bind his principal. *Nort* E= 144.

infant because an

under agreement to make a new contract for the future occupation of it, will be wife should have this extensive power of conducting the business of the 2, Fay § 60b impliedly constitutes a third person his agent for the purpose of

impliedly authorised to make a
Fateh v Baldeo, 5 O W N 155=A I R 1928 Oudh 233

S. 18.

19 Pick (Mass U S) But the opinion or conclusion of an agent is not binding on his principal unless it is in his behalf and are not admitted but is admitted to make a principal Burr upon the personal action, inference is of acknowledgment. Limitation Act

(IX of 1908)

Evidence in Primary Admissions by an agent have the same quality of primary proof which characterizes other admissions. The declaration is equally competent though the declarant be in Court and available as a witness. The evidence furnished by the fact of an admission is primary. So also, the statement continues competent after the death of the principal, if made by the agent before that event. It is entirely unaffected by the death of the agent. *Chaitin v. Lym's Ex* § 1343

Agents
statements, which
latter will on
them (a) in

tion, or (b) in pursuance of an authority to make statements or reports as to matters affecting his principal's business or interests; or (c) in the due execution of a general authority to carry on the business of his principal or a particular department of it with full discretion and powers of management. *Hills v. El* 163. So a letter written by the secretary of a company by order of the acting directors, stating the number of shares held by M was admitted on behalf of his executors in proceedings against them. *Meux's Executors Case* 2 D M & G 222, see also *Natural Exchange Com* ment made by the chair. Act, 1862, at a general meeting against the company. In *Roscoe N P* 70 in rejecting the admission of the chairman in *Fry J* said

his agency. If that were so the statement would be admissible. *It is for it was made*

So also the secretary of a projected company has not by any power to bind the members of the provisional committee by admission. *Burnside v. Dayrell*, 3 Exch 225. In *Bruff v. Gl N Ray Co*, 1 F & F 115. *Hills J* rejected an admission of the secretary of a company as to the receipt of a letter. And an admission by the board meeting of a company registered consisting of a less number of directors than was required by the deed of settlement was rejected in *Ridley v. Plymouth Banking Co* 2 Exch 711. Admissions by servants of a company, in

dants in action to
to who was responsible
ence, when made at the time of
tent, against the company,

on the ground that his employment did not carry with it authority to make declarations or admissions at a suit performed his duty; and that which the injuries arose and was then engaged, but that it was a mere narration of past occurrence. But as has already been pointed out, that there is a class of cases in which the

S. 1

business, are made
Kirkstall
his, 18 C.
v. London
ramuay Co, 27 L. T. 193; *Mauheir v Nelson & Co & P* 58; *Loughboro*
389. But in
the agent's
Jo. *Widont*

So in every case the question invariably by the agent in the scope of his authority or, as it is sometimes put, in the time of his duty? If so, it is admissible against the corporation. The declarations

npo

don

by him. *Durr Jones Ex. § 357.*

contracts, give receipts, compromise
business, *Kishan v Har*, 39 I. A.
V N 321 He can maintain suit on
as and can receive payments and

Ramkrishna, 15 Bom L
v. *Ram*, 35 A 380; *Sark*

- S. 18. the transaction was really for the benefit of the family, he can not rely upon an acknowledgment of the liability, made by one of them as an acknowledgment duly made on behalf of all of

adult co-parceners under special circumstances, bind the other
suami v Krishner
 is also not open
 make an acknowledgment
 those who claim through the person acknowledging *Ram Kishan v Hardilam*
 71 Ind. Cas 737 = 1923 Lrb 135

against the employer? Because
 made in performance of any work
 been asked by a brakeman when
 point, and had then mentioned receiving certain instructions from the
 despatcher, this statement might be regarded as made in the course of performing
 his appointed work. *Wigmore* § 1078.

Admission by agents in criminal cases. The rules of admissibility are in
 general the same for the trial of civil and of criminal causes. Not only in
 practice, but in principle and in spirit there is no occasion for a distinction
 18 Cox 460,

upon the division of opinions whether under the circumstances or not
 the testimony of *Captain Coit* to the facts stated in the record, was admissi-
 ble. That testimony was to the following effect That he, *Captain Coit*
 was at *St. Thomas* while the *General Winder* was at that island, in September
 1924 and was frequently on board the vessel at that time, that *Captain*

of the authority of the master, the nature of the fittings, and the way

accomplishment of the voyage, being thus laid, the testimony of *Captain Coit* was offered as confirmatory of the proof, and properly admissible against the defendant. It was objected to, and now stands upon the objection before us. The argument is, that the testimony is not admissible, because, in criminal cases, the

S.

force of the argument. In general, the rules of evidence in civil and criminal cases are the same. Whatever the agent does, within the scope of his authority, binds his principal, and is deemed his act. It must be shown that the agent has the authority, and that the act is within its scope; but these being conceded or

be con-
poison.
istive or
circumstantial, but this is matter for the consideration of the jury and not of the legal competency. So, in the cases of conspiracy and riot, when once the conspiracy or combination is established, the act of one conspirator, in the prosecution of the enterprise, is considered the act of all, and is evidence against all. Each is deemed to consent to or command what is done by any other in furtherance of the enterprise. The master was just as much the purview of the

The evidence here offered was not the mere declarations of the master upon other occasions totally disconnected with the objects of the voyage. These declarations were connected with acts in furtherance of the objects of the voyage, and within the general scope of his authority as conductor of the enterprises. He was the agent for the *Captain*. His declarations were all made with reference to that object, and as persuasive to the undertaking

he is; and
principal
they had

An admission
criminal, as
defendant him
sible for a lett
letter was wi
it was written
Where a pers
agent, then it

5. 18. as where the agent is dead, which can be produced decided that a receipt given by the agent is the best evidence of the fact.

proved in the other, each particular fact is to be proved by its own evidence." Mr Plumer on the opposite side: "I desire it may be distinctly stated that the rules of evidence are the same in all cases."

between the agent and or said by the other; Chancellor Erskine in admitting the proof must advance cases, for a fact must be followed by a crime

is admissible

the statement of his servant, the strictly proved. It is not sufficient to say that because a man is another to the third the former is a servant of the latter. *Rabaram v. Embar*, 46 Ind. Cas 709-4 P L W. 120-19 Cr L J 789

Admission by wife The admission of the wife will bind the husband only where she has authority to make them. *Emerson v. Blomden*, 1 Esp 142, *Anderson v. Sanderson*, 2 Stark, 204. *Case v. Alderson*, 4 Campb. 92. This authority does not result, by operation of law, from the fact that the wife is a servant of the husband; but is a question of fact, to be

inference of with great

Greenl. Ev § 165, *Gregory v. Porter*, 1 Campb 355, *Riley v. Snyder*, 4 Barb 222, *Paethrop v. Furnish*, 3 Esp 142, *Where a wife is authorised to manage business of her husband, during his absence, her admission is evidence against her husband. Clifford v. Burton*, 10 Q B 190. The law on this subject is that laid down by *Alderson v. Burton*, 4 Campb 92. This authority does not result, by operation of law, from the fact that the wife is a servant of the husband; but is a question of fact, to be

may be his agent to make admissions with respect to matters connected with the trade." A wife's admission has been rejected to prove a slander by her husband *Tait v Beggs*, (1907) 2 Ir R 525. An admission of a daughter is not binding on the father. *Buchan v Luter*, 2 Agr 20.

Admissions by Pleadors, Attorneys and Counsels A vikal in this country has not ordinarily any greater power to bind his client than that which is possessed by an attorney in England. *Wooltrotte Et 237*, *Prem Sukh v Parthee* Pat. 11, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

his authority to act as agent in as it is to be implied from the mere been enlarged in the particular case, extends only to the management of the cause. Yet, conversely, all his admissions during the management, including utterances in the pleadings do affect the client. *Wignmore* § 1063. "The attorney is not the agent of the client for the purpose of making admissions, except in the cause and for the purpose of the cause. All that appeared here was that one of the plaintiff's witnesses

by a they Au a ly because Lu Art 17 n on the ala, 10 W R. as IB is not

evidence in the cause. *Young v Wright*, 1 Camp 139, *Petch v Lyon*, 9 Q B 147 (154). The reason for this distinction is found in the nature and extent of d for the management of the also *Parkins v Hawkshaw* *Wilson v Turner*, Launt, 398. If the admission is made appears that the attorney was *Chiff*, 4 Camp 133, *Ellis v Bishesuar*, 5 Pat 777 = 1927

Pat 61. But in *Wagstaff v Wilson*, 4 B & Ad 339 a letter threatening legal proceedings, but written before action begun, was excluded. See also, *Doc v Richards*, 2 C & K 216. So in the absence of any retainer at that time in the ke the admissions ss 185; *Burghart* 34 *Green* Lu § "If an attorney herein binds the tams 2 B & Ad

845, 855; *Standage v Greighton*, 5 C & P 406, *Taylor v Foster*, 2 C & P 195, *Griffiths v Williams* 1 T R 710, *Fruschie v Burton*, 9 Moore 64, *Lord Owen & Co v Wood*, 120 Ia 303 (Am)

wards be withdrawn" *Taylor* § 783 citing *Hart v Croudson Union*, per Ct. of here there was no counsel in the N 82, *Mr. Justice* to conduct his

S 18.

Venkata
v Minis
Bhasya

see also *Sen v Chunn Lal*, 51 C 385, *Ashtaran Muthu*, 105 Ind Cas 5. A counsel's authority is less extensive than that of a solicitor *Richardson v Peto*, 1 M & G 806, *R v Greenwich* 15 C 2. *Gaya*, 1923 (Pat) 307. It is not binding on the

to bind his client by 466, but see *Bansi Lal v. Emperor*, 30 Bom L. R 646-A 1 R 1928 Bom 241. If a plaintiff relies upon any statement by the defendant or his pleader made in a previous litigation between the parties, that statement must regularly proved. On proof of such statement the question arises as to its weight to be attached to it. *Mam Lal v Uma Charan*, 19 C L J 541. A judgment deliberately recording the admission of a pleader must be presumed to be correct, unless contradicted by an affidavit, or the Judge's own admission that the record was wrong. *Hu Dyal v Hura Lal*, 16 W R 107.

Oral testimony on behalf of a litigant in a litigation with B on the footing of a admitted as evidence against him in a litigation with B on the footing of a not strictly in it, although any subsequent. *British Insulate* Co v Jo 252-156 L T Jo 440. *Per Russel J* affirmed an appeal in (1934) 2 Ch 160-93 L J Ch 467-131 L T 683.

Partners and joint contractors. 1. virtue of

ner concerning partnership affairs by this Act is evidence against the member. By the act of Er

1 Taunt 104; *Pethering v Turner*, 1 Taunt 104, *R v Hardwick*, 11 East 589, *Fox v Chpton*, 6 Bing 792, *Nicholls v Dowding*, 1 Stark, R. 81; *Lucas v De la Cour*, 1 M & S 249; *Whitcomb v Whittington*, 1 S L C 44-9 Doug, 622. *Kals v Gope*, 2 C W N 166, 189. *Partners and joint contractors*

making admissions against or joint conf 588 (591) in the admissions admissible 281 (Am); 1 who are present one of them, within his presence within the partners have been observed made during

action, are admissible against both; and entries in the partnership books made by a partner during the continuance of partnership are admissible against both. Admissions of one partner are admissible against all to prove the execu-

tion admissible. Although one admission may be received, without question of credibility." *Burr* received against another on the same ground that they are

business and within the scope

Koersulaiah v. Mukta, 11 C. 528 (591), *Steph Dig Et* art 17; *Re Wintely*, (1891) 1 Ch 593; *Catha v. Jhoro*, 39 C. 995. While the firm thus created exists, it speaks and acts only by the several members; and of course when the existence ceases by dissolution of the firm the act of an individual member ceases to have the effect,

as by the agreement. *Bel.*

v. Braddick, 1

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is not

the statement made during the existence of the partnership, it is undoubtedly binding on and evidence against the other members of the firm. *Burr Jones* § 248. In *Wood v. Braddick*, 1 Taunt, 104 (1803) which was an action brought to recover from the defendant the sale proceeds of certain linens, which the bankrupts, in the year 1796, had consigned for sale to America, as the plaintiffs alleged, to the defendant jointly with one Cox, who was then his partner, but, as the defendant contended, to Cox only, the plaintiff produced a letter from Cox, dated 24th June, 1804, stating a balance of £919 to be then due to the bankrupts upon this consignment. It was in proof that on the 30th of July 1802, *Braddick* and Cox dissolved their partnership, as from the 17th of November, 1800 *Cochett* and *Lens Serjts*, objected that this letter, being written after the dissolution of the partnership, was not admissible evidence to charge *Braddick*. In rejecting the contention *Mansfield C J* said "Clearly the admission of one partner, made after the partnership has ceased, is not evidence to charge the other in any transaction which has occurred

rights created
lear that one
principle is it
joint contract
one person in
regard to past
last exception
Myl 191, 199,

200, when
payment,
against th
Whitney,
Deane V

S. 18. others, admissions made by the signatory at a time other than the execution of the contract were held inadmissible *Tuft v Church*, 162 Mass 527 (1m) And where one partner after having given a note in his own name said it was for the partnership in *Smith, 21 Wind* ("partnership, that for the rest, in con that relationship for himself in simi goods, either of t into the same business, at the same place, on his own account. The legal presumption is, when a person purchases a thing, he purchases it for him self In such case, the vendor, in order to charge another person as a partner, must show the purchase was made for the firm or that it went to their use. So where a member of a partnership bought a mule, ostensibly for himself, and when it was sent home he said it was for the firm, his declaration so made after the purchase was not of itself competent to bind them. It is a general rule of the law of evidence that the against all the rest, evidence is admis

received when the rule of interest in the cause excluded the witness" *Burr*

all the partners, and kept more or less also generally be received as *prima facie* evidence *inter se* *Gething v Keighley*, 9 Ch D 547, 551; *Lindley on Partnership* p 566 *Day* " *Golding v Newman* 10 B & C 910. In *Tolson v Pritchard* 3 De G M & G the books of against them a tion If one ground for an to exclude an allegation of a mistake or erroneous omission or insertion The only question is whether the books are *prima facie* evidence between partners and their estates In my opinion they are" But it is not conclusive evidence again if he can by clear evidence show that there is an 9 Ch D 549, c 5 Ir 5 *R* in *Gething v Keighley* App 587, *Hutchinson v Smith* *Day* .

with
So an
But representation or in respect to some partnership 2 B & A 795, *Thwaites v R* 81, per Lord Ellenborough of several parties in fraud

as fact by the innocent parties, created by the Court *Raeburn v* One member of a firm can borrow notes and such promissory notes as, 40 M 727, *Karmali v Karu* 11.

39 II 261.

Limitation—Saving of, by acknowledgment of one partner An acknowledgment or a payment by a partner without special authority is binding upon another partner. Under section 21 of the Limitation Act a partner who has no authority to acknowledge or to make a part payment, but if he has general authority to contract debts or make payments he has implied authority to keep the debt alive and it is unnecessary to make out a special authority.

Chegamull v Govinda Swami, A I R 1923 Mad 972 So in the absence of S.

v. Viera
18 (1918)
Ind Cas.
1 Ind. Cas.
33-35 M. 112; see also *K. R. Firm v Sathyarado*, 21 Ind. Cas 635=37 M.
146=25 M. L J 501

In *Premji v Doss*, 10 B 353, *Scott J* said at p 362. "It must be shown that the partner
plied to do so
to be presumed
bad High Court in *Gadu Bibi v Pirsolam*, 10 A. 418 and *Candy J* of Bombay
High Court in *Dulsukham v*
W R 145; *Lalla v Bibu*, 32 A

) and though the
nership (*Watson v*
circumstances be
treated as continuing where, for instance, the retirement of a partner is kept secret
and payments of interests are made in the name of the firm *In re Tucler* (1894)
3 Ch 429=63 L J Ch 777, see also *Abulali v Ranchadlal*, 38 Ind Cas 872=
19 Bom L R 80 (95), *Karamali v Boralanji*, 26 Ind Cas 917=39 B 201=10
C W N 277

of payments by
s of Limitation as to
of that particular
form of liability is of first importance, and the solution lies in stripping the
proposition to the bare statement of the authority, express or implied, with
which the declarant was invested at the time of the declaration The discussion
is limited to admissions made after dissolution Prior to it, and whether the
admission be regarded as a new contract or an extension of an old one,
there need be no question of the partner's ability to charge his co partners
with the act which bars the Statute But after dissolution the agency and
its cessation, or rather the exact time of the determination of the agency
regulates the period when such admissions or payments which operate as
admissions become, as to the other partners, ineffectual *Burr Jones* § 249

partnership does not
Similarly a partner of
authority to give an
36 Ind Cas 225=

8 L B R 363

Parties suing or
party is receivable as
interest, & relation
to be affected by the ac
evidence as that other person may have furnished by way of admissions on this
privity may be
Where the p
administrator,
and only adn
statements ma

41; *Couling v Ely* 2 Stark 366), though it may bind the person himself when he is afterwards a party, *suo jure*, in another action. A solemn admission, however, made in good faith, in a pending suit for the purpose of that trial only, is governed by other considerations.

startling proposition," says Taylor, "that the assets of a testator, and the consequent rights of legatees may be affected by some inconsiderate statement which the executor, before the death of the testator, may have been induced to make." Taylor § 755. But statement of such persons is competent, made while representing the person beneficially interested, and in the transaction of business or in performance of the trust in such manner as to be part of *res gestae*. *Church v Howard*, 79 N Y 415 (Am), for an affidavit of guardian of an infant. *Concha v Concha*, 11 App Cas 541 543. So infant in another

"If he was a
while actually

607, 611, affirmed (1897) 2 Q B 192. *Trustee v. Humming*, (1897) 1 Q B 192. *Land etc Co*, 28 Colo 320, the Court ref
fraudulent admission.

14, Fox & Walters, 12 A & E 43, Dr 1

v. Russell, 53 Hun 17=4 N Y Supp 781 (1st Chancery H) and 70 N.Y. 1st S

operate as a waiver *Katlas v. Sheikh Chhennu*, 12 C 516, *Woodroffe*, 232.

§ 1076(2); (see also)

guardian of the person of an infant as to the property right of the latter are not for other purposes as 825, see also, 10 C L R 377, *Ammal* 24 I A rt of Wards, made bind or prejudice Cas 825=29 C L

J. 577; *Ram Aulur v. Royah Mohammad*, 24 C 853=1 C W N 117, 21 W R

253 An acknowledgment of debt

period of limitation *Ram Charan v.*

J. 375; *Sobhanadasi v. Sriramulu*

456, *Annahaganda v. Sanjadyappa*,

292; *Chhata v. Bullo*, 26 C 51,

guardian of a Hindu minor has no power to keep debt alive against the minor *Ramzuanji v. Kashinath*, 103 Ind C 529=A I R 1928 Mad 226

t in receiving

to the party is

same person

that view that

flows that the

becomes recipi-

other words,

the admissions of one co plaintiff or co defendant are not receivable against another merely by virtue of his position as a co party in the litigation This is necessarily involved in the notion of an admission, for it is impossible to discredit A's claims as a party by contrasting them with what some other party B has elsewhere claimed, there is no discrediting in such a process of contrast, because it is not the same person's statements that are contrasted Moreover ordinary fairness would forbid such a license, for it would in practice permit a litigant to discredit an opponent's claim merely by joining any person as the opponent's co-party and then employing that person's statements as admissions It is plain, therefore, both on principle and in policy, that the statements of a

who happen to be joined as parties to the case See also *In re Whiteley*

L R (1891) 1 Ch 558, *Azizul*

Lachman v. Tansukh 6 A 395; *Amrit*

W R 214=2 I A 113, *Chandewar*

lah v. Himmul Ali, 23 W R 519

by one defendant can not be read in evidence either for or against his co-defen-

to be read in

Johns

being,

.. have been

S. 18. afforded for cross examination (*Jones v Fairbairn*, 2 Ves 11, *Morse v Russell*, 12 Ves 355, 361, 363), and moreover, if such a course were allowed, the plaintiff might make one of his friends a defendant, and thus gain a most unfair advantage (*Witch v Mead*, 3 P Wms 311) *Taylor* § 151

But the situation has often been obscured by the circumstance that the co-party's admissions are received against himself, and that they are sometimes received also against the other co-party because of a privity of obligation or of title. But it is not by virtue of the person's relation to the litigation that this can be done, it must be because of some privity of title or of obligation, which would indeed have admitted the statements even had the declarant not been made a co-party. *Hignior* § 1076. In *R v Hardwick*, 11 East 578. *Fletcher* borough L C J said "Evidence of a defendant in trespass will not, But if they be established to

declaration of the one, evidence against all object" The payment period of limitation for the surety's debt. *Gopal Daji v Gopal Bin*, 28 B 248.

In *Ambar Ali v Lutfec Ali*, 45 C 159=25 C L J 619=21 C W N 100, at page 999 Mr Justice Mookerjee said "There can be no room for contrivance that the admission is good evidence against the maker of conveyance, but the question arises whether it is admissible against the other defendants. These defendants it will be observed, are jointly interested in the land now in dispute, along with fourth and fifth defendants, in fact, they claim under a common lease from the landlord, and have on the basis thereof, taken a common defence to defeat the suit of the plaintiffs. But these defendants were not joint owners of the property covered by the conveyance of 1894, and were strangers to that transaction. They consequently press the view that an admission made by the owners of that property cannot be received in evidence against them, merely because, since the date of the alleged admission, they have jointly acquired the property now in suit. In our opinion this contention is well founded and section 18 of the Evidence Act is of no assistance to the plaintiffs. The principle which regulates the reception in evidence of an admission by one defendant against another defendant, is formulated in *Sundari* 11 C 385, *Chaito Singh v Muddi*, 41 C 130=20 C W N 1217 are jointly interested in the subject matter these persons is receivable not only defendants, whether they be all joint relates to the subject matter in character of a person jointly interested is tendered. The requirement of the owners of fundamental

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in legal interest between the joint
relationship. *shop*, 11 B
a joint owner
as in *Blakeney*
person cannot
interest in the

the other to the litigation that frequently it is not in view of the

admission against the co-defendant

the words of section 18 were perfectly clear and in as much as he made the statement when he had parted with his interest in favour of his co-defendant in the present suit, the admission made by him could not be treated as evidence of admission against the co-defendant *Banbhallay v. Union Bank 30 C W N*

S.

that the brothers were not joint at the date of the sale and that the properties were exclusively owned by U put in a deposition given by another brother K in the suit in which the money decree against U was passed in the course of which K stated that the family was not joint and the properties belonged exclusively to U. *Hell*, that the deposition of K in the previous suit was not

including defendant No 6 constituted a joint family and that a certain property was joint family property. The defendant No 6 in the course of his deposition as a witness on behalf of the representatives of Upendra Nath Ghose in suit No 127 of 1911 stated that on the death of the plaintiffs' father Upendra separated from his brother and that there was no joint family. The defendant No 6 therefore was not claiming any interest in the property in question and in the 'admission' made by him in the previous suit he did not fulfil the character of a declarant jointly interested with the party, in respect of the property con-

urther more, it is

ay that at the time

No 6 there was

thers" *Nogendra*

v. Laurence Jule Mills, 25 C W N 89 (94)=61 Ind Cas 544. An admission of one defendant in a written statement in a suit will not be evidence against the

by examining that defendant who

Ind Cas 924, see also *Appar*

4 M L T 117=25 M L J 729,

s 2, *Hat Bakhsh v. Lachmuna*,

a confession of judgment by one of

nce against the other defendant

129, *Amrito Lal v. Rajanee Kant*,

11 I A. 113=23 W R 214=15 B L R 10, *Narindar Singh, v. C M King*,

A I R 1928 Lah 769, *Saidu v. Meher*, 101 Ind Cas 589, *Jones v. Turberville*

2 Ves Jur 11, *Hay v. Gordon*, 10 B L R 301=18 W R 450 P C, *Gopal v.*

Gopal, 28 B 248, *Worse v. Royall*, 12 Ves 362, *Daniel v. Potter*, 1 M & M 503,

Chandraeswar v. Chuni Ahn, 9 C L R 359. A co party cannot, indeed, as a

rule use the statements of his associate on the record as against the opposing

interest. He may, however, employ them in his own favour as against the

declarant. *Chamberlayne v. Et* § 1316

interest, and may be easily applied. Many other cases arise which cannot be brought under any certain rule but must depend largely upon the facts as to identity of interest, as they are brought out at the trial. In either case the authority should clearly appear before the statement of one should be considered binding as against another. Bare statements by an agent unaccompanied by

doing of his principal's business,

ess it were shown that the principal

In most cases the statements of an

l with acts in such a way as to be

part of the *res gestae*. *McKelvey v.*

S. 18. Admissions of persons having joint interest.

Persons seized jointly are seized of the whole, each being seized of the whole, the admission of either is the admission of the other and may

Nagendra v Lawrence Jute Co, 25 C

C 159=21 C W N 996=25 C L J

8 An admission made by some of several defendants in their character of persons jointly interested with the other defendants in the matter in respect of which the admission is made is binding on the other defendants *Bhika Mol v. Ganga Ram*, 69 Ind Cas 35; *Mansur Matbar v Alimuddin Khan*, 21 J. L. C. 571.

Persons and his fellows, whether they be all jointly suing or sued provided the admissions relate to the subject matter in dispute and were made by the declarant in his character of a person jointly interested with the party against whom the evidence is given.

Masjan v Alimuddin, 34

v. Mukta, 11 C 588

in evidence against those

were jointly interested,

mere community of interest will not be sufficient *Taylor Ev* § 700. An apparent joint interest is obviously insufficient to make the admission of one party receivable against his companions, where the reality of that interest is the point in controversy. A foundation must be laid, by showing that a joint interest is

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promisor is not bound by such admission *Manna v Madho*, 21 Ind Cas 165

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the admissions of party in interest. Thus the interest of cestui que trust of a bond, in a suit by the trustee, is an original interest, and not a mere incidental interest in the result of the suit, so also, the interest of persons in a policy effected in another's name, for their benefit. It is also a requisite that the statements should have been made during the continuance of the interest. Declarations, made after the declarant has ceased to have any interest in the matter are not admissions, but mere hearsay *Burr Jones* § 233. The admission of one executor does not conclude another. *Chunder Kant v Rammaram*, 3 W.

R 63 The admissions of the executor of a donor may be treated as the admission of the donor. *Dwarkanath v. Chundecchurn*, 1 W R 339. The admission of a *ryot* of the rate of rent at which he holds a tenure cannot be treated as evidence against another *ryot* to prove the rate at which he holds the tenure. *Nuroohun v. Naramee*, W R (L. B.) 23=1 Ind Jur O S 9.

Privies in Obligation. So far as one person is privy in obligation with another, &c., is liable to be affected in his obligation under the act by the acts or admissions of

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() _____, a member of the other classes of liability. If ignore § 1077.

Joint Promisors : Co promisors like principal and sureties are also privies in obligation, and on principle the admission of one should be admissible in evidence against the other provided the other conditions are satisfied. The rule is that, in the absence of fraud, if the parties have a joint interest in the matter in suit, whether as plaintiffs or defendants, an admission made by one is, in general evidence against all. Such was the rule laid down

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... the act of one member of a class is liable to be taken as the act of all. No acknowledgment of a Juden

Ashanullah v. Dakhini, 37

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18. of English Courts are by no means uniform in this respect. Thus in an action against joint makers of a note, if one suffers judgment by default, his signature must still be proved against the other. *Gray v Palmer*, 1 Esp 135, *Shirreff v Wells*, 1 East 48

Principal and surety. Principals and sureties are privies in obligation, i. e. one is liable to be affected in his obligation under the substantive law by the acts of the other. *Wigmore* § 1077. So where the effect of a contract is that a surety shall be responsible for the acts and admissions of the principal, such admissions are competent evidence against the surety. *Burr Jones Et* § 238. So the entries of the principal were evidence against the surety because they were made by the collector (principal) in pursuance of the stipulation contained in the conditions of the bond. *Whithash v George* 8 B & C 351; *Goss v Watlington* 4 B & B 132 (137); see also *Jordon School District v Gaets*, 23 D L R 739 (Canada), *Sanders v Keller*, 18 Ida 592. But ordinarily where a principal is not a party to the suit his declarations are not admissible, unless they are made while the employment in which the principal was engaged continued, and in such manner as to be part of the *res gestae*. *Burr Jones* § 233. The principle is thus laid down by *Greenleaf*: "The admissions which are thus receivable in evidence must be such as we have seen to be those of a person having at the time some interest in the suit to which he is a party."

It looks chiefly to the real parties in interest, in the same weight, as though they were parties to the record. Thus, those of the persons interested in a policy of the *cestui que trust* of a bond; those of the persons interested in a policy effected in another's name, for their benefit; those of the shipowners, in an action of the identifying creditor, in an action against a deputy sheriff in an action against the high sheriff, are all receivable against the party making them. And in general, the admissions of any party represented by another, are receivable in evidence against his representatives." *Greenleaf* Et cetera. incidental or contingent interest in the introduction of hearsay evidence. *Burr Jones* § 233.

so as to become part of the *res gestae* otherwise not. The surety is considered a party, and not for whatever he might be to proof of his conduct by original evidence, where it can be had, *ex parte* all declarations of the principal, made subsequent to the act to which they relate, and out of course of his official duty. *Greenleaf* § 197. So in an action against a surety the admissions of any admissions of the surety. *Rambhia v Sreedevi*, 25 M L J 668, *Lush J* 57.

had received. receivable. *Chesney*, one being a clerk, confessions of embezzlement made by the principal after his dismissal, inadmissible in evidence (*Smith v. Whittingham*, 6 C & P. 78. *Goss v. Hail*, 11 M L J 117).

37), though, *Whitnash*
McGahay v.
cise of Lx
 it even a decree against the principal
 to the amount of debt, but see *Drum-*
mond v. Priestman, 12 Wheat 515

the money that the wife's admissions of the receipt by her of the carriage
 and horses were admissible *Francis v. Lewis*, 10 Johns 35, *Greenl* 1;
 § 187 So when A guaranteed the performance of any contract that B might
 make with C, the admissions and declarations of B were held admissible
 against A, to prove the contract *Wells v. McDouell*, 5 Bing 195; *Greenl*
Ft § 187.

But where the surety, being sued for the default of the principal, gives him
 notice of the pendency of the suit, and requests him to defend it, if judgment

they operate against the surety *Greenl* *Ev* § 189

Privies in Title The admissions of one who is privy in title stand upon
 the same footing as those of one who is privy in obligation (*Vide supra* p 343)
 Having precisely the same motive to make correct statement and being identical
 with the party (either contemporaneously or antecedently) in respect to his
 ownership of the right in issue, his admissions may, both in fairness and on
 principle, be

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admissible evidence of any fact admitted by them to be true, and may be given
 in evidence to prove it, notwithstanding the confessions might be such as to
 show a

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 party extends not only to the admissions of them against himself, but against
 all who claim or derive their title from him, in other words, between whom and
 himself there is a privity There are four species of privity privity in blood,
 as between heir and ancestor privity in representation as between testator and
 executor,
 common
 privity of

confessions . . It is asked, why not swear him? The answer is, the other

Admission to land is so identified in title, that his admission title, that interest are received with the self interest involved in the ownership of the truthfulness of statement against interest in 19 Ill CS3, Taylor, § 787 It is imperative prior of stat affi Kel anc

fact of his being alive at the time of the trial, when, perhaps, his memory of facts was impaired, and when his interest was not the same, does not in our opinion, affect the admissibility of those declarations which he formerly made on the subject of his own rights" *Woolway v. Roe*, 1 Ad & E 114. So the declarations of former owners or occupiers, made while in possession, have been admitted as evidence of the nature and extent of their title against those claiming in privity of estate. *Taylor* § 758, *Doe v. Austin*, 9 Bing 41; *Darke v. Pierce*, 367, *Jackson v. Bord*, 1 Johns 230, 234.

scheme between the grantor and grantee, e.g. that the declarant, if at the time owner in possession, and conversely, that his being in possession does not make his declaration competent as an admission. *109 Cal 682 (1914)*.
On this ground, where the books of survey, under whose direct control they are offered, are shown to be in the possession of the declarant.
So, as to receipts for

admissible against the vicar, in proof of modus, by reason of privity between them *Jones v Carrington*, 1 C & P 329, 330 n); *Maddison v Nattall*, 5 Price 485. An answer in Chancery is also admissible in evidence against any person actually claiming under the party who put it in, and it has been held *prima facie* evidence against persons generally reputed to claim under him, at least so far as to call upon them to prove the contrary. *See* *Earl of Sussex v Temple*, 1 Ld 16 East 331, 339. The act of a vicar in mortgaging the rectory is admissible in evidence against him in a mortgage deed in interest of the original owner. *See* *11 A L J 221, Briggs v 10 A L J 390 Bakhshi v Lalladhas*, 35 A 353, *Burba v. Behari*, 70 Ind. Cas. 815.

The admission of a zamindar that the holding of certain tenants is **S.**
Moharrures at a given rent is binding on any zamindar who succeeds him without
 being an auction purchaser at a sale for arrears of revenue. *Watson v Nobin*,
 10 W R 72.

Sales for arrears of Revenue . . .

bind v. Ralhal, 12 C
Hossain v Girdharce
Lal, - Bom L R P C 78; *Pureshnath v Ananta Nith*, 9 I A 147, *Watson v*
Nobin, 10 W R 72 The auction purchaser at a revenue sale acquired all the
 rights, which the original seller at the date of perpetual settlement had *Forbes*
v. Meer Mahomet, 20 W R (P C) 44 He is not also bound by the admission
 of the previous owner *Rungo v Ry Coomaree*, 6 W R 197; *Radha v Ralhal*,
 12 C 37; *Paisa P v P* . . .

judgment debtor *Dinendro v Ram*
Kumar, 7 C 107 P C = 8 I A 65 = 10 C, L R 281, In *Lala Prabhu Lal v*
Mylne, 11 C 101 (413) it was held that an auction purchaser is not a representative
 of the judgment debtor
 See also *Gour S* . . . *vidence Act*
 6 W R 197, 1 . . . *ay Coomaree*
 is not barred . . . *a purchaser*
Gout of India, 11 B L R 71 (P C) = 11 M I A 247 Where the property
 is sold in execution of a decree, it can not be correctly said that the owner gives
 any right to the purchaser.
Mulji v Kashi Bai, 10 B . . . *Koodep v*
 judgment debtor to the exte . . .

his wish, and he is not bound by some of the acts of the judgment debtor, such
 as alienations made by the latter to defeat the decree but that does not show
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 a purchaser
 held in execution of a simple money decree against a judgment debtor is a
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 is between the judgment-debtor and the auction purchaser and the interests of
 the two are conflicting, the auction purchaser can in no sense be considered to
 be a representative of the judgment debtor *Narotam v Sulhraj*, A. I. R 1928

S. 18. *Johnson v. McCull*, 10 Johns (N Y) 33, to show that the ancestor had once would have been admissible 69 N Y. 404 Stating the rule for the admissions of an ancestor are admissible against him claiming under him by descent The principle upon which such evidence is

18. Am 377]; made again more would claiming under him b received in that the declar his interests were such of his title or possession would have to his own *Chadwick v Fournier*, 69 N. Y 404. In the same manner the admissions of a devisor are competent against the devisee, those of an intestate against his administrator, and those of a testator against his executor *Broadbush v Jarvis*, 13 Cal App 464. Thus in an action by an administrator against the widow of his intestate for the conversion of property, declarations of the intestate that his tenant was to pay no rent are admissible for the defendant *Mooney v Mooney*, 80 Conn 446, see *Nuttall*, 1 M. 6 C & P 100. *Cox v Baird*, 11 N. L. J 100. Intestate are admissible against his administrator, or any other claiming in his right *Smith v Smith*, 3 Bing N C 29; *Lat v Finch*, 1 Taunt, 141. A statement by the testatrix suggesting any inference as to the execution of a will would be an admission relevant against her representatives and would therefore be admissible as evidence *Nina v Shanker*, 3 Bom L R 465.

Life estate

admissions are to distinguish be

tail. A tenant for life cannot, unless empowered by some statute, prejudice an admission, the interest of a remainder man or reversioner, but a tenant in tail is regarded as representing the inheritance, and, therefore, what he says or does, will often be binding on the person entitled in remainder *Taylor* § 20. So the remainder man is bound by release of equity of redemption by a tenant in tail in possession *Reynoldson v Perkins*, Amb 563, *Pendleton v Smith*, 4 T. R. 71, that were not the law.

Rao, 82 Ind Crs 1002; 86 Ind Crs 853. But by Act I of 1859 s 3 the decisions as regards acknowledgment have been made absolute. The declarations of the tenant for life, do not bound the remainder man, as there is no privity between them, for a privity in estate is a successor to the same estate, not to a different estate in the same property, and the statements of the tenant for life are not admissible against the owner in fee *Hill v Roderick*, 4 Wills & P (Pn) 221.

prideces or as though they were his own *Jackson v Davis*, 5 Cow. (N. Y.) 11. An admission made by landlord, after creation of tenancy is not binding on tenant. An agreement between two proprietors to become joint proprietors not binding on tenants *Puran v Dhanpat*, 52 Ind Crs 739. But the declarations of the tenant are not admissible to affect the title of the landlord *Jones* § 243.

The admissions of mortgagor as against mortgagee are on the same footing as those of grantor and grantee, and evidence only in as far as they affect

estate mortgaged, and are limited in point of time to those declarations made before the signing of the mortgage *Loote v Beecher* 78 N. Y 155 An admission by the surviving daughter of a member of a joint Hindu family, that the children of her deceased sister were entitled to her father's share was held to be evidence of the existence of the title before the suit *Gour Lal v Mohesh*, 14 W R 181

Vendor or Assignor of personalty The same principle holds in regard to admissions made by the assignor of a personal contract or chattel previous to the assignment, while he remained the sole proprietor, and where the assignee must recover through the title of the assignor, and succeeds only to that title as it stood at the time of its transfer, in such case, he is bound by the previous admissions of the assignor, in disparagement of his own apparent title. But this is true only where there is an identity of interest between the assignor and

already stale, or otherwise infected with circumstances of suspicion *Harrison v Tallance* 1 Bng 15, *Greent Fv* § 190, *Faylor* § 790 citing from *Greent Fv* § 190 Thus, the declarations of a former holder of a promissory note negotiable

is not to be cut down by the acknowledgment of a former holder that he had no title *Barrough v White*, 1 B & C 325 explained in *Woolway v Fove* 1 Ad & Ll 114 116, *Shuo v Droom*, 1 D & R 730, *Beauchamp v Parry*, 1 B & All 89, *Hickell v Martin*, 3 Greent 77 So, so far as choses in action are concerned, this is one exception to the general rule already stated Therefore declarations of a former owner of negotiable paper are not admissible against one

of the indorser made while the interest was in him are admissible in evidence for the defendant *Bayley on Bills*, 502, 503, *Pocock v Dillings* Ry & M 127

Admissions of the act of insolvency, evidence against one *nam v Radha* 31 C L J 107=49 C J3 66 Ind Crs 15, see also *Re v Tolle-mache*, 13 Q B D 720 *Re Bottomley*, 81 L J K B 1020 So also evidence taken in the public examination of an insolvent cannot be used as against a third party to prove or disprove a title *Jnanendra v The Official Assignee*, 30 C W N 346, *Re Brunner* 19 Q B D 572 *In re Cooper* 19 Ch D 580 *Madkoram v Official Assignee*, 27 C W N 611

Illustrative cases of Admissible evidence In order to be a relevant admission, it is necessary to show that the person who made the statement had an interest at the time when he made the statement *Jogeswar v Akhoy* 19 C L J 1=22

as admissions only when the admissions are of a date prior to the date of their deriving interest Statements made by persons in possession of property and qualifying or affecting their title thereto are receivable against the party

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by accused to a Police officer are

under ss 17 and 18 of the Evidence Act. *Amrudy v. Emperor*, 44 C L J 233 = A I R 1927 Cr 17. A statement made on oath by the accused before the Coroner at the time of the inquest is admissible in evidence at the trial as a statement made by a party to a proceeding under ss 18 and 31 of the Evidence Act. *Emperor v. Raminath*, 28 Bom L R 811 = 50 B 111 = 93 Ind Cr 690. A statement in a case drawn up by an attorney for the opinion of a pleader is admissible in evidence as it must be regarded as a statement of the persons on whose behalf he was acting and what is said or done by him in the course of his business and within the scope of his authority is said or done by the persons on whose behalf he was acting. *Chandrasekar v. Bheswar* A I R 1927 Pat 61 = 5 Pat 777. A party is bound by the questions of facts, whether

Ganesan, A I R 1929 All 146. The admission

unsupported by other proof, should be received and citation *Mrs L v W L* A I R 1928 Sind 55 = 105 Ind Cr 410. A statement made by an agent to the effect that his principal was a bankrupt was admissible in evidence as an admission under section 18 of the Evidence Act. *Raj Futeh Singh v. Balloo Singh*, 3 Luck 416 = 109 Ind Cr 310 = A I R 1928 Oudh 233. An admission if gratuitous, can be withdrawn at any time and therefore such a confession though against the interest of the party making it, is of little value. *Badhu Ram v. Uttam Chand*, A I R 1925 Lab. 726. A Bitwar paper signed by the Partition Deputy Collector and containing entries required by the provisions of Ch 7, is a record made in the course of official duty within the purview of s 35, Evidence Act. It would also be evidence against the proprietors under ss 18 and 13, Evidence Act, because they

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him *Jumuna v. Lal* A I R 1929 Pat 254 = 10 P. L. T. 183. A pleader has authority to admit certain facts so as to dispense with the necessity of further proof in a criminal case at the trial. *A I R 1928 Bom 241 = 36*.
be proved by the plaintiff

accused under section 18 of the Evidence Act. *Amrudy v. Emperor*, 44 C L J 233 = A I R 1927 Cr 17.

Illustrative cases—Inadmissible evidence. An admission made by a creditor after transferring his debt to a third person to the effect that the debt had been paid to him in part or whole before he had sold the claim, is not binding upon the vendee under section 18 of the Evidence Act. *Wasana Singh* 25 Ind Cr 100.

made by his *Mulhinar* of the authority conferred by another plaintiff in a suit between plaintiff and vendee. *Ahmad v. Jauhar*, 84 Ind Cr 100.

257 = A. I. R. 1923 Lah. 16. A party cannot be bound by admission of his pleader as to law in as much as the parties must be presumed to know what is correct law. *Chantoo v. Murlidhar*, A. I. R. 1926 Oudh 311 = 13 O. L. J. 138 = 92 Ind. Cas. 732; *Fateh Ali v. Ahmal Din*, A. I. R. 1927 Lah. 281 = 100 Ind. Cas. 833; *Punjab v. Bhagwan*, 31 Bom. L. R. 89 = A. I. R. 1928 Bom. 89, *Mutha Chetti v. Muthu*, A. I. R. 1927 Mad. 852 = 26 M. L. W. 465 = 39 M. L. T. 240; *Ulchi v. Natlamali*, A. I. R. 1928 Mad. 90. Recitals, regarding the boundaries in a document not *inter partes* and statements made by third parties cannot be admitted. *Sarat Chandra v. Sarala*, A. I. R. 1928 Cal. 63 = 105 Ind. Cas. 6. one of several defendants in *Narindar v. C. M. King*, A. I. R. 1929 Lah. 129. *Kishan v. Lachman*, A. I. R. 1930 Lah. 133. Neither the declaration of a donor nor the declaration of evidence is against the R. 1928 Oudh 114. capable of being regarded as a stale or time barred claim, it is to his interest to make allegations which would save the claim from the bar of limitation. Having

were actually made *Ammallu*

Admission by one of the defendants that the land in a suit is ancestral is not binding on the others when they are not represented by him and have independent rights of their own. *Aishore v. Lachman*, 123 Ind. Cas. 109 = A. I. R. 1930 Lah. 230.

The Mohants of *Deva Prithi Sahab* are managers. A Chela must first be nominated

cannot be regarded as admissions

Worshippers are not bound by the admissions of previous Mohants. *Ram Parshad v. Shivomani*, A. I. R. 1931 Lah. 161; but see *Vidya Purna Tritha v. Vidyanathi Tiratha*, 27 M. 435; *Ilargan v. Baldev*, 127 P. R. 1908 = 123 P. W. R. 1908 (F. B.)

19. Statements made by persons whose position or liability

Admissions by persons whose position must be proved as against party to suit it is necessary to prove as against any party to the suit, are admissions, if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and if they are made whilst the person making them occupies such position or is subject to such liability.

Illustrations

A statement by C that he owed B rent is an admission, and is a relevant fact as against A, if A denies that C did owe rent to B.

Scope of the section. Ordinarily statements by strangers to a proceeding are not relevant as against the parties. *Cool v. Bahan*, 3 Ex. 183. But in some cases, the admissions of third persons, strangers to the proceeding are receivable. *Green v. Evans* § 191, *Taylor* § 759. The admission of a third person against his own interest, when it affects his position or liability and when that

5. 19. to add to the category of persons by whom a statement may be made before it can be considered to be an admission within the terms of the Indian Evidence Act. The statements referred to in section 19 become admissible only provided that the
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- to property,
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statements are admissible
 of such persons at a particular time; in which case the practice is now evidence in general is would be legally admissible in an action between the parties themselves. *Green v. Dy § 181*. Thus in actions against the sheriff for not executing process against the debtor, the admission of the debtor admitting his debt to be due to the execution of the sheriff. *Kempland v. Macaulay*.

42, *Re Brunner*, 14 Q. B. D. 572. So an admission by a person has been held sufficient evidence, on the part of the defendant, to support a plea in abatement for the non joinder of such persons as defendants in that suit; it being admissible in an action for the same cause. *Clay v. Longslow*, 1

Re Tollemache, 14 Q. B. D. 415.
 An admission made by a land

Jarret v.
 bankruptcy,
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Dy § 181
Edna ds
 } D 72
 his being
 others,
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Mal, 11 Lah. 503—A. I. R. 1930 Lah. 579—128 Ind. Cas. 300. In title proceedings in a previous title suit instituted by defendant against three persons are relevant under this section. *Jairam v. Loke Nath*, 125 Ind. Cas. 782—A. I. R. 1930 Pat. 405.

Illustrative Cases—Admissible Evidence. Where in a case of a disputed deed of adoption the defendant alleged that the deceased executant had become shortly after the execution of the deed aware of its existence, purport and nullity

taken regarding it, cannot be excluded as irrelevant, but is admissible under section 19, 19A or 191 or section 11 of the Evidence Act in a

for a long time in an admission in the defendant tenant's favour and amount to setting up a custom. *Janaki Kuar v. Usman*, 62 Ind. Cas. 417, see also *Rameshwar* An admission made by a person against and from the for

question at issue was
 whom her mother was
 it was alleged, that
 she was described as
 which she stated that she

had been living with the alleged father for 10 or 12 years, even if admissible in of no weight for the reason that her statement does not amount to an admission that she was living in adultery. *Maqbulan v. Ahmad Husain*, 26 A. 108 P. C = 8 C. W. N. 241-6 Bom L. R. 233-31 I A. 38

20. Statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute are admissions.

Illustration

The question is whether a horse sold by A to B is sound. A says to B—
"Go and ask C; C knows all about it." C's statement is an admission.

Principle. If a party, instead of expressing his belief in his own words, names another person as one whose expected utterances he approves beforehand, ment; and it "said Ellen- another upon a third person by himself,"

7 A. & E. 468, *Richards v. Morgan*, 33 L J Q B 114, *Wills' Ev* p 162

Admission by persons expressly referred to by party to suit. It not

cases, the party is bound by the declarations of the persons referred to, in the same manner and to the same extent as if they were made by himself. *Burns v. Jones*, 263, *Solomon v. Herne*, 2 Esp 695, *Williams v. Bridges*, 3 Stark 42, *Kemp v. Macaulay*, Peake's Cas 65. In such a case the admission of a third person are receivable in evidence, against the party who has expressly referred another to him for information, in regard to an uncertain or disputed matter. This species of admissions is well rec-

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what he says

if it is connected with the business which is referred to him, is evidence." In *Daniel v Pitt*, 1 Camp 364 note, defendant said, "If C will say that he did deliver the goods, I will pay for them." In the circumstances C's admission was held admissible. Similarly in *Brock v Kent*, 1 Camp (note) defendant desired the plaintiff to enquire of Jones about it, Jones being a person who had paid money. Jones' statement was held admissible. In *Garrett v Ball*, 1 Stark 160, which was an action of trover for a horse the plaintiff had said "if the defendant would take his oath that the horse was his, he should keep him." The fact of the defendant's affidavit was held admissible. In *1 C & P 533* the defendant said "him" he meant one H. His statement was held admissible. In *Sydney v Smith*, 1 Stark 160, the defendant said "the horse was killed was the horse which I bought of you." His statement was held admissible to charge the defendant, because he was a dealer in horses. In *R v Mallory*, 1 C & P 533, the defendant receiving stolen goods by the accused, the accused referred the police to his wife for a list of the prices and dates of purchase of the goods, stating that he did not know the value of the goods.

20. not know them, and the next day the wife handed the police the list in his presence. The list was received, is an admission of the price, and date. This is the principle of awards by reference on a contractual basis. *Rests on a contractual basis* is pronounced in *Higginson v. H. & Co., infra*. Such statements which were in the nature of awards required no stamp even when in writing. *Tay § 701.*

What questions may be referred. In the application of this principle, it matters not whether the question referred be one of law or of fact; whether the persons to whom reference is made, have or have not any peculiar knowledge on the subject; or whether the statements of the reference be adduced in evidence hereafter where two parties had on the construction of a Statute, it was held bound thereby & Sel 105; *Douglas v. Cooper*, 2 can be referred to a third party.

Sydney v. White, 1 M & W 435; *Taylor § 761*

Reference must be express. This rule must not be understood as giving the force of an admission to statements made by a witness as against the party who calls him. *Gardner v. Moulton*, 10 A & E 468, *R. v. Latchford*, 6 Q B 567, 577, *Bricknell v. Halse*, 7 A & E 456. There must be an express reference for information in order to make the statement an admission. Thus if A says, "I will now say what I know," the matter will

Killinger, 8 Wall (U S) 480 (Am). Thus, where a defendant stated that a book keeper would furnish whatever information was contained in the books, the

party makes the referee his accredited agent for the purpose of giving such answer. *Evatt v. Hudson*, 97 Ark. 265. If a party, on motion before a Judge, uses the affidavit of another person to prove a certain fact deposed to therein, such affidavit is on any subsequent trial evidence as against him of this fact, and that too, though the person who made the affidavit is present in Court. *Brickell v. Aulse*, 7 A & E 454, *Bollen v. Rullin*, 2 Ex. R. 675 (679), *Prichard v. Bughshaw*, 11 Com B 459, *Johnson v. Ward Esq* 47; *White v. Dowling*, 9 Ir L R 128, *Tay*, § 764

does not affect the reference. *McElue v. Troubridge*, 111 Hun 23=22 N.Y. Supp. 674 (Am); *Burr Jones § 263*

is bound by the facts

Lord
had
reced

n to have caused

mere admissions are not conclusive as is provided in section 31, but admissions

Gorahan v Husain, A I R 1927 All 659=103 Ind Cas 34, *Himanchal Singh v Jatwar Singh*, A I R 1924 All 570=46 A 710=10 Ind Cas 16, *Muhammad Imtiaz*, A. W. N (1893) 200; *Keshoram v Piar*, 71 Ind Cas 761, *China v Venkata*, 42 M 625

Admission by interpreters To render the declarations of a person referred to equivalent to a party's own admission, it is not necessary that the reference should have been made by express words but it will suffice if the party by his

interpreter should be considered a

nd are in no sense hearsay, nor is it necessary that his interpretation
A wife's statement
Schutter v Williams
ed by two persons
ication with each
statements of what

circumstances is
during a trial is
Scheerer v Harber,
cannot be admitted
People v. Ah Yute, 56 Cal 119 (1m)

Deposition
of a party's witness
the House of

- 21 Ings as admissions *British Thomson Houston v British Insulated etc Co* (194) 2 Ch 160, *Phip Ev* 214 Unless an express reference has been made to a witness on a certain question his statement will not constitute an admission as regards that question L R 2 All 209

Criminal Cases This section is applicable to criminal cases as well. Thus where the accused told a constable that his wife would make out a list of certain property, a list afterwards made out by her was held evidence against him. *J* expressly refrained from the effect of the previous evidence and where he had asked for certain inquiries to be made, facts elicited in direct answer or mere hearsay, are evidence against him *v Cambell*, 8 Cr App R 75, R v Westwood

Illustrative cases—Admissible Evidence The plaintiff and the defendant in a suit signed a written statement that he may against the plaintiff. Held that the statement of G must be taken to be an admission made in the suit by a nominee of a party thereto which was effectual as an admission by the party himself. *Humanchala v Jatuar* 80 Ind Cas. 16 A I R 1924 All 570, see also *Gordhan v Husain*, A I R 1927 All 603=103 Ind Cas 34, *Sitaram v Prasad* 47 A 921, *Muhammad v Imtia*, A W N (1898) 200

Illustrative cases—Inadmissible Evidence A party to a litigation is not bound by the statement of the mukteer of the opposite side who was cross-examined by the parties. *Mt Srimati Ausanbati v Ram Jas*, 4 U P L R 9 (Rev)

21 Admissions are relevant and may be proved as against

Proof of admissions the person who makes them, or his representative in interest, but they cannot be proved against persons making them and by by or on behalf of the person who makes or on their behalf them or by his representative in interest except in the following cases —

(1) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under section 32

(2) An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable

(3) An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission.

Illustrations

(a) forged or is not a statement by himself that the deed is genuine, nor can B prove a statement by himself that the deed is forged.

(b) A, the captain of a ship, is tried for casting her away.
Evidence is given to show that the ship was taken out of her proper course.
A produces a book kept by him in the ordinary course of his business day to day, and
A may prove
and parties, if he

were dead, under section 32, clause (2)

(c) A is accused of a crime committed by him at Calcutta

He produces a letter written by himself and dated at Lahore on that day, and bearing the Lahore post-mark of that day.

The statement in the date of the letter is admissible, because, if A were dead, it would be admissible under section 32, clause (2)

(d) A is accused of receiving stolen goods knowing them to be stolen.

He offers to prove that he refused to sell them below their value.

A may prove these statements, though they are admissions, because they are explanatory of conduct influenced by facts in issue

(e) A is accused of fraudulently lawfully taking possession of a thing

and told him it was genuine.

A may prove these facts for the reasons stated in the last preceding illustration

heads are receivable is discussed under each topic (*vide infra*)

to
a ci

the general rule as an admission *Abdul Gham v Emperor*, A. I. R. 1931 Lab. 763 The primary rule in section 21 is that an admission is relevant and may be proved as against the person
Gulab v. Fadali, 68 Ind Cas
evidence against him *Lachman*.
Ma Tha, U II R. (1897-1901)
be proved in a criminal case just as much as an admission by the defendant in a civil suit under section 21 of the Evidence Act But an admission under that

- 21 section is one made by the party against whom it is tendered before the proceedings in which it is sought to be given in evidence. It does not refer to pleadings in the case or to an admission contained in such pleadings. *Jemima v Vas* 1 Ind Cas 961=10 M L T 506=(1911) 2 M W N 576. A statement whereby of money is in most cases an

to a police officer is not if he is on his trial as an accused person yet it is acceptable in a civil suit as an admission under sections 17, 18 and 21 of the Evidence Act. *Bishandas v Bawa* Labhaya, 32 Ind Cas 18=106 P I title which was non-existent though making it if the title admitted had 37 Ind Cas 933. A member of a Hindu joint family, whose house was at Lucknow, practised as a pleader at *Hardoi*, and made considerable savings from his professional earnings. He eventually became managing member, but was all along District earnings so entered

he purchases in the name of B was a statement against his own *Sury Narain v Ratanlal* 40 Ind

Cas 988=21 C W N 1065=20 O C 211=19 Bom L R 737=15 A L J 684. A written agreement by a tenant to pay the *Suantantram* or *Thandurava* is admissible as an admission of the evidence of custom unless the tenant explains away the admission and its effect can not be discounted or neutralised on the ground that the admission is recent. *Kumarappa v Manappa*, 44 Ind Cas 699=41 M 374=1918 M W N 350 (F B). An oral confession by an accused person not being open to exception under section 24, 25 or 26 of the Evidence Act is as an admission by an accused person a relevant fact, and may be proved at his trial under section 21, and therefore such a confession made to a Magistrate is relevant, and may be proved by the evidence of the Magistrate. *Ieroz v Emperor* 45 Ind Cas 843=11 P R 1918 Cr=19 Cr L J 651, see also *Per Heurad J in Emperor v Maruti*, 54 Ind. Cas 465=31 Bom L R 1065=21 Cr L J 65, *contra Per Shah J in Id.* The statement of an accused person as a witness in a previous case is admissible against him under this section to prove admission of relevant facts made by him in that statement. *Emperor v Banarsi*, 77 Ind Cas 629=23 A L J 144=46 A 254=25 Cr L J 477. An entry in the body of the bond that no further account is outstanding against the debtor does not bind the creditor in any way and is merely an admission by the debtor in his own interest. *Gurdilla v Nabi Balsh* A 1 R 1926 Lah 391=93 Ind Cas 996. The statement that a document is a copy of the original is admissible when made by a deceased person in a document admission under s 21. *Secthaya*

W N 578 (P C). Entries in

purchase for client

Ram v Madan

531 (P C). An

weight, but it

operates as an

after him his her

v Rabishankar

v Ahmed, 1923

before a military

criminal charge in a Civil Court

17 D 190

were untrue. *See Dev* L R 109, see also *Hirani* statements made by a soldier evidence against him on a *R v Colpus*, (1917) 1 K B 674=50 L J

wholesome provisions elaborately laid down in these two sections practically reduced to a nullity. *Queen Empress v Bhaurab*, 2 C W. N 702. An oral deposition made by a witness in a case before a Magistrate. *J* 651; see *Cr; Raykumar v Emperor*, 9 Pat. L. T. 449-A, I R 1928 Pat 473; *Madan Guru v Emperor*, 1 Pat. L. T. 381-73 Ind Cas 963-24 Cr L J 723; *R v. Crouse*, 81 J. P 28. *D* to a Police officer may *m*, 100

sible as admission. *Satish v Bheswar*, A I R 1930 Cal 559. But an admission of judgment by one of several defendants is no evidence against his co-defendant. *Rashiduddin v Nazimuddin*, 11 Lah L J 401-A I R 1929 Lah 721.

32, of the Evidence Act, or it must be relevant otherwise than as an admission. In either case its value would be slight. *Parak Chandia v. Prosauno*, 78 Ind Cas 719-28 C W. N 679-39 C L J 339

Representative in interest would be admissible against him claiming under him by descent, and the same manner as they would *Green v* § 189, *Davis v Nelson* of one having or claiming title him, they are competent against persons subsequently deriving title through or from him *Burr Jones* § 212. An admission against her own interest by the predecessor in title of the defendant is relevant under ss 13 and 21 of the Evidence Act to shift the burden of proof. *Ind Cas* 700. The term "legal representative" C. P. C. cannot be the estate of the decedent *Naram v Jai Kishen* are of three kinds, namely (1) privies in blood, such as ancestors and heirs (*Weeks v Birch*, 69 L. R. 759) (2) privies in law, such as executor of a testator or

an admission made by the plaintiff's lessor in his own favour and was consequently not admissible under any of the provisions contained in section 11, 13, 21 or 32 of the Evidence Act *Radha v Sarbeswar*, 86 Ind Cas. 674=29 C W, N 469=A I R 1925 CIL 689

Ev § 520, *Phip* *Ev* p 223 The framers of the Indian Evidence Act in this

and (3) of the section. The reason for these exceptions are thus given by Mr Cunningham "this rule (i.e. admission cannot be proved in favour of the person making it) however, if enacted without any relaxation would work harshly as there are some statements which though they are in the interest of the person making them, are yet from some particular circumstances deserving of special credit. Such for instance, are the statements mentioned in section 32 of the Act, to which illustrations (b) and (c) refer. Practically the effect of this and the following exception is to let in a very large number of admissions as evidence in a man's favour, given to them" *Cum Ev* 137.
tive force. An admission against evidence, not only against parties in title, but also against strangers. *Rajcoomar v Bissessur Dyal*, 10 C 688.

Clause (1) The securities which have been devised by municipal law for insuring the veracity and completeness of the evidence given in Courts of Justice vary, as might be expected, in different countries, and with the systems of law in which they are attached. Several of those are principally relied on by the English law, such as the publicity of judicial proceedings, the compulsory presence of witness in open Court and the right of cross examination, etc. *Best Ev* § 51. Of these safeguard against false testimony confrontation and cross-

another, cannot be received in any criminal Court to affect anybody except him. Every individual who stands upon his trial in a British Court of Justice has a clear right to have the witness brought in front of the Court, to be submitted to his cross examination, that he may have an opportunity of interrogating him respecting all the particulars of the fact. We have seen that this rule is not violated when an admission is received against a party making it. But the same principle is not available when the admission made by a party is received in

as a relevant fact must have some probative force. So in eight cases where such

statements are made admissible by section 32, the circumstantial guarantee of trustworthiness has been shown. Clause (1) lays down that an admission by a person may be proved by or in behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as

such admission is always admissible. Section 34 of the Indian Evidence Act enacts that entries in books of account regularly kept in the course of business shall be relevant evidence though not sufficient of themselves to charge any person with liability. *Josuant v Sheo Naran*, 16 A. (157 (161))=21 I A 6. The admission of such entries on behalf of a person making them is an exception to the general rule laid down in section 21 of the Act. But where the documents are not proved to be account books regularly kept in the course of business their admission is illegal because proof of the entries therein would be in violation of

ments against proprietary interest
custom or matter of public int
sions of
behalf

of pay
fall within the language of section 32 of the Indian Evidence Act
and although they are
section 21 of the Act
purchased the holding

the entry in the sale certificate might be used in evidence in favour of
landlord. *Manik v Jagadindra*, 24 Ind Cas 263 see also *Farah v. Prosanna*, 73
Ind Cas 719=28 C W N 679=39 C L J 389. Statements as to the date of
birth of a person contained in his census returns and in affidavits filed by him are
admissible in evidence under section 32 of the Indian Evidence Act, if made by
or hearsay. *Ram v. Ram*, 19 M W N 208.
inter alia that
by one of the parties
in suit arose in
266. A statement
certificate, obtained
decree against the
person by him or his predecessor in title, and it cannot be used as evidence,
does not come under any of the exceptions to section 71. *Ramant v. Mahanand*,
31 C 380. So also a recital in a writ of attachment is not admissible in favour
of maker of the statement and is against persons who claim under an independent
title. *Moheseruddin v. Sumera*, 15 Ind Cas. 510. On the question whether
the Courts below should or should not have received in evidence the testimony
of a
document
person
suit
Act,
Babu Madho Das, 19 A. 77 P. C.

section 21 of the Evidence Act and exclude road cess returns which are sought to be admitted in favour of the person by or on behalf of whom they have been filed

against persons other than the one who has made the return. *Chalho v. Jhara*, 39 C. 995. A cess-return filed

by a stranger against another

Dina Nath, 43 C. L. J. 425.

of any person who claims a

title in interest. *Lachmi v. Jag Mohan*, 18 C. L. J. 643 (636), but see *Ramprosad*

v. Lala Sham Narain, 11 C. L. J. 22, where it is ruled that section 95 of

the Road Cess Act has no application, to the case where the parties who

tendered road cess returns in evidence were not the persons who filed them,

in pursuance of the provisions of the Act. Road cess returns are admis-

sible in evidence against the person by or on behalf of whom they are

filed. *Hem Chandra v. Kali Prasanna*, 30 C. 1033 P. C. - 8 C. W. N. 1,

Suarnamoy v. Sourindra, 89 Ind. Cas. 747-42 C. L. J. 14. The effect of

section 95 of the Cess Act is to prohibit the admissibility of return when

tendered in favour of person of filing it, and it has, and was intended to have no

immaterial whether it was put in evidence directly to prove an admission or indirectly for some other purpose. *Ram Narain v. Hara Narain*, A. I. R. 1926 Cal. 727-92 Ind. Cas. 104.

Clause (2) "Clause (3) has received no illustration in the Act, probably because it has already been

21. relevant admission when religion of deceased person is a fact in issue *Lang v Leon*, 7 R 720—A I. R. 1930 Rang. 42.

concomitants of illness and of physical
nymph of pain and distress. I think
ity of the case." *Dennis J. in Caldwell*
n *State v. Davidson*, 30 Vt. 383 (Am)
party are received to show the extent
general ground that such injuries are

incapable of
their effect"

It would be

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that the

suffering In some cases it seems to be required that the person be otherwise in
an apparent condition of bodily ailment, of which his statements are the natural
product *Penn Mutual L. Co v. Wiler*, 100 Ind. 103 (Am); *McMurry v.*
Rogby, 80 Ia. 325 (Am), *Wigmore* §§ 1718, 1719

Who may testify as to statements The extrajudicial statement of one
suffering pain or conscious of other bodily sensation may, as well as his
coherent or incoherent (jactitation on the same subject, be testified to by any one
who heard it. Accordingly, a wife, parent, daughter, nurse, other attendant, or
even a mere bystander is permitted to detail the statements to the Court.
Even the declarant himself may testify as to his own statements. *Chamberlayne's*
Ev § 2625.

to use of any degree of coherence. Whatever this may be, whether that of a single
word, or series of words, a disjointed or completed sentence, the evidentiary
purposes is the same. We are dealing with circumstantial evidence, logically
tending to establish the existence of a relevant bodily condition. On this ground
exclamations indicative of present pain suffering or distress, are normally
received without objection. *Chamberlayne's Ev* § 2626

Kinds of fact narrated—statements of past events and conditions, ex-

because they do not relate to an inferential state and thus other evidence is

is narrative is admissible as to who caused
R. v. Gloster, 16 Cox Cr 471 (173) The rule
Cleland & Co v J R Co v Newell, 104 Ind
 essent existing pain and of its locality are

admitted upon
 whether pain
 beyond the ne

ings, pains or symptoms

principle of guarantee of trustworthiness, for they are not naturally caused by
 the existing pain or other symptoms, but being deliberate accounts of past occur-
 rences,

to the

toms, and

ed in the same way. *Wignmore* § 1722.

Clause (3) This clause is intended to apply to cases in which the state-
 ment is sought to be used in evidence otherwise than as an admission, for instance

explaining an

inadmissible

by reference

31-A I R

is relevant

11, clause (1), as inconsistent with a rele-
 prisoner's innocence by circumstances

they will be excluded as

So also "care must likewise

res gestae The language

N 91-25 C 210, where the defendants

1 which they obtained under a parti

he plaintiff and denied the said partition

sly made by them, which went to show

that there had been a partition and they had changed their attitude could be

proved as against them and the statements were admissible evidence under

sections 21 (3) and 11 (3) of the Evidence Act An admission may be proved

on behalf of the person making it under section 21 clause (3) of the Evidence

Act if it is relevant otherwise than as an admission If self serving statements

are made in the presence of the opponent, and not denied by him, they are

evidence for this purpose, so in the case of taking accounts, or where the entries

are of a public nature (see 35-37) or

In the case of a house said to have

Raghunath v Briendeshwari L R 5 A 231=82 Ind Crs 582-A I R 1924 AIL

21. which the defendant was not a party, might be admissible in evidence as against the latter either under section 21 clause (3) read with section 11 clause (2) of the Evidence Act, or under section 32 clause (5) or under section 137 of the Act. *Sayeruddin v Samiruddin*, 72 Ind Cas 985=A I R 1923 Cal 379 Self serving statements are admissible where they make relevant facts highly probable or improbable or they are *res gestae*. *Harikar Prosad v Kesho Prasad* A I R 1925 Pat 68

Party can show mistake or fraud "There is no doubt that the express admissions of a party to the suit or admission, implied from his conduct are evidence—and strong evidence—against him, but we think that he is at liberty to prove that such admissions were mistaken or were untrue, and that he is not estopped or concluded by them, unless another person has been induced by them to alter this condition, in such a case the party is estopped from disputing their truth with respect to that person (and the person claiming under him) in that transaction, but as to third persons he is not bound. It is a well established rule of law that estoppels bind parties and privies, not strangers. See *Bailey J in Hearn v Rogers*, 9 B & C 686. The person against whom an admission is proved is at liberty to show that it was mistaken or untrue. When an admission is duly proved and the person against whom it is proved does not satisfy the Court that it was mistaken or untrue there is nothing in the Evidence Act and there is no general principle or rule of law to prevent the Court from deciding the case in accordance with it. *Misra v Ma Tha U B R* (1897 1901) Vol II, 377. An erroneous admission does not bind the person making such admission. *Mangru v Shivanant* A I R 1923 All 575. When in a petition there is an inadvertent admission as to the nature of certain property it is open to both sides to give evidence as to whether the person who made the admission was or was not acquainted with the incidents of the property when he made the statement. *Dudabanthu v Ma in Lal* 52 Ind Cas 113. Statements made by a party at a previous proceeding without any definite knowledge of his rights and liabilities do not operate as an estoppel. Where the previous proceedings were compromised at an early stage without any decision of Court the party can show in a subsequent suit that the statement previously made was untrue. *Mahamed v Pir Mahomed* 65 Ind Cas 363=A I R 1923 Nag 67

Statements Post Litem Motam If the analogies of other exceptions be followed [vide clause (5) section 12] all statements made *post litem motam* are to be rejected as untrustworthy. But it is questionable whether an absolute exclusion based on this distinction is either just or necessary. *Hopwood* 1721

Illustrative cases—Admissible evidence Where in a suit for mortgage the defendant admits the execution of the document he also limits the scope of the consideration. *Seth Jagannath v Dalborsal*, 21 N L R 40=47 C L J 223=107 Ind Cas 113=A I R 1918 P C 39. The fact that a co-defendant took part in certain *batuara* proceedings in which the land in dispute was measured and a map was prepared is admissible in evidence though it is not. Plaintiff's title was a limited one on the other defendants who claim under him. *90 Ind Cas 643=A I R (1916) Cal 236*. The accused under s 312, Cr P Code prematurely at a time sufficient to connect him with the crime, with the commission of which he was charged, had been shown to be innocent. It was held that although the Magistrate was wrong in convicting him, the Criminal Procedure Code was not rendered inoperative by his error. The purpose of enabling them to explain any circumstances which might be given, be rejected as inadmissible in evidence on account of this irregularity of procedure; and that *prima facie* as admissions, these statements were relevant under section 21 of the Evidence Act. *Queen Empress v Naranjan*, 10 Ind Cr C 679=Cr Rg 15 of 1893. The statements of an accused person, from which his guilt may be inferred are admissions and may be proved under section 21. *May Mal v Empress* 3 P R 1880 Cr. *Mt Mehro v Crown*, 8 P R 1907 Cr=5 Cr L J 182, *Haroon v King Emperor*, 8 O C 335=Cr L J 811, *Nga Po v King Emperor*, 5 Cr L J 360.

Illustrative cases—Inadmissible evidence Under section 21, a Court is bound to receive in evidence admissions of a party but no such rule applies to denials. *Janki v. Emperor* 49 A 482—25 A L J 337—A I R 1927 All. 383. A statement in an order for delivery of possession as to the rent payable in respect of the land is inadmissible in evidence in a suit between the landlord and the tenant in which the rent payable is in dispute. *Chandra Mohan v. Sheikh Elm* A I R 1926 Cal 415—87 Ind Cas 512. An admission by an agent in favour of his principal cannot be relied on by the latter to prove his title to property. *Maula Baksh v. Jafar Ali*, 4 Lah L J 437. A respondent's admission in a divorce suit is not evidence against a correspondent. *Gordon v. Gordon*, 53 P R 1870. A party's income-tax paper may be used against him but not in his favour. *Shah v. Emamun*, 11 W R 275. A party cannot use in his own favour an admission by his predecessor in his own interest. *Bijoy v. Kalipada*, 20 Ind Cas 78—17 C W N 1013—18 C L J 347.

22. Oral admissions as to the contents of a document are

When oral admissions as to contents of documents are relevant, not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under the rules hereinafter contained, or unless the genuineness of a document produced is in question.

Origin of the rule In evidencing the contents of a document, it has at least, his oral accounted for as advanced in early

English rulings, in a forceful opinion, *Parke B*

declarations were for with that mentioned in the schedule, although such admissions involved the contents of a written instrument, not produced, and I believe my Lord Abinger, who was not present at the argument, entirely concurs. Indeed, if such evidence were inadmissible, the difficulties thrown in the way of almost every

party himself admits to be true, may reasonably be presumed to be so: The

an unprofessional or ignorant man may be led to believe it may be so and so, where the real and true meaning may be the very reverse or something very

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A I R 1925 Pat. 68

Party can show mistake or fraud "There is no doubt that the express admissions of a party to the suit, or admission, implied from his conduct are evidence—and strong evidence—against him, but we think that he is at liberty to prove that such admissions were mistaken or were untrue, and that he is not estopped or concluded by them, unless another person has been induced by them to alter this condition, in such a case the party with respect to that person (and their but as to third persons he is not

privies, not strangers' *Pir Bailey J* in person against whom an admission is mistaken or untrue When an admission is duly proved and the person against whom it is proved does not satisfy the Court that it was mistaken or untrue there is of law, *Mysa v*

does not bind the person making such admission" *Mangru v Shivanand*, A I R 1923 All 570 When in a petition there is an inadvertent admission as to the nature of certain property, it is open to both sides to give evidence as to acquainted with the *bandhu v Mammal* proceeding without operate as an estoppel by stage without any decision of Court, the party can show in a subsequent suit that the statement previously made was untrue. *Mahamed v Pir Mahomed* 65 Ind Crs 63-4 I R 1922 Nag 67

Statements Post Litem Motam If the analogies of other exceptions be followed (*vide* clause (5), section 32), all statements made *post litem motam* are to be rejected as untrustworthy But it is questionable whether an absolute exclusion based on this distinction is either just or necessary *Hignior* 1731

Where in a suit for mortgage document he also admits the receipt *Moorital*, 21 N L R 40-47 C L J 222-107 Ind Crs 113-A I R 1928 P C 39 The fact that a co-defendant took part in certain *baluara* proceedings in which the land in dispute was measured and a map was prepared in which the plaintiff's title was admitted is admissible in evidence though the defendants who claim in 90 Ind Crs 613-A I R the accused under s 312, sufficient to connect them with the crime, with the commission of which it is held that although the Magistrate 342 Criminal Procedure Code

under section 21 of the Evidence Act *Queen Empress v. Narayan*, 1884 Cr C. 679-Cr Rg 15 of 1893 The statements of an accused person, from which his guilt may be inferred are admissions and may be proved under section 2 *H. Mehro v Crown*, 8 P W R. 1907 *perior*, 8 O C 205-2 Cr L J 811

is party tendering them is with-
out admission assumes a degree
to possess as of a construction
Judge may direct the docu-
F & P 673, *Boulter v. Peplow*.

S. 2

J. C. B. 133) *— 1 sup Ev 226*

Scope of the section This section departs from the English law as laid
down in *Slatterie v. Pooley* 6 M & W 664 Following Mr *Taylor*, the
views expressed in *Laurens v. Oucale* 1 Ir L R 352 has been adopted in the
present Act Oral admissions as to
provided in this section are excluded
statements as to such matters, are how

Cur Li 140 So when the existence conditions or contents of the original
have been proved to be admitted in writing by the person against whom it is
proved or by his representative in interest, such written admission is admissible
Section 6, clause (b) But written admission mentioned here must be distin-
guished from written admission made under section 58 This section does not
exclude admissions which the parties or their agents agree to admit at the

S B H C R A C J 163 (165) Oral admissions as to the contents of a
document are admissible when the party is entitled to give secondary evidence
of the contents of such document under sections 65 and 66 of the Act Such
admissions are also admissible when the genuineness of the document produced
is in question "Where the question is" says *Norton* "not what are the contents
of a document, but whether the document itself is genuine—that is, in the
handwriting of the party whose writing or signature it is alleged to be—evidence

of the document produced is in question The effect of the last clause of
this section seems to be that if such a document is produced, the admission
of the parties to it, that it is or is not genuine, may be received *Nort Ev 153*
Even where the contents of a document may be established by admission they
cannot
can the
be so pro
is not necessary *— 1 sup Ev 226*

Oral admissions of contents In
79—13 C L R 271 *their Lordships*

money is lent on terms
and, the lender suing
promissory note If
promissory note is
a case indepen-
3 (182)—A. W. N
da v. Alhoychurn,

50 In
appears to m
of sections 91,
denied that it
See also *Damo*

Rule in t
on this point
fixedly approved

23. final judgment a former action against the defendant. The Court used the following language. The admissions of a party are not open to the same objection which belongs to parol evidence from other sources. A party's own statements and admissions are in all cases, admissible in evidence against him though such statements and admissions may involve what must necessarily be contained in some writing deed or record. Thus the statements of a party though the conveyance the production of written admissions of parties as what a party admits against himself may be reasonably taken as true. The weight and value to the statements and admissions will vary according to the circumstances and must be determined by the jury. *Smith v Palmer* 6 Cal (Mass) 513. So the admissions of a party have been received to prove the contents of letters and of a deed. *Loomis v Wadham* 8 Gray (Mass) 501, the existence of a partnership, 67 Pa 374, the terms of a will and the contents of a telegram. On the other hand there have been cases in which the declarations of a party or their weight and value have been determined by the jury. They point out the danger of mistake or misconception as to the terms of written evidence and also the danger of falsehood or fabrication and the difficulty of detection and the danger of following record titles to be lost by mistake only so uncertain in character. They lay down the rule that admissions rank only with oral testimony and that unless made in open Court, they are competent only where parol evidence would be admissible to establish the same fact. *Hallbert v Fletcher*, 22 Ark. 453, *Burns v McElroy*, 11 Ark. 23, *Flournoy v Newton* 8 Ga. 306, *Burr Jones* § 209.

23 In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given.

Explanation.—Nothing in this section shall be taken to exempt any barrister pleader, attorney or vakil from giving evidence of any matter of which he may be compelled to give evidence under section 126.

Principle of exclusion on principles which examination it would be satisfactory. It would be the principles laid down

not to be 209

character has always been excluded and the rule has been so broad as to exclude all admissions thus made. Another instance of exclusion of testimony is that of an offer of one party to another to pay a sum of money or other valuable consideration with a view to a compromise of the matter in controversy. It must be permitted to men to endeavour to buy their peace without being

prejudiced by a rejection of their offers. Hence, evidence of such offers or proposals is irrelevant, and they are not to be taken as admissions of the legal liability of the party making them. But here a distinction exists between the cases of an offer to pay money to settle a controversy, and an admission of particular facts, connected with the case, made by a party pending a negotiation for a compromise. The more convenient rule might have been that which is applicable to communications between client and attorney, excluding as testimony, everything communicated in this relation, which rule, if applied here, would exclude every admission made during the interview which was had for such compromise. To some extent this rule was attempted to be introduced, excluding all admissions of the parties, even admissions of particular facts, where it appeared that they were expressly stated at the time 'to be made without prejudice'. But the exception was soon introduced, that the evidence was competent where it was the admission of a collateral fact. This theory is consistent enough with general theory of privileged communication, (vide ss 126 129) namely, that expeditions and extra judicial settlements are to be encouraged and that privacy of communication is necessary in order to encourage them, and there is indeed a privilege for a party's statements to an official conciliator. In policy however it may be doubted whether the recognition of

S. 2

that the supposed privilege does not fit the rule of law as it is everywhere accepted and applied. *Wigmore* § 1061(a)

appear

entered into any contract by it if the offer contained in it is not accepted. Similarly *Landley L J* in *Walker v Wilsher*, L R 23 Q B D 335, said "What I think they mean, if the terms he accepted, without prejudice, This theory contained in be used for its it contain the express words 'without prejudice', may still be inadmissible in evidence and conversely". *Wigmore* § 1061 (b)

Taylor § 793 'The essence of an offer to compromise is, as *Thomson v Austen*, 2 Drol & Ry 358, 361, 'is that the party making the offer Money paid upon

23. final judgment a former action against the defendant. The Court used the following language: "The admissions of a party are not open to the same objection which belongs to parol evidence from other sources. A party's own statements and admissions are in all cases, admissible in evidence against him though such statements and admissions may involve what must necessarily be contained in some writing declared or recorded."

"... as the best evidence does not apply to the admissions of a party as what a party admits against himself may be reasonably taken as true. The weight and value to the statements and admissions will vary according to the circumstances and must be determined by the jury." *Smith v Palmer* 6 Cb 4 (Mass) 513. So the admissions of a party have been received to prove the contents of letters and of a deed [*Loomis v Wadham*, 8 Gt. (Mass) 501], the existence of a partnership based on a written contract (*Eduard v Ira* 62 Pa 374) the terms of a lease in writing [*Edwards v B. & C. (N. H.)* 111]

1
... point out the danger of mistake or misconception as to the terms of written evidence and also the danger of falsehood or fabrication and the difficulty of detection and the danger of following record rules to be lost by testimony so uncertain in character. They lay down the rule that admissions rank only with oral testimony and that unless made in open Court, they are competent only where parol evidence would be admissible to establish the same fact. *Hallberton v Fletcher*, 22 Ark 453. *Bucks v McLeroy* 11 Ark 23, *Flournoy v Newton* 8 Ga 306, *Burr Jones* § 208.

23 In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given.

Explanation—Nothing in this section shall be taken to exempt any barrister, pleader, attorney or vakil from giving evidence of any matter of which he may be compelled to give evidence under section 126.

covered by this section are excluded recently by different Courts. But on explanations are more or less unsatisfactory the cases and to try to find out whether satisfactory

Principle analogous to that of privileged

When

the usual way by which the privilege is by stipulating that the

Ibid In *Dickinson v Dickinson*,

The rules of evidence, exclude to

of a party. Thus, the more fully to protect the rights of parties litigating all their communications with counsel are held to be privileged. Evidence of this character has always been excluded and the rule has been so broad as to exclude all admissions thus made. Another instance of exclusion of testimony is that of an offer of one party to another to pay a sum of money or other valuable consideration with a view to a compromise of the matter in controversy. It must be permitted to men to endeavour to buy their peace, without being

for granted, not because they are true, but because good policy constrains the temporary yielding of them to effectuate a greater good, is not admissible, truth being the object of evidence." "The preliminary question always is," says *Dor U J* in *Colburn v. Colton*, 66 N H 151, 156, "not merely whether an admission of a fact was made during a settlement or negotiation, but whether a statement or act was intended to be an admission. It is a question, not of time or circumstances, but of intention." So it is apparent that the occasion of the utterance is not decisive, that is, it may or may not have been accompanied by a reservation or an injunction of secrecy, and it may or may not have occurred during negotiations for a settlement or a compromise. What is important is the form of the statement whether it is hypothetical or absolute. If, making all implications from claim will a therefore the pl claim is abs occurrence in the course of compromise negotiations or in other words a concess-

trans v Small, 1 M & M 449 An offer of compromise, in the sense of a peace offer, may be made by an where the authority of the alleged agent for example, a wife acting for her husband will be rejected *Chamberlayne's Ev.* § 1448 An offer to compromise might be very well made, without restriction as to confidence *Ibid* So also to pay money by way of compromise with a view to buy peace is not evidence *Jetton*, 4 C. P 461, *Gregory v Howard*, 143; *Furner v Barton*, 3 Esp 474, *on v Benson*, 1 P Wms 495 In *Isie* was whether a written notice sent by a had suspended or was about to suspend be written "without prejudice" was inadmissible in evidence to prove an act of bankruptcy upon the hearing of a bankruptcy petition In admitting the petition *of a Paulan Williams* *I* said "It prejudice' with anot

23. See also *Grace v Baynton*, 21 Sol Jour 631. But now the question is whether the same rule applies in India also. Such a question arose in *Bombay* *a* but it was left undecided by the Appellate Court. *Madhabrao v Gulab*, 23 B 177. In that case the defendant pleaded limitation. In reply the plaintiff relied on an acknowledgment of the debt by the defendant. The alleged acknowledgment was written on a post card sent by the defendant by the plaintiff. It was in *Gujarat* and was as follows:—"I was bound to send Rs 30 according to my *taida* (fixed time) but on account of the receipt of the intelligence of the death of my father I have not been able to fulfil my promise. But now on his obsequies being over, I will positively pay Rs 30 to *Sant Meruanji's*. You, Sir should not entertain any anxiety whatever in respect thereof. As to whatever debts may be due by my old man, I am bound to pay the same as long as there is life in me. Therefore I write without prejudice and they disagree that even if acknowledged by limitation observations evidence. To exclude it from evidence it would be necessary to hold that the words 'without prejudice' amounted to an express condition that the card should be admissible in England apparently the card of *Vougan J* in *In re Dainary*, quoted, are not, as the Subordinate Judge in the Court of first instance supposed, mere *obiter dicta*. There are documents marked 'without prejudice' has in dispute or negotiation with another, and the dispute or negotiation. This rule is to be found in many cases.

"Probably a person may have his demand being proved at a time for until the claim is not only to enable negotiations to be entered into to settle an existing dispute. A document marked 'without prejudice' but which contains the terms be not accepted, can be admitted. *Spence*, 58 L T 433 = 57 L J Ch 200. In an anecdote of a young attorney who has always brought an action for breach of promise of marriage against him. When his letters

he merits of the cause and her means." For the purpose of the parties, a letter written without prejudice prevents it being read at the trial (*Patterson v Forrester* 33 Key 33). *Forrester*, has even been clearly privileged. *Peacock v Harper*, 26 W. R 109, *Oliver v Nautilus Steamship Co* (1903) 2 K.

B 639, *Powell* 293 The same rule is applicable in the case of conversations S. 2
 Unless there be a clear break between the conversation which is clearly *without*
prejudice and subsequent conversation no admission of a party in the latter
 part of the conversation can be given in evidence *Thompson v Austin* 2
Dowl. & Ry 361 Correspondence marked "without prejudice" can be seen
 s *Waller v Wilsher*, 23 Q B
 awarding costs. *Ibid* They
 r these are marked "without
prejudice" In re *Duntrey* (1893) 2 Q B 116: *Pracock v Harper*, 26 W R 109.
 the statements made during
 It is ordinarily against public
 A conviction based on such
 'superior, 11 C W N 26 N, see
 a dispute between two parties,

446), or where an agreement, though purporting to be a compromise, has been
 finally concluded (as, where it
Erognell v Leuclyn, 9 Pr 122, 20 C. W. N.
 1217. Where certain letters were
 the plaintiffs
 it prejudice' and the defendant's

under s 23 of the Evidence
 regards the letters it must be
 intended to claim the same
 6 O W N 1088=A I R 1930 Oadh 193 Section 23 is no bar to the use of
 admission in compromise which is not rejected *Sadhu v Botha*, 11 L L J.
 446=A I R 1930 Lab 293
 In *Healey v Thatcher*, 8 C & P 398 *Gurney* H excluded a letter beginning
 ddock v
 ally M.
 empt to
 Thomas,
 Jordan
 adverse
 party with a view to a compromise, or to an action, you must look with very

intention to admit liability to the extent of the claim" *Mearns v Amman*,
 11 C 130=20 C W N, 1217=25 C L J 12

24. Facts admitted can be proved by the witness "the question in the defendant, of money on compromise" and therefore to be admissible. *Thomson v. Austin*, 2 Dowl &

148 = 4 Pat L J. 676 = (1920) Pat 52.

which the Court can infer, etc This section d the words "infer that it was the intention of the fer that the parties agreed together that" In England there has been some difference of judicial opinion as to whether admis

be drawn almost as a matter of course from the nature and circumstances of the case" *Wills' Ex 299* This difficulty is further more obviated by the words used in the section

Explanation The explanation refers to the obligation on the part of Barristers and others to answer questions as to professional communications made to them in furtherance of a criminal purpose or as to any fact observed showing the commission of a crime or fraud since the commencement of their employment *Cun Ex 141*

Illustration 1. A barrister is asked a question as to whether he has seen a person to

it is for the Court dealing with the proper to such an admission *Punjab Singh v. Ramantur*, 52 Ind Cas 111 Admission made by the tenant defendant before the pleader of the plaintiff landlord, to whom one of the defendants went before the suit for compromise is admissible in evidence in the absence of any express or strongly implied condition that evidence of the same would not be given *Morgan v. Almond*, 20 C W N 1217 = 44 C 180 = 341 A. 571.

A I. R. 1926 Lah 509 = 92 Ind Cas 319

- 24 A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat, or promise, having reference to the charge against the accused person, proceeding from

Confession caused by inducement, threat, or promise, when irrelevant in criminal proceeding

a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him

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defined in the Indian Evidence Act" says *Mahmood J* in *Queen Empress v Babu Lal*, 6 A 509 (1 B) at p 539, "it, however, occurs under the category of admissions, and to make my meaning clear, I adopt the definition given by *Mr Justice Stephen* in Art 21 of his *Digest of the Law of Evidence*, by saying that a 'confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime' In *Queen Empress v Jagrup*, 7 follow the definition given "was written in view of a pre

the
and
kept
out the spot to the effect that he
whether those statements amounted
23 Held that the above statements
as they suggested the inference that
not intended by the accused, as a

confession of guilt they were an admission of a criminalizing circumstance and would form a very important part of the evidence against the accused in showing

Evidence Act makes a clear distinction between an admission and a confession. It is only under s 3

accused persons jointly
as against the rest

affect both the person confessing, and the crime confessed. As held by the *Yesuada* taken by themselves do not fall within that category. As held by the Allahabad High Court in *Emperer v Jagrup*, 7 A 646, the word 'confession' must not be construed as including a mere inculpatory admission which falls short of being an admission of guilt. Section 30 must be strictly construed. The learned Sessions Judge has construed the statement into a confession by a process of inferential reasoning which is not what the terms of section 30 countenance. See also *Emperer v Nani Gopal*, 15 C. W. N 593 (612) = 33 C 569

In *Queen v. Mac Donald*, 10 B L R App 2, *Phcar J* observed that there is a distinction in the Evidence Act between admissions and confessions, but the judgment contains no definition of the term. This case was followed by

24. *Prinsep J n.*

the subject
Tribhovan M

statements which it is proposed to prove against an accused person to establish an offence or in other words what admissions do amount to confession, remained unanswered

Mullik, 15 C

meaning of

between admission and confession In *Queen Empress v. Nidmadhub*, 15 C 335, *Petharam C J* also said at p 607 "If the contents of the document did not

amount to a confession relevant as an admission the learned Chief Justice

under s 21 of

admitted the existence of confession but did

not give any definition of the word 'confession'. The High Court of Madras

silent on this point

reported Madras

sion" one should

Empress v. Jagann

the Law of Evidence

time by a person

committed the crime

26 Ind Cas. 161

ting the guilt of a

committed the crime

followed the

of the Law

it has been

admission made at any time by a person

ing the inference, that he committed that

which amount to a direct acknowledgment

inculpatory statements which although they

of guilt, yet suggest an inference of guilt or from which an inference of guilt

follows The factor determining whether a statement amounts to a confession

but the fact that it leads to an

Tha v. Emperor, 5 L B R 131-4

10 P R 185 Cr

ing the inference that he committed the crime

P L R 1905=20 P R 1905 Cr; *Queen Emp*

(707), *Superintendent v. Lalit Mohan Singa*,

In *Queen Empress v. Jate Charan*, 19 II 363

Hakiman v. King Emperor

10 P R 185 Cr

him; it was no admission whatever of criminalizing circumstances. It was therefore, inadmissible. The statement held to be inadmissible in *Imperatrix v. Pandharinath*, 6 II 31 was of a different character. It admitted possession of a cheque alleged to be one of the criminalizing circumstances which were against the accused. In the present case the statement does not amount directly or indirectly, to an admission of any criminalizing circumstance, and is, therefore, outside the principle of the ruling cited." "In the result," says *Carnell J.*

Barindra Kumar Ghose v Emperor, 11 C W N 1114 at p 1197-37 C 167 "it seems to me that each case must be decided as it arises with reference to the question whether the particular statement concerned, whether it be positive or negative, verbal or expressed by conduct, is or is not a confession. See also *Muthu Kumar Suami v King Emperor*, 35 M 397; *Emperor v Cuna*, 22 Bom L R 1247, *Ganapati v Emperor*, 6 N L R 180-12 Cr L J 60-8 Ind Cas. 1181 "By confession I understand not necessarily a full confession of guilt, but any statement made which, being relevant to the issue, may be put in evidence against the person making it" *R v Wong Chin Kai, Roscoe, Cr. Ev 37* Confessions of other crimes not relating to the charge *e g* showing or admitting a general tendency even to the crime charged, are inadmissible *R v Cole*, 1810, *Roscoe, Cr. Ev 37*

In *Smith v Emperor*, 13 Ind Cas 605, at p 611, *Phillips J* said "There is no definition of confession in the Evidence Act but I take it that it must be something more than a mere admission. In *Emperor v Kangal Mahi*, 26 Ind Cas 161-15 Cr L J 713-11 C 601 when dealing with the admissibility of statements, it . . . they were put . . . of the accused . . . be found to amount to confessions. Accepting both these propositions I would add that in order to make . . .

... making, I am doubtful whether the fact that it does become incriminating owing to subsequent events would make it a confession" See also *Pan Gong v Emperor*, 19 Cr L J 42; *Jasoda v Emperor*, 53 Ind Cas 691.

An admission of all the ingredients required to constitute an offence is a confession. A confession is an admission made at any time by a person charged

... recovered stolen articles from the house of the person making the confession and from the persons named by him, held, that the confession was not rendered untrue merely because the person making the statement minimised his share in the dacoity. 126 Ind Cas 498-31 Cr L J 1017-A I, II 1931 Oudh. 74 A statement of the following . . . sion of complicity in an offence "I told . . . kill my husband, they were at liberty . . . against them. But when they arrived at . . . I endeavoured to restrain them and was . . . threats to kill me and my son if I . . . in the murder, nor did in any way assist the murderers after my husband was put to death" *Bhag Singh v Emperor*, 4 Ind Cas 429-21 P W. R 1909 Cr-153 P. L. R 1909 A statement of an accused to the effect that under threats of death he was forced to sit outside the

Gul Hossain v Crown
A confession must
state in law the offence

... 133 Where the complainant, it is . . . for the Magistrate to treat the circumstance as an indication of the accused's guilt. In *re Abdul Rahman*, 4 L W 556-17 Cr. L J 462-36 Ind Cas 142 To constitute a 'confession' under the Evidence Act, it is not necessary that the person confessing should make a full and explicit . . .

24. of his guilt so clean as to leave no other hypothesis tenable. *Smith v Emery*, 43 Ind Cas 605-19 Cr L J 189 The fact that the accused did not claim a piece of cloth as his own before the Police but admitted at that time that it belonged to the deceased might have been due to this that the defence is not

judicial case the legal act of confession is not a mere statement
1929 Cal 539

Confession, meaning of--English Law Stephen defines that "a confession with a crime, stating or If the words 'any time' time they seem too wide

■ K B 108 *Phipps* 255

Confession, meaning of--American view The general rule that a confession, a statement by one accused of crime directly or by necessary inference admitting his guilt, is receivable in evidence, provided it complies with certain requirements of procedure, is not questioned in any quarter. It necessarily follows from the very definition of a confession that it must, as a total, incriminate the declarant, as to the crime charged in the indictment. But while every confession must be an incriminating statement, it by no means necessarily The confession confession as to to the knowledge or not conceded,

"A confession in a legal sense is restricted to an acknowledgment of guilt made by a person after an offence has been committed and does not apply to a mere statement or declaration inferred" *State v Reinhard* Ev § 1476; *Wigmore* § 821 that an acknowledgment an inference of guilt is properly design

of facts which could be true whether the main fact existed or not" *Puley v* State, 1 Gr difference the main fact admitting with innocent or subordinate fact or marked

On the other hand, the term confession has been strictly confined, by Court, to distinct concessions of liability, nothing being left to inference. So "to constitute a declaration a confession within the legal meaning of the term it must amount to a confession of the crime charged, or participation in

such commission, as distinguished from admissions or other statements tending to prove guilt or innocence, or of facts from which, taken together, guilt is directly deducible" *Encyclopaedia of Evidence*, Vol III, p 298

Confession . . .
of admissions,
a criminal charge
exists and a special rule based on the general testimonial principle of trustworthiness exists, and a special rule, based on the general testimonial principle of trustworthiness of narration, becomes applicable. That rule satisfied, the confession occupies the status of ordinary admission; its relation to other rules of Evidence is therefore determined by its quality as an admission. For example, as an extra-judicial statement, it would ordinarily be obnoxious to the Hearsay rule but admissions are either not within the prohibition of that rule, or are an

law that it will not force any man to accuse himself; pain and force may compel men to confess what is not truth of facts, and consequently such extorted

Gilbert Ev 6th Ed (1801) p 123,

Wainwright, 8 A & E 691 (700),

Wills' Ev 2nd Ed 150, Taylor §

ived on the same principle as that

d, viz, the presumption that a

against his own interest *Taylor §*

K B 346 So it is clear that

Hearsay exception for statements

to day be so regarded, where the accused, not being compellable, fails to take the

stand *Vide section 32, clause 4 and notes thereunder; Wigmore § 816 (Foot*

note) As in the case of admissions, certain vicarious admissions, i.e. those of

agents and other persons are often receivable, so also in the case of confessions,

the confessions of co accused, co conspirators, and others are also receivable.

Wigmore § 816

matter begins to be considered, and it is recognised that some confessions should

an examina
Wigmore § 1
Leach Cr
by threats o

24.

suspicion of all confessions
to repudiate them upon the

of changing the law or the practice" *Wigmore* § 817.

The Evolution of Reason To a certain extent, the history of the evolution of the law of confessions is that of most rules in the law of evidence. As is said elsewhere the early history of the law witnesses down to the close of the sixteenth century was decreasingly one of administration and increasingly one of administration as part of the executive of the courts. Jurors as to what they might do were practically no rules, certainly none having the force of law. At most the action of the judges in this respect was determined by the custom, or practice of the various circuits of the King's Courts. The effort was to administer the customs of the realm or other provisions having the force of law with legal reasons, as that term was then understood, for the attainment of substantial justice, though, of course, conventional.

In respect to confessions by way of pleas of guilty, the judges made sure that the prisoner was fully aware of the consequences of his plea. The penal code then in force, for comparatively unimportant offences, accused laboured, it seemed but just that before the judge should allow a prisoner to plead guilty without the aid of witnesses, and hurriedly tried, often

not necessarily be taken at his word, he was to be warned and even, occasionally, advised to retract his plea. Of this judicial administration, as of any other, the characteristic guide and test was reason.

The political events of the seventeenth century in England, to which brief reference is elsewhere made, were united with the assumed necessity for concealing valuable judicial legislation, the temper and philosophy of the times and much else, to evolve the use of reason into the direction of establishing rules of law in place of those of practice or administration. During the eighteenth and most of the nineteenth centuries the rules of evidence were being formed. To a very large extent, this development was marked by a change from administration, as represented by the practice on the several circuits, into rules of substantive law relating to procedure. Positive regulation of admissibility of evidence, establishing classes of facts to be received or rejected had taken the place of legal reasoning as freely applied in the administration to the facts of the individual case. It might almost be said that practice had hardened into law. It seemed to the mind of the time the protection of individual liberty as of the reasoning faculty, that a species of legal character and the like, which

substantial justice

From this period or stage of legal evolution has come the multiplicity of conflicting decisions, each having the force of precedent, concerning the

and a lively consciousness, that it has been a voluntary, naturally, and a valuable from the trial of substance. The natural law that all confessions made after a certain time may be referred to the declarant by recognized classes of persons shall be respected. In many cases such statements would be calculated to mislead a jury that the usage of fact have been many and conspicuous. To a certain extent this evil consequence has been found to attend the operation of voluntary law which has but century classes or species of facts regardless of their probability effect in any particular instance even where any alternative process will never be secured in any other way. It has therefore come to be felt that a declaration should be applied to the individual case rather than employed in the creation of a treaty classes to which the quality of a declaration is subject for all purposes and denied by the substantive law relating to procedure. In other words while the feeling of the last century in favour of having a rule of law which led to the conduct of legal business and the rights and liabilities of procedure on a higher and far reaching judicial distinction of each particular case regarding the work of the courts is maintained. Where this rule is the relation to the law of procedure where certainly is important, a rule of law, having not the force of precedent and capable of codification, results from the principle of justice in any particular case. Should, on the other hand, the law, the law of actions, the law to be attained, the enforcement of the law, the expediting of trials and the law are to be reached. At this point sound legal reasoning, the flexibility of a legislative action, properly takes the place of the rigid rule of law, the precedent enforcement on appeal. Into this stream of legal evolution, the interesting structure of the element of reason, the modern law of confession is and for some time has been, gradually emerging. *Chamberlaine's J. r. 25 1917, 1918*

Narration as affected by Motives to Confess guilt. The trustworthiness of confessions of guilt has been a constant theme of argument in the administration of justice. From the point of view of logic, the question is whether the confessional narrative is explainable by any motive other than that of a consciousness of guilt arising from actual guilt. Obviously a double inference is involved,—first from the utterance of the confession to a consciousness of guilt as its motive cause and secondly from that

cause than the actual doing of the deed. There have been false confessions in every case whether at

the confession to the
ords, of the confession
being a voluntary one, the process was one of *choice of motives*. If the confession
was a false one,
of utterance with
non-confession
who is it?
confessor chooses
though damag-
es of damaging

gence, his physical condition (hunger, fatigue, fear), and his environment. E.g. in the old English case where (under the then trial rules of Evidence) a confession was excluded because some one had promised the accused a glass of beer if he would confess, we could hardly conceive of ourselves making such a choice of motives; but we might have to believe that this particular man did make it, after we learn all the data about him. So, too, the oft-repeated case

4 in China of a man falsely confessing and implicating the guilty one out of execution, rests on motives which would not be meretricious

between the observers idea of the choice of motives that he would make and the choice of motives that the accused bears what he is, is alleged to have made. And the observer finds it difficult to judge the choice from any but his own experience and standard. The alleged choice of false confession by the accused could have been due only to the dominance of a motive so unlikely and queer (from the observer's experience) that the explanation seems far-fetched and improbable.

Hence the decision in such cases calls for wise acquaintance with the human nature of confession and an estimation of the probabilities that one of the rare or unusual motives is in deed present and dominant in the case in hand! — *Wignores Principles of Judicial Proof* § 222

Same—Motives for confession. 'The confession is a very extraordinary psychological problem. (1) In many cases the reasons for confession are very obvious, the criminal sees that the evidence is so complete that he is soon to be convicted and seeks a mitigation of the sentence by confession, or he hopes through a more honest narration of the crime to throw a great degree of the guilt on another. (2) In addition there is threat of vanity in confession—is among young peasants who confess to a greater share in a burglary than they actually had (easily discoverable by the magniloquent manner of describing the actual crime). (3) Then there are confessions made for the sake of care and winter lodgings. (4) confession arising political criminals and others). (4) There nobility, from the wish to save an intimate such as occur especially in conspiracy the men of the real criminal or for the destruction of in the latter case guilt is admitted only until the plan for which it was has succeeded, then the judge is surprised with a well founded regular and successful establishment of an alibi. (6) Not infrequently confession of small crimes is made to establish an alibi for a greater one. (7) And finally there are the confessions catholics are required to make in confessional and (8) The death bed confessions. The first are distinguished by the fact that they are made freely and that the confessor looks at first to state his crime, but aiming to make amends, penance. Death bed the desire to prevent person. (9) A number of cases may perhaps be explained through the of conscience persons who are would appear ceases, etc. If the confessor only intends to free himself from the cause

in response to mere pressure, we have a cause of conscience. There is always considerable difficulty in explaining these cases. To deny that there is is comfortable but wrong, because we each know collection of cases in which no effort can bring to light a motive for confession. The confession is made because the confessor wanted to make it, and that is the whole story. *Wignores Principles of Judicial Proof* § 223 citing from *Hans Gross*, Criminal Psychology.

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confessions are either rough mistakes are the mistakes a corpse for finding the body of the

but do not know that legally he is not guilty. (*R v Lambie*, 5 C 26, 5, *Neary* R, 11 C 101.) In many cases false confessions are intentionally made to escape a punishment and this includes all those false confessions which are extorted from a person physically or mentally tortured. A second motive is a desire to shift the blame, which may be illustrated by the case of a man falsely accused of a conspiracy to defraud a bank, who, by a confession to throw off suspicion as to his crime, transferred the blame to another who has already committed a similar crime. A third motive is a desire to escape a punishment. A fourth motive, originating in the relation of sexes, is thus described by the *Illustrations* to whom we are originally indebted for the whole of this section—In the relation between the sexes, says the *Illustrations*, the false confession is a confession, "may be said to be the most natural expression of the need of this as of many other eccentric habits. The female unvirtually, as for seduction, hazards the situation and her reputation, for the purpose of keeping off a rival and from doing just what she allures. The female marriage—the like is said to be even though in married women with a view to marriage through life. A fifth motive is vanity. *Best* takes the following extract from *Best* 11—Vanity will at the aid of any other motive, has been known (the force of moral sanction being in this case a little against itself), to afford an interest strong enough to induce a man to sink himself in the poor opinion of one party (a woman) under the notion of raising him in that of another. A sixth motive is the desire to benefit others. A seventh motive is the desire to injure others, thus—
the crime and the
revenge has for its
expense of their own part.
11 pp 11, 18, 28, also 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

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in habitual criminals the consciousness of guilt of a serious crime, plus the nervous strain of avoiding detection lead naturally to a confession upon being detected and arrested.

The process is one of a suddenly relaxed inhibition. Upon doing a heinous act the person is conscious of an emotional shock at violating common morality and at finding himself in danger of punishment and ruin upon discovery. He therefore now inhibits every form of conduct that could reveal his guilt. The nervous strain of these multiple inhibitions cumulates hourly and leads to—

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So all the inhibitions

no longer released. A flood of normal nervous consciousness returns. A full nervous relief is felt—equal to the physical relief given by a purgative after long constipation. There is no longer any strain of inhibition. And the

in this condition, however brief and violent the [the person] condition

reasonable hope of escaping discovery; *Impress v Dade*, 15 B 452 (479).

and half savage nature of the accused (*Taylor's Trial of cases*, para 135 cited

24 in China of a man falsely confessing and implicating the guilty one out of execution, rests on motives which would not be merited between the observer's idea of the choice of motives that he would make and the choice of motives that the accused, being what he is, is alleged to have made. And the observer finds it difficult to judge the choice from any but his own experience and standard. The alleged choice of false confession by the accused could have been due only to the dominance of a motive so unlikely and so queer (from the observer's experience) that the explanation seems far-fetched and improbable.

Hence the decision in such cases calls for wide acquaintance with the human nature of confessions and an estimation of the probabilities that one of the rare or unusual motives is in deed present and dominant in the case in hand.—Wigmore's *Principles of Judicial Proof* § 222

Same—Motives for confession. 'The confession is a very extraordinary psychological problem. (1) In many cases the reasons for confession are very obvious, the criminal sees that the evidence is so complete that he is soon to be convicted and seeks a mitigation of the sentence by confession or he hopes through a more honest narration of the crime to throw a great degree of the guilt on another. (2) In addition there is thread of vanity in confession—is a young peasant who confesses to a greater share in a burglary than they actually had (easily discoverable by the magniloquent manner of describing the actual crime). (3) Then there are confessions made for the sake of ease and winter lodgings. The confession arising from 'firm conviction' (as an ongoing confession arising from

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terms of confession, we are not but more or less with ease where such hallucinations are the confession is made freely

in response to mere pressure, we have a crucifix of conscience. There is a considerable difficulty in explaining these causes. To deny that there are such is comfortable but wrong, because we each know collection of cases in which no effort can bring to light a motive for confession. The confession is made because the confessor wanted to make it, and that is the whole story. (Criminal Psychology) Wigmore's *Principles of Judicial Proof* § 223 citing from Hans Gross

are the body for the

charge . . . According to the rules of evidence, what a person says and respecting a particular fact is amissible evidence, not in the nature of a confession, but as evidence of the particular fact.' 'The distinction between a confession and an admission, as applied in criminal law, is not a technical refinement but based upon the substantive differences of the character of the evidence derived from each. A confession is a direct acknowledgment of guilt on the part of the accused, and, by the very force of the definition 'excludes an admission which, of itself, as applied in criminal law, is a statement by the accused 'direct or implied' of facts pertinent to the issue, and tending, in connection with proof of other facts, to prove his guilt but of itself is insufficient to authorize a conviction.' *Per H. L. J. in State v. Gure*, 5 Mont. 125-126 Pac. 329.

What are confessions and what are not confessions were very lucidly explained by H. L. J. in *State v. Price*, 32 Or. 15-19 Pac. 904 (sm) where he said: "We take it that the admission of a fact or of a bundle of facts, from which guilt is directly inferrible, or which within and of themselves import guilt, may be denominated a confession. But not so with the admission of a particular act or acts or circumstances which may or may not involve guilt, and which is dependent for such result upon other facts or circumstances to be established. It is not necessary that there be a declaration of an intent to admit guilt; it is sufficient that the facts admitted involve a crime, and therefore port guilt, or as put by Mr. Wharton, 'I am guilty of this', and "this" imports the admission of all the acts constituting guilt. It is necessary however, that the accused should speak with an *animus confitendi* or an intention to speak the truth touching the specific charge of guilt and when he with such intention, narrates facts constituting a crime the guilt becomes a matter of inference, a resultant feature of the narration without an explicit declaration to that effect. So that we conclude that whenever the statements or declarations of the accused, voluntarily made, are of such facts as involve necessarily the commission of a crime, or in themselves constitute a crime then the facts admitted import guilt, and such admissions may properly be denominated confession." So it is admitted on all hands that there is a distinction between admission and confession. *R. v. Macdonald*, 10 B. L. R. App. 2, *Empress v. Debee* Pre. 1, 6 C. 530-7 C. L. R. 531, *R. v. Duthie* 3 N. L. R. 51-5 Cr. L. J. 131, *Emperor v. Mithomei*, 5 Bom. L. R. 312, *R. v. Gopal*, 7 C. 95-5 C. L. R. 171, *R. v. Chooramoni*, 11 W. R. Cr. 25, 26, *R. v. Jay Gomar*, 2 C. L. R. 62, *R. v. Meher Ali*, 15 C. 593, *Empress v. Nilmathab* 15 C. 595 (607), *Q. v. Jaffir Ali*, 19 W. R. Cr. 57 (62); *Faju Pramanik v. Empress*, 25 C. 711, *R. v. Hurnibole*, 1 C. 207, *Harris v. Emperor*, 1 L. R. 1927 Lah. 650.

Confessions—Division of Confessions may be divided into two classes—Judicial and Extra-judicial. *Rowce* Fi. 37. Judicial confessions are those which are made before the magistrate, or in Court, in the due course of legal proceedings, and it is essential that they be made out of the free will of the consequences of the

as a complainant

Magistrate, or in Court, this term embracing not only explicit and express confessions of crime but all those admissions of ions of this kind be weighed by the itself to supply it. *Cr. Ev. 17*. An the person. *Id.* Cr. 69. *Id.* *R. v. Gopal*, 7 C. 95 (607). *Oral* *Cr. 17*. may be in any form. A favo

24 confession may properly be in written form and the accused may either prepare it for himself or adopt it as his when prepared by another. For example, a prisoner's confession taken down by some one else and signed by the declarant is as much his written declaration as would be one prepared by his own hand. As to the manner in which a written confession should be authenticated to the tribunal, no established rule exists. That some authentication is necessary is obvious. *Chamberlayne's Ld* § 1512. In case no written document exists covering the confession, its statement may be proved by the evidence of any person who heard them. *Ibid* § 1571. It may be in the form of a letter. *Booth v R* 15 Cr L J 55=18 C W N 386.

Form of confession writing—Best Evidence Rule. Where a confession has been reduced to writing by the witness and signed by him the document itself is preferred in proof of it being the best evidence. Parol evidence therefore will not be received until the absence of the document has been explained to the satisfaction of the presiding Judge. *Chamberlayne's Ld* § 1573. But when some body else has it down the confession may be proved by oral evidence of some witness who heard it made. *R v Lajer* 10 Win Abr 96.

To whom Extra judicial confession is Made. An extra judicial confession can be made to any person or collection or body of persons. (*Harbans v K E* 8 O C 395, *Chanon v Crown*, 21 Ind Cr 468=14 Cr L J 576, *Heslin Mel v Emperor*, 15 Cr L J 502=24 Ind Cr 590. It is not necessary that the statement should have been addressed to any definite individual. It may have been made to a group of persons in authority, upon the great majority of whom it is believed. *85 Gr 69*). Though it is in connection with

confessions so made that they are carefully scrutinized, no reason why what has been said to him even the trial judge are equal voluntary confession by oral statements made, or letters written by the accused or by the prosecutor (*R v Heat* 69 J P 224), 2 K B 108 where the letter was

Gardner, 85 L J K B 1, against him, if independently proved. And it is immaterial whether the per-

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clear, consistent and convincing. The evidence of an admission of guilt to villagers may be as strong evidence against an accused person as a confession before a Magistrate. It requires no corroboration. The Court is to decide whether the persons before whom the admission is said to have been made are trustworthy witnesses. *Mannu v Emperor*, 134 Ind Cr 1018=A I R 1931 Oudh 415.

Extra judicial confession—Proof of corpus Delicti as corroboration. Whether extra judicial confessions uncorroborated by any other proof of the *corpus delicti* are of themselves sufficient to found a conviction of the prisoner has been gravely doubted in England. In the Roman Law such naked confessions amounted only to a *semi plena probatio*, upon which alone no judgment could be founded, and at most the party could only in proper cases be put to torture. But if voluntarily made in the presence of the injured party, or if reiterated at different times in his absence and persisted in they were received as plenary proof. *Greenl Ev* § 217 *Taylor* § 868. In each of the English cases usually cited in favour of the sufficiency of this evidence, some corroborative circumstance will be found. *Ibid*. In the United States the rule is held

receiving and weighing the evidence of confessions in other cases, and it seems countenanced by approved writers on this branch of the law. *Greenl. Ev.* § 217; *Taylor Ev.* § 868; *Guilla's Case*, 5 Halst. 168, 185, *Long's Case*, 1 Hayw. 524, 2 Russ. & M. 825, 826.

Weight of confession. The evidence of verbal confessions of guilt is to be received with great caution. For, besides the danger of mistake, from the misapprehension of witnesses, or from the prisoner's expressing his own meaning, that the mind of the prisoner and that he is often influenced by motives of hope or fear to make an untrue

confession, offenders, who persons which are exaggerated into sufficient proof, together with the character of the persons necessarily called as witnesses, in cases of secret and atrocious crimes, all tend to its rejection, *Ev.* § 214

decided conflict of of confessions. On affirming the slender classical precedents for's language. On in equally positive kind of evidence side of the controversy.

Judicial confession has been made testimony. Such testimony is often associates, angry victims, and over zealous testimony of these persons the suspicion

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that sort of negative evidence by which the proof of plain facts may be and
often is confronted. In other words, the suspicion that he has found it neces-
sary to entertain is directed entirely to the work of proving in alleged confes-
sions and for the following reason: "This is the reason above suggested as the real cause of the distrust we are
ready enough to trust the confession if there really was one, but we are going to
doubt and suspect for a long time before we accept it as a fact." *Per* *J. J. 11*
Danav v People, (1917) 63 Colo 119. *Mr J. Earle* touched the kernel of the
subject when he

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this seems to

if we distinguish the confession as evidence,
we find that few have ever really doubted
value, while the second is always to be susp

So the remarks that "confession should be received
especially oral confession" (*S v Mc Ken* 10, 35 Cal Rep 926) and that the
books are full of admonitions from the wisest and best Judges in this respect"
(*Per Groves J in Peachout v People*, 41 N Y 7, 19) are applicable to the evidence
of confession and not to the confession as evidence. *Emperor v Praniatha* 10
50 C L J 503, see also *Vellor v Vithia Chetty*, 48 Ind Cas 931=35 M L J
518, *R v Nazir*, 9 C W N 474. The reason for this caution is that under the
charge of a highly criminal offence, the mind must always be agitated and may
be influenced by hopes or apprehensions which it is difficult, if not impossible
sometimes to comprehend. *U S v Nott*, 1 Mc Lean (U S) 499. Besides being
satisfied that the witness who testified to the confession speaks truly the jur
must be satisfied that the witness could not be, or was not mistaken in the
substance of the confession. *S v Hughes*, 34 Fed Rep 732. In the last
named case *Mr Criminal J* in charging the jury said at p 736 and "For want of
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who made the confession

But it is generally agreed that voluntary and deliberate confessions of guilt
are among the most effectual proofs in law, on the presumption that a rational
being will not make admissions prejudicial to his interest and safety, unless
urged by the promptings of truth and conscience. *Moore on Facts* § 1141,
Greenl Ev § 21.

Conclusions from witnesses are not to be accepted. In *Queen v Soobhan*,
10 B L R 332, (335) *Phear J* said. Now, it is to be observed that these state-
ments are in general terms and so are merely statements of a conclusion as
not proved

for the opinion formed by the Court, because, it may turn out that the
taken together with the questions and the circumstances under which the
questions were put, do not in truth amount to a confession of guilt such as the
witness chose to represent it. See also *R v Ali Husam* 23 A 36 200,
Aha Hlaw v Emperor, 4 L R 116=7 Cr L J 82. *Lauab Bibi v R*,
22 P R 1883, *Queen v Babu Lal*, 6 A 503 (519), *R v Mohan Lal*, 4 A 46,
Nur Ali v Emperor, 81 Ind Cas 530=5 L 140. But where the actual words
used in the confession are not given it does not affect the admissibility but the
weight to be given to such evidence. *Ibid*, see also *Desraj v Emperor*, 19-3
Lab JS=29 P L R 486. There is no rule of law which requires an extra
judicial confession to be recorded. 11 P R (1913) Cr. 31 P R 1881 Cr, 21
Bom L R 1065, 111 P R 1887 Cr.

c III, section 8, see also *Greenl Ev*
v Simmons, 6 C & P 510. That
visions and for the following reason:
are often misreported—whether it is

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Confessions made by signs or gestures Under this head we may group

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whenever the spoken or written word could be excluded" Underhill Cr Ev §

141 But where an accused, not shown to have understood English, is asked

responsible for the act and he nods his

act does not amount to confession It is

used under-tood to be the meaning of

remarks addressed to him as to his complicity in the crime and without being

satisfied that the accused exactly understood the meaning and the import of the

, standing by themselves

erstood what was sought

which were intended to be

his questioners

approved and so

Cr L J 141-A I R 1930 Lih 81

Confession-Test of Truth A true confession made by a person who

takes part in a murder invariably adds something to the knowledge already

possessed by the investigating officer and that is the greatest test of its truth.

Mata Din v Emperor, 132 Ind Cas 228-32 Cr. L J 854-A. I R 1931

Oudh 166

Confession must be taken as a whole When a confession is used against

an accused person, the whole confession must be introduced So where an

accused person makes a confession, the confession is evidence in his favour as

well as against him and must be taken as a whole Queen-Emress v Dada

Ind, 15 B 452, Kati v Ind 83 Ind Cas 455-26 Cr L J 1142 Emperor v

1 (F B), Queen v Greathory, 7

ung Po, 1 Bur 324; Wafadar,

2 v Sahadu Rik Un Cr C 771,

7, 22 C W N 834; Simras v E

justice to the accused person

a confession to

tion therewith,

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2 Ali 154, 160

part which is against him, and disbelieve that which is in his favour R v

Higgins, (1829) 3 C & P 603, R v Cleves, (1830) 4 C & P 221; R v Steptoe,

(1830) 4 C & P 397, Halsbury Vol IX p 398, Faylor § 870, Kamoda v

Emperor, 46 Ind Cas 705 There were earlier rulings to the contrary R v

Jones, 2 C & P 629, Bosanquet Sergeant; R v Lyod, 1 Phill Ev (3rd Ed) 399

In determining whether the statement is true or not, the jury should consider

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24. only for measure as to take confession as a whole *Mannj Po Thin v Queen Empress*, L B R (1872-1893), 321; *Queen-Empress v Elgit*, L B R (1872-1893), 327; *Crown v Summudur*, 4 P R 1872 Cr; *Queen v Bishoo*, 9 W R Cr. 16, *Queen v Shesh Boodhoo*, 5 W R Cr 33, *Queen v Chala Khan*, 5 W R 70; *Queen v Sonapoolah*, 25 W R Cr 26; *Golole v Magistrate of Chittagong*, 25 W R Cr 15; *R v Gour Chandra*, 1 W R. 16(17); *R v Beshor*, 18 W R Cr 29; *Pila Ben v R*, 16 C W N 1055; *Pulin v Emperor*, 40 C 873, *Queen v Soobjan*, 10 B L R 332. So a prosecutor is not to be allowed to give in evidence part of a confession made by a prisoner, but it must be put in proof as a whole, so that the jury in one case, and the Judge and the assessors in the other may have the fullest means of testing its accuracy and forming their opinion as to whether the whole or part, and what portion of it, can be believed. For example, if a passage in a statement made by a prisoner standing by itself amounts to an passages which merely because point *Empre* 1926 Lah 551, Ind Cas 178=

with the general tenor of the confession. *Queen v Nityo Gopal*, 24 W R Cr 80. The mere fact that the accused has been interrupted, and therefore has not stated all that he meant

consequences (1) The prosecution must put in the whole of the accused's statement, including the portions favourable to himself as well as the unfavourable. But this does not prevent the use of statements which are separate in themselves though not forming all the accused's utterances nor of such fragments of a

has a right to lay before the Court the whole of what was said in that conversation of a crime, the full not being confessed against him, occasion, *relat*. *Queen's Case*, C 46 § 5, R. Case, *Leigh* the whole which whole any part the jury for their consideration, precisely as in other cases where one part of evidence is contradictory to another, of a confession are entitled to equal charges the prisoner, and reject that on grounds for so doing. *Q E v Jhina Valt*, Rat Un Cr C 436, *Neq v Lmt*, 10 B H C R 500; *Kamoda v Emperor*, 19 Cr L J 785 (Nag), *R v Lmt*, Rat Un Cr. C 370 *Mata Din v Emperor*, 1930 Oudh 113, *Lalsimay v Emperor*, 1930 M W. N 785. If what he said in his own favour is not

contradicted by evidence offered by the prosecutor, nor improbable in itself, it will generally be believed by the jury; but they are not bound to give weight to it on that account, but are at liberty to judge of it like other evidence, by all the circumstances of the case. (1) And if the confession implicates other persons by name, yet it must be proved as it was made; not omitting the names, but the Judge will instruct the jury, that it is not evidence against any but the prisoner who made it. *Greenl Ev* § 218.

A Judge ought to decide the question of the admissibility of a confession first and should in its ordinary course him and coming that this can be pressed to the extent of requiring that no part be accepted as true without accepting the whole. *Hasun v Emperor*, 53 Ind Cas 145=20 Cr L J 737; see also *Kamoda v Emperor*, 16 Ind Cas 705=19 Cr L J 785, *K E v Injico*, 15 A L J 15, *Q E v Umar*, Rat. Un Cr. C 371.

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Uncorroborated confession, evidentiary value of. If there is no reasonable
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Crown, 21 P W R 1907

cannot appropriately be
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6. 24. of an accused person are not subject to an examination on oath compelling his

other than the deponent *Emperor v. Yellaraddi*, 6 Bom L R 73 1be
 ble violence used to the accused for h
 ised in the police custody for more than
 the marks on his per on, were held to
 have vitiated the voluntary character of his confession, which wa, therefore

thus confirmed by the fact is proved to be true, and not to have been fabricated in consequence of any inducement. It is competent, therefore, to inquire whether the prisoner stated that the thing would be found by searching a particular place and to prove that it was accordingly so found, but it would not be competent to inquire whether he confessed that he had concealed it there. 1 Phil. 411; *Warickshall's Case* 1 Leach Cr. Cas. 293; *Mosey's Case* 1 Leach Cr. Cas. 301; *R. v. Gould*, 9 C. & P. 364; *R. v. Harris*, 1 Mood Cr. Cas. 333. This limitation of the rule was distinctly laid down by Lord Ellenborough and that where the knowledge of any fact was obtained from a prisoner, under such a promise as excluded the confession itself from being given in evidence, he should direct an acquittal, unless the fact itself proved would have been sufficient to warrant a conviction. East P. C. 607; *Hartley's Case* 130, *Green's Case* 231 and delivered them up.

to the prosecutor, notwithstanding it may appear that this was done upon inducements to confess, held out by the latter there seems no reason to reject the declarations of the prisoner, contemporaneous with the act of delivery, and

prisoner, thus improperly induced, and of the information given, by a search for the property or person in question prove wholly ineffectual no proof of either will be received the confession is excluded, because, being made under the influence of a threat, it is not voluntary and information of the prisoner is not admitted by the finding of the jury. The influence was groundless conduct.

Cr L. J. 488=12 Ind Cas 96

Where the circumstances of the case compel a tribunal to reject all the other evidence and act only upon a confession the confession must be used *in totum et verbatim*, and due effect must be given to every statement contained therein whether in favour of the accused or against him. *Jagdeo v. Emperor*, 12 A.L.J. 15.

The law does not require that the confession of an accused person be corroborated before it can be acted upon. It is for the Court to decide whether it believes a confession or not. *Empireor v Dhant*, 52 Ind Cas 581 = 20 Cr L J 721. The fact that the confession was retracted before the committing magistrate would not deprive it of its voluntary character. *Sheo Prasad v Emperor*, 52 Ind Cas 50 = 20 Cr L J 562.

372 Apart from inadmissible in evidence, they are not of such a nature as entitles them to any weight, because it is impossible to ascertain the exact words used by the person. To base a conviction on such a confession is not safe. *De Ry v Emperor*, A. I. R 1928 Lah 558-29 P. L. R 156. The evidence of an admission of guilt to villagers may be a strong evidence against Magistrate. It requires no corroboration.

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prison another them down, or by some one else who heard them. In the case of *Munger Bhoojan*, 10 W. R. Cr. 50.

Confession how construed. Where people are so ignorant as the Burmans are, of the an admission the acknowledge.

Circumstances strengthening Testimony to Admissions or Confessions. Among these would be the fact that the confession

jury; that the witness and the and both of them admitted to do

but does not necessarily establish the untruth of the main feature. *Moore on Facts* § 1182.

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Section 164 of the Cr Pro Code and Judicial Confessions. Judicial confessions indicate confessions which are made on a magisterial investigation

S. 24.

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tion, in the case of *Emperor v. Yelluaddi*, 6 Bom L R 337, the accused admitted ill usage, viz the unjustifiable violence used to the accused for his arrest, illegal detention of the accused in the police custody for more than twenty four hours after his arrest, and the marks on his person were held to have vitiated the voluntary character of his confession, which was, therefore, not admitted. *Rom L R 337*. The

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R. v. Gould, 9 C & P 364; *R. v. Harris*, 1400. Cr C 338. The knowledge of the rule was distinctly laid down by Lord Eldon who said that where the knowledge of any fact was obtained from a prisoner, under such a promise as excluded the confession itself from being given in evidence, he should reject it acquittal, unless the fact itself proved would have been sufficient to warrant a

East P C 607, *Harris* is 430, *Greenl Et 23* and delivered them up but this was done upon and no reason to reject

the declarations of the prisoner, contemporaneous with the act of delivery and that may amount to a confession

act of delivery, is to be rejected. And if the prisoner, thus improperly induced, and of the information given search for the property or person in question proves wholly ineffectual no promise of either will be received. The confession is excluded, because, being made under the influence of a promise, it cannot be relied upon, and the information and information of the prisoner under the same influence, not being confirmed by the finding of the property or person, are open to the same objection. The influence which may produce a groundless confession may also produce groundless conduct. *Greenl Et 232*

Confession four days after the offence and the fact of the accused pointing out the place of the burial of the body is admissible in evidence. In a case of dacoity and burial of the corpse, the Sessions Judge need not have tried it with the aid of the jury. *Naga Methu v. Emperor*, (1911) 2 M W N 197-1. Cr L J 488-12 Ind C 36

Where the evidence is *et verbatim*, whether in favour of the accused or the prosecutor, the tribunal to reject all the evidence. *Emperor*, 15 A L J 15. on build

truth would not admit. 52 Ind Cas 50-20 Cr. L J 562

No doubt the extra-judicial confession is of great importance but it must be a true extra-judicial confession. Additional evidence to be taken can be taken on the question whether the evidence, they are not of such a nature as entitles them to any weight, because it is impossible to ascertain the exact words used by the person. To base a conviction on such evidence is not safe. *Emperor, A. I. R 1928 Lah 558-29*. It may be that the confession was made before a Magistrate. The persons before whom the admission is said to have been made are trustworthy witnesses. *Emperor v. Batul, A I R 1928 O 393-5 O W N 698*. When the accused were unable to explain away their confessions which clearly indicated the guilt, held that the confessions alone were sufficient for the conviction. *Sitai v Emperor, 5 O W N 968*.

Confessions of prisoner in another case—how proved The confession of prisoner in one case in which he was convicted cannot be used against him in another case, unless they are deposed to on oath either by the person who took them down, or by some one else who heard them. *In the case of Munger Bhoojan, 10 W. R Cr 66*.

Confession how construed Where people are so ignorant as the Burmans are, of the most elementary legal principles, it is extremely dangerous to accept an admission as a plea of guilty without the closest scrutiny of the meaning of the acknowledgment. *Ma Nyein v Q E, U B R (1897-1901) Vol 1, 72*.

but does not necessarily establish the truth of the main feature. *Moore on Facts § 1182*.

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24 Section 164 of the Criminal Procedure contains the provisions for recording confessions by Magistrates. The evidence of witnesses who are sent up by the police for the purpose of having their statements recorded under s. 164, Criminal Procedure Code, and who have been presumably in police custody until their production before the Magistrate, should not be recorded by such Magistrate, unless he has some assurance that their attendance and statements were voluntary. *King Emperor v. Bhulnath*, 7 C W N 345. The provision of this section is imperative. *Indar Nath v. Emperor*, 32 Cr L J 818 = A I R 1931 F 102. When an accused person is asked to make a statement, he does not, the Magistrate should (be) and ask the accused to ascertain clearly whether the statement will be made with a view to the fact that he is being recorded as though he is a free man. *Gaya Singh v. Emperor*, 133 Ind C 593 = A I R 1931 All 609. A Magistrate must not put any question to an accused which tends to incriminate him.

Under section 164 and prepare a record. *Lalu Prasad v. Emperor*, 2 P R 1893 Cr 1. Great care and circumspection are necessary in recording a confession under section 164 of the Criminal Procedure Code. *Emperor v. Patey Singh*, 133 Ind C 593 = A I R 1931 All 609. A Magistrate must not put any question to an accused which tends to incriminate him.

Confessions obtained by threats and not been procured by threats or inducements. *Kandhar v. Emperor*, 15 Cr L J 633 = 25 Ind C 833, see also *Kesho Singh v. King Emperor*, 20 O L J 188 = 1882 A. W. N. 166, *Imperator v. Kura*, 1882 A. W. N. 166, *Imperator v. Kura*, 1882 A. W. N. 166, *Imperator v. Kura*, 1882 A. W. N. 166.

At the end of the statement, the Magistrate should ascertain whether the accused had not acted properly. *Royappan*, 2 Weir 136; *In re Royappan*, 2 Weir 136. The Magistrate should ascertain whether a confession was made at the beginning of the statement, and not at the end. *In re Royappan*, 2 Weir 136. O. C. 191. *Patil v. Emperor*, 133 Ind C 593 = A I R 1931 All 609.

There is no provision for the admission in

- S. 24 a Magistrate under section 164 in exculpatory nature, *Gulam v Emperor*, 1 Pat 103=86 Ind Cas 811 A statement recorded by a Magistrate is admissible in evidence under section 164 Cr Pro Code, whether taken on solemn affirmation or not *Bahadur v Emperor*, 28 Cr L J 1063=88 Ind Cas 7=A I R 1925 Sind 289
- A confession recorded in answer to the only question viz (after due warning) 'do you want to say anything?' cannot be accepted as being in accordance with law in the absence of any indication as to what due warning was 129=59 Ind Cas 551=22 Cr L J 119 A in accordance with the provisions of section 164

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improbability of his guilt *Madan v Guru*, 4 Pat L T 381=73 Ind Cas 933=24 Cr L J 723

person made a statement in the prescribed form of question is prescribed and the extent to which a Magistrate should question the person making the confession must largely depend on the particular facts of each case *Thibu v Emperor*, 4 Pat L T 2=73 Ind Cas 569=24 Cr L J 649=A I R 1923 Pat 356, see also *Pul Tanti v Emperor*, 40 C 873=22 Ind Cas 169=15 Cr L J 25 It is highly desirable that a Magistrate in recording the confession should put various questions to an accused to enable him to decide whether the confession is voluntary one or not *Emperor v Dewan Kahar*, 72 Ind Cas 961=24 Cr L J 497=4 Pat L T 100

Emperor, 25 Cr L J 116=76 Ind Cas 180

Magistrate, showing that he observed all the Procedure Code, is sufficient and the confession of the persons making them, should to ascertain how long such persons have been in police and, in recording their reasons for the subject *Empress v Madan*, A W N 1886, 59 (F B) Section 164 of the Criminal Procedure Code does not apply to any statement of the accused taken by the Magistrate holding the enquiry *Emmess v Chatter*, A W N 1884, 84.

Magistrate question the confession to be recorded is made voluntarily; and that the record made by the Magistrate should contain a full and true account of the statement made by the accused *Nga We v Emperor*, 2 L B R 317 When the Magistrate who recorded the confession took all possible precautions to satisfy himself that the confession was made at the time and place where it would get recorded

Magistrate was recorded on a Sunday and at the house of the Magistrate and the Magistrate himself that the accused was satisfied with the questions put and a full and true account of the evidence was recorded in the presence of the accused and the Magistrate

Emperor, A I R 1931 L W 103=133 Ind. Cas 55; see also *Khanum v*

Crown, A I R 1930 Lah 171=31 Cr L J 759 Where the confession of a prisoner is made in a language foreign to the recording Magistrate, and is interpreted to him by some person who is not an official interpreter, such confession can not be regarded as properly proved by the testimony of the Magistrate which is only hearsay evidence. The signature of the accused in the translated record of the confession is no evidence of its correctness, when there is no proof of the record having been accurately translated to the prisoner. *Queen Empress v. Lakshmya, Rat. Un Cr C 575*

Section 364 of the Criminal Procedure Code—the rules laid down in section 361 of the Criminal Procedure Code are applicable to the examination of the accused under section 312. *Emp v. Nagar, 1 Bom. L R 161* All that a Court has a right to do under s 364 Criminal Procedure Code, is to ask the accused person to explain the circumstances which

him. *Tufan v. King-Emperor 15 C L J 32*

283 In examining an accused person under improper to ask him such a question as 'If you

who did?" *Chelan v. King-Emperor 7 O C 1*

person to a statement recorded in the presence and under the control of the

Bhika, Rat. Un Cr C 1

statement by a prisoner in

Majji v. Chentramma, 3 Weir 137 Where the Magistrate instead of asking

separate questions to the accused puts him a long composite question, the

examination of the accused is irregular and not in accordance with law. *Hassan*

v. Emperor, 103 Ind Cas 847=28 Cr L J 707=A I R 1927 Lah 660 If

the prisoner is not prejudiced in

questions put to him does not make it

in any way in his defence

1=100 Ind Cas 821=A I R

and they are admissible only if the confession is proved to be strictly observed,

.. .. .

presiding officer of the Court. The whole of it need not be in the Court's

handwriting. *Empress v. Riaz Ali, A W N 1900, 203* The recording of

confessions should be made by Magistrates with their own hands. *Criminal Cr*

Memo No 7 of 1873 But a confession recorded by a clerk, under s 364 of the

Code, in the presence of a Magistrate, in the form of a narrative and without the

questions being recorded would not be illegal if the accused was not prejudiced

if the accused makes a statement in

be inferred that the statement

held that such a statement is

Procedure Code. *Emperor v*

Paranath, 37 C 735=8 Ind Cas 653,

error has not injured the accused is to his defence on the merits. Section 333,

Cr Pro Code, is intended to apply to all cases in which the directions of the

law have not been complied with, without any distinction between omissions to

comply with the law and infractions of it. Under that section, if the record of a

confession is inadmissible owing to failure to comply with the law such as

omission

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Act, not

proved,

- 24 that it has not affected the merits of the defence *Queen Empress v Raju*, 23 B 221. Section 533 is to be interpreted liberally, and though a confession recorded by a Magistrate was in the first instance and by itself inadmissible as not being in the form of question and answer, not being recorded in the vernacular of the accused, and not bearing the signature or mark of the accused, it will become admissible by the taking of the evidence of the Magistrate that the accused duly made the statement recorded *Empress v Pularam*, 8 C P not to a Police officer and not improperly the Evidence Act is always admissible *uj-Emperor*, 8 O C 395=2 Cr L J 511 to certify the voluntariness of a confession recorded by him under s 161, Cr Pro Code, the defect may be cured by the evidence of the Magistrate *Ram Sanchi v. Emperor*, 9 Ind Crs. 148=12 Cr L J 15; see also *Khudiram v Emperor*, 9 C L J 55 The Sessions Judge

as a witness nor was evidence taken that the accused duly made the statement so recorded. *Held*, that as it could not be presumed without some evidence that the statements had to be recorded in English as they could not be recorded in the language in which they were made, there was no justification for their being recorded.

Judge was wrong in admitting such a record of the statements again in the accused *Baua v King Emperor*, 10 O C 112=6 Cr L J 94; but see *Lunda v Queen Empress*, 8 C 277 Oudh.

A defence person by the confession Code, provided person "duly either the Magistrate himself or some other person who was present when the statement was recorded. *Empress v Mussaumat Hani* 8 C P L R Cr 6, J B R r = 164 he was 11, th 1 under solar

voluntarily made *Ma On Nyun v King-Emperor*, 1 U B R (1902-1903) Cr Pro Code, 18

This section has no made of a confession 211=19 Ind Crs 307=3 Magistrate shall record making it, he has reason where laid down that the he has put to the person made voluntarily. But it is advisable that the Magistrate should always receive a minor inducement showing that he has, by questioning the person making it, satisfied himself that the confession is made voluntarily. *Khemau v Emperor*, 6 Lab 58=5 P L R 316=A I R 1925 Lab 315; d Crs 1029=26 P L R 513=26 C Under section 533 Cr Pro Code, 1892,

in accordance provisions have that the confession or other statement was duly made *Queen Empress v Shairab*, 2 C W. N 702

Section 80 of the Evidence Act and confession. So far as section 80 of the Evidence Act is concerned, the Court is bound to make the presumptions specified

in that section in respect of the document purporting to be a confession of the accused *Sin Ban v Crown*, 1 L. B. R. 310 F. B. Both the memorandum and the certificate required by s. 161 should be attached to the confessions. The effect of these is to afford proof of the accuracy of the record, of the presence of the Magistrate, and of the voluntary nature of the confession. *Reg v Shwaya*, 1 B. 219; *Prater v F*, 1 B. 219; *R. Cr. 5, 18*.
 "Magistrate"
India R. v
R. 9 Cr. L. J.
 169 = 16 Bom. L. R. 261 = 15 Cr. L. J. 433

essions, s) made by a prisoner, to any person at any moment of time, and at any place, subsequent to the perpetration of the crime, and previous to his admission in evidence as
best Ev § 524; Wills
 promise of benefit,

or a threat of harm, it is unworthy because it has been associated with an attraction too strong to reject
 person which causes our distrust
 two alternatives, one of which is
 truth or falsity — *Wigmore § 82*
 is a pseudo confession. It is not a confession at all. It is not made *animo confitendi*. It is merely a self-serving statement masquerading in the garb and under the name of a confession. Accordingly, it has not the relevancy of a true confession, a self-diserving statement, and is, in consequence, rationally to be regarded with suspicion. As
 impairment of probative value due to

the object of the rule relating to the admission of confessions is
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J in R v Court, 7
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Declaration must be voluntary Confessions it is said, must be voluntary. The reserve statements that a confession will be received in evidence, are equally familiar. The difficulty experienced in understanding precisely what, in these expressions given out of the fact other words several distinct ideas
 the most commonly and widely accepted meaning of the term "voluntary" is that which is employed when a confession is rejected as involuntary because the speaker has been over-persuaded, coerced by hope or driven by fear into making it
 statement
 it was true

matter covered by his declaration and honestly endeavoured to state it. An

24. under a misleading inducement is therefore, said to be involuntary *Chamberlayne v Ev* § 1479

Meaning of the term voluntary The terms voluntary and involuntary are apparently used in respect of confession indiscriminately in three distinct entirely separable situations—(1) Where the will of the declarant has been left entirely unconstrained to his judgment in such a incriminating statement for the declarant statement subject, (3) cultural statement To put a incriminatory declaration b

misleading inducement, by a judicial compulsion to break silence or the

states of fact is found to exist, and what are the real considerations attending question of admissibility in any particular case in which they are present *Chamberlayne v Ev* § 1480 A confession may reasonably be said to be voluntary when it is made with the concurrence of the will,—where the volition is not for a voluntary one, the exact truth or however a confession rejected by a rule of procedure,—even though it is a matter of experience that this incriminating statement, though subject to criticism or the argument of counsel would still warrant the jury as reasonable men in acting in a word with it *Chamberlayne v Ev* § 1483

Scope of section 24 In this section the framer of the Act perhaps properly avoided the use of the word voluntarily or involuntarily which is of doubtful import but stated the circumstances under which a confession is made by saying that a confession is one of receiving some benefit or with pending proceedings in authority over the court. Section 24 of the Evidence Act provides that a confession of an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the Court to have been caused by any inducement having reference to the charge against the accused.

of voluntariness 2 Bom L R J 228 The reason for rejection of confession thus stated by *Ejpe C B* A confession forced from the mind by the

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overestimating it. The law does not presume it is untrue, but rather that it is uncertain whether a statement so made is true." *Lord Campbell, C J* added "I doubt whether the rule excluding confessions made in consequence of an confession is and that known from same case

Pollock C B said "There is no presumption of law one way or other. There is no presumption that it is false, or that the law considers that such a confession is true, but such confessions are rejected because it is dangerous to leave such evidence to the jury." *Wyllie 11 Cox C 1 639 Williams J* said. "It is saying the truth elicited that these confessions are excluded, but the law is jealous of not having the truth." Similarly in *Scott's Case, 1 D & B 58, Campbell L C J* reiterated "It is a true maxim that the confession of a crime, to be admissible against the party confessing, must be voluntary, but this only means that it shall not be induced by improper threats or promises, because under such circumstances the party may have been influenced to say that which is not true, and the supposed confession can not be safely acted upon." The principle upon which all this class of cases is founded is that by inducement being held out to the prisoner, he may be led to suppose that he will be more mercifully dealt with if he confesses and that

temperament, may falsely acknowledge guilt. This possibility arises wherever the innocent person is placed in such a situation that the untrue acknowledgment

is preferable. The law cannot attempt to weigh testimony before even listening to high testimony of a confession. Thus conceivably than silence unless a confession of a confession more § 822 section 24 of

the Indian Evidence Act. Section 24 contains an absolute rule which is not affected by the proviso made for a different purpose in section 27. When the Legislature wished to make an exception to the absolute rule, it did so by a separate section, namely confession rendered irrelevant that are irrelevant under other section of the Act. promise can be relevant, e.g. *King Emperor v Nga Po Mun, 2 L R 168, Nga Sanya v King Emperor, U R 1909 1st Cr Evidence 3=11 Cr L J 41 1 Ind Cas 759, but see Amriddin, v Emperor, 45 C 557=22 C W N 213. A confession to be*

- S 24. But, in coming to a decision law and principles which Justice and should not be in recording what should be evidence adduced *Nja Shue v Queen Empress*, L B R (1883-1900) 147 A confession by an accused person is not made irrelevant if otherwise relevant merely because the accused person has been sworn or affirmed *Raj v Empress*, 3 P R 1880 Cr An oral confession by an accused person is not irrelevant merely because of the Evidence Act is, as an

Emperor v C 57-23 C W N 213-37 C L J 148-41 Ind Cas 305-31 Cr L J 305, but see *Emperor v Nja Hung*, 35 Ind Cas 962-17 Cr L J 402-U B R (1916) Vol II 114 *Jara Singh v Emperor*, 29 Ind Cas 317 11 P R 1915 Cr 16 Cr L J 345

If the case against the accused entirely rests on the confession made by the accused and there is a conflict as to the manner in which the confession was obtained, the accused is justified in asking the Court to give him the benefit of doubt *Rahman v Emperor* A I R 1930 Lah 88 Where a person of sound mind and of full age makes a confessional statement in ordinary language after he has been warned he must be bound by the language of the statement and by its ordinary plain meaning and a subsequent retraction of the same is of no effect *Munari v Emperor*, 121 Ind Cas 247-A I R 1930 Oudh 303-31 Cr L J 1210 Where the confession made before the police was found by the Court not to have been voluntary it cannot be corroborated by the confession of the accused as an approver, subsequently retracted *Sufi v Emperor* A I R 1930 Nag 209-124 Ind Cas 459-31 Cr L J 661 A confession made by an accused person is not invalid merely because it was made under the benefit by making it *Public Prosecutor v I R* 1919 Mad 92 A confession is not a statement and hence the evidence of persons who say that the accused made counterfeit coins in their presence is not barred by s 24 or 26 *By Andan v Emperor* 133 Ind Cas 151-A I R 1931 All 91 A confession alleged to have been made by the accused person in the jail to the warder in the absence of any evidence on the part of the prosecution to prove it

Emperor v C 57-23 A I R 143-144 Cr L J 536

Emperor, 26 Cr L J 957-86 Ind Cas 1001-A I R 1930 All 1001 Where the Magistrate who recorded the confession took all possible precautions to satisfy himself that the confession was made voluntarily and that the accused and he were alone in the room In *C* 57-23 A I R 143-144 Cr L J 536

The mere fact of a person being in custody cannot be a valid basis for a confession, if it is induced by an inducement, threat or promise. *S. 24, Cr. P. Code*

Lawrence Act *Dip Singh v. Emperor*, 27 Cr L J 158 = 101 Ind. Cas 891, A. I. R. 1926 All 216.

that a certain set of words used in a particular case has been held to be in the nature of an inducement. *Kunja Subulu v. Emperor*, A. I. R. 1929 Pat 275. Where there is a veiled threat as well as inducement, a confession so obtained is invalid. *Kunja v. Emperor*, A. I. R. 1929 Pat 275.

Made A confession made to one person by the accused is irrelevant, even where the inducement, threat or promise is held out by a different person if the confession is made to a person who is a prisoner, for a confession by the use of a promise made by a person not to be presumed to have induced him to confess the crime. *Russ Cr p 303*

C R 416 But unless the confession is made to a person who is a prisoner, for a confession by the use of a promise made by a person not to be presumed to have induced him to confess the crime. *Russ Cr p 303*

Accused person The expression "made by an accused person" in this section, means that person must be an accused person at the time of the confession. *Per Sunlara Appar J in Kumara Swami v. A. I. R. 35 M 397 (1936)* see also *Empress v. Jaddab* 4 C. W. N. 129. The words "accused person" in this section, means that person must be an accused person at the time of the confession. *Per Sunlara Appar J in Kumara Swami v. A. I. R. 35 M 397 (1936)* see also *Empress v. Jaddab* 4 C. W. N. 129.

It is sufficient if the person ultimately comes to be an accused person with reference to the charge in respect of which he is said to have made the confession. *Per Shah J in Emperor v. Chhina* 22 Bom. L. R. 147 = 19 Ind. Cas 324, A. I. R. 1931 Bom 147.

It is sufficient if the person ultimately comes to be an accused person with reference to the charge in respect of which he is said to have made the confession. *Per Shah J in Emperor v. Chhina* 22 Bom. L. R. 147 = 19 Ind. Cas 324, A. I. R. 1931 Bom 147.

24. was present when the deceased was killed, then stated that he and not the accused had shot the deceased, is properly excluded unless the person whose statement is offered shall be produced as a witness. *Selby v Commonwealth (Ky)* 80 S W 221. The prisoner may, of course, disprove his guilt by proving the guilt of some other person. But he cannot do that by introducing the extra-judicial confession or declaration, or that he had committed it never conclusive upon the declaration because of this so-called confession. To receive such statements as exculpatory proof would be to open wide the door for the practice of fraud whereby the acquittal of the real criminal would be assured. *Underhill Cr Ev* § 145.

If it appears "The words lend some colour to the argument that the confession ought to be made to appear to the Judge to have been improperly induced—in other words that the *onus probandi* is in the first instance on the prisoner. I do not accede to that argument. A confession may appear to the Judge to have been the result of inducement on the face of it, and apart from any proof at all. In every case, I contend, where a prisoner says he has been forced to confess the Judge is put upon judicial enquiry, and as I ended before, I end now, that enquiry should precede the admission of the confession and any examination into its truth." *Lex, 2 Bom L R (Journal)* 163. "A confession seen made voluntarily in section 24 of the same Act. When admitted, and acted on only if it is proved to have been made voluntarily." *Basu v State* 25 Bom L R 168. The use of the word 'probably' in a particular case fairly hesitates to say that it was proved that the confession had been unlawfully obtained and yet might be in a position to say that such appeared

case, it appears to the Court that there is reason to suspect that a confession was

take into consideration
conjecture. *Em*
Cr L J 497—
depends upon a

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Ind Cas 1001—*A I R* 1925 All 606

In *Pratap v Panchikari Dutt*, 29 C W N 300—52 C 67—86 *Ind Cas* 111—*Cr L J* 782—*A I R*, 1925 Cal 587, *Mr Justice Mukherjee* said

attached on surmise.
Ind Cas 961—
guilty of a confession on
evidence antecedent
that it is liable to rejection
and upon this issue and
upon the contents of the
—26 *Cr L J* 937—

"There are words and expressions in this section to which one must point out S.
direct his attention in order to construe the section. There occurs the word
'appears', the 'inducement' against the accused person."

is said as to the person
in inducement, threat or promise would in the opinion of the Court be sufficient to
give the accused person grounds which would appear to the accused person
(and not the Court) reasonable for supposing that by making the confessions he
would gain an advantage or avoid an evil of the nature contemplated in the
section. It will be seen therefore that the mentality of the accused has to be
judged rather than that of the person in authority. That being so, not merely
actual words, but words accompanied by acts or conduct as well on the part of
the person in authority, which may be construed by the accused person situated
as he then is, as amounting to an inducement, threat or promise, will have to be
taken into account. A perfectly innocent expression, coupled with acts and
conduct on the part of the person in authority together with the surrounding
circumstances may amount to inducement, threat or promise. In scrutinising a
statement at the Court will
t, to determine
ertain grounds,
l to see whether
position that is
the confession

appears to have been caused in consequence of the inducement, threat or promise
the use of these vague expressions has been deliberately made with the object

this direction. A study of the cases, bearing upon the question, which are
too numerous to mention, would show that anything ranging between the
barest suspicion on the one hand and absolute certainty on the other has
been held to be sufficient to satisfy the requirements of the section. In this
connection reference may be made to *Reg v Balwant* 11 B H C R 137,
Shafi v Emperor A I R 1930 Nag

11a 15 B
Empress v
Pranmali
tion is not

is not as strong an expression as proved

N 1112 = A I R 1929 Cal 226. The true

view seems to have been taken in the case of *Empress v Pranam* 1925

Thompson, (1893) 2 Q B p 12

matter, with regard to which there

opinion in this country is well

of the Indian Evidence Act and also to the presumption attaching to certain
recorded confessions and arising under section 80 of the Act the true and

been obtained by use of threat, persuasion etc. Anything from the barest

24 suspicion to positive evidence would be sufficient for a confession being admitted
Raghu v. Emperor, 23 A. L. J. 521=89 Ind. Cas. 903=L. R. 6 All. Cr. 161-6
 Cr. L. J. 1431=A. I. R. 1925 All. 627 P. C.

Burden of proof—English law The question of voluntariness is for the

2 Q. B. 12, *R. v. Rose*, 19 Cox. 717, *Abraham v. R.* (1914) A. C. 593 (610, 611-18 C. W. N. 705 (P. C.) where all the English cases have been reviewed, *Phy*,
 18) 1 K. B. 301 But *Prof. Wigmore* interpreted
Thompson in a different way. He was a
 middle pub, and seems to receive the confession
 improper inducement, and then in case of
 doubt leaves upon the prosecution the burden of convincing the Court of the
 admissibility *R. v. Thompson* (1893) 2 Q. B. 12, 18, *Carr J.* (in case of doubt)
 See also *Chamberlayne's Ev.* § 1579

Burden of Proof American view 'Under the early English procedure
 which has been followed and still prevails in a majority of American Courts (*R. v. Thompson*, [1893] 2 Q. B. 12, *R. v. Harrington*, 2 Den. Cr. 447, *Thompson's Case*, 1 Leich. Cr. L. 3rd Ed. 328 *Emperor v. Bhagi*, 8 Bom. L. R. 691) the
 burden of evidence is upon the prosecution to satisfy the Court upon the tender
 of the confession in evidence that it was voluntarily given, to the extent at
 least, of showing that no threats, promises or other misleading inducements were
 held out to the declarant by the person to whom the confession was made.
 Where objection is taken to a confession as 'involuntary' its voluntary nature
 must be affirmatively established in the first instance by the prosecution to the
 reasonable satisfaction of the presiding Judge. This may be done either by
 direct or circumstantial evidence. Such a requirement will, however, receive a
 fair construction. The State need not show beyond a reasonable doubt that there
 was not the slightest fear or the least possible hope of benefit in the mind of the
 declarant.' *Chamberlayne's Ev.* § 1579 The view has also found representa-
 tives that the prosecution must not merely in the above circumstances, but in
 all cases show the absence of an inducement from any one else and not merely
 from the person receiving the confession (*State v. Garvey* 28 La. An. 559
 This is an absurd extreme. A few jurists regard the confession as *prima facie*
 admissible and require the defendant to show that the alleged improper
 inducement existed. The reason to object to the
 Of course he should
 the Court's ruling,
Chamberlayne's Ev. § 1577 1578

Introduction of confession into Evidence It is a natural, if not inev-
 itable, says Mr. Chamberlayne 'result of the rules of procedure rejecting con-
 fessions deemed, for some reason 'involuntary' that a prisoner's counsel is
 tolerably certain to contend that his client's statement of guilt was not a
 'voluntary' one. Usually the chance for success on the main issue of the trial
 is entirely dependant upon his ability to keep that confession from the jury.
 Much
 subject
 selves
 nature
 evidence. In the absence of statutory regulation, or binding precedent, the
 presiding Judge will be called upon to consider (1) Shall he decide the question
 of admissibility upon
 prosecution or shall
 examine the government
 (2) Is it better that
 jury or after their retirement from the courtroom? (3) Would it be better
 whole, sounder admin-
 the prisoner's statement-
 alternative instruction
 they find that it was not 'voluntary' as that term is defined by the law
 procedure?—*Chamberlayne's Ev.* § 1577

1112; *Emperor v. Panch Kori*, 29 C. W. N. 300-52 C 67, *Wingmore* § 861, *Borton v. State*, 167 Ala 108; *Emperor v. Kesari*, 11 Bom L R 332. The right

both parties, at the stage of *voir dire*, to enter upon an extended range of enquiry into all facts bearing upon the voluntary nature of the confession, tracing any attendant circumstances under which it was made and also the physical, mental and moral characteristics of the declarant. The Judge, on the other hand, as is elsewhere said, may receive the confession in evidence upon a *prima facie* showing by the prosecution that it is relevant;—leaving to the defendant at an appropriate later stage, an opportunity of showing that the confession was in fact involuntary. Among considerations tending to exclude the evidence of the accused at that stage is the very important one that it is not customary to consume time by hearing affirmative defences resting upon controverted fact on *voir dire*. It is not, moreover likely that a Judge will overlook the further consideration that evidence, as a rule, is admitted whenever the jury might reasonably act upon it, and that, unless the facts are such that

probable that it would be within short, conclusive point disposing the trial of receiving the evidence it once is obvious. It has been said that where, the burden of evidence is upon the defendant to show the

heterodox rules prevalent in
in admitting evidence. In

“(1) The Judge must hear the defendant's evidence (including evidence

may be introduced

R 338-A I R 1930
voluntarily made and was
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not *Emperor v. Kesari*, 11 Bom L R 332-2 Ind Crs 514

The maxim of the English Courts is
no influence used, or decide upon its
1 & 7 36. But the Indian Act places

In *Reg v. Navojji Dadabhai* 9
leaves it entirely to the Court to fix

evidence which would be rejected in

§. 24. suspicion to positive evidence would be sufficient for a confession being direct
Raghu v Emperor, 23 A L J 821=89 Ind Cr 903=L R 6 All Cr 161=6
 Cr L J 1431=A I R 1925 All 627 P C

Burden of proof—English law The question of voluntariness is for the Judge; and it is now settled that it lies upon the prosecution to establish, and not upon the accused to negative the element, it being the duty of the prosecution to satisfy itself therefore before putting the statement. *R v Thompson*, (1893) 2 Q B 12, 18, *Cate J* (in case of doubt) 2 Q B 12; *R v Rose* 18 C W N 705 (P C) : : : : :
Li 7th Ed 256; R v : : : : :
 the ruling laid down in : : : : :
 modern English law : : : : :
 unless attacked by evidence of an improper inducement, and then in case of doubt leaves upon the prosecution the burden of convincing the Court of the admissibility *R v Thompson*, (1893) 2 Q B 12, 18, *Cate J* (in case of doubt) See also *Chamberlayne's Li* § 1579

view 'Under the early English procedure prevails in a majority of American Courts (*R v Warringham*, 2 Den Cr 447; *Thompson*), the Case, 1 Leach Cr L 3rd Ed 28, *Emperor v Bhagi* 8 Bom L R 697), the burden of evidence is upon the pro- : : : : :
 of the confession in evidence : : : : :
 least, of showing that no threats, : : : : :
 held out to the declarant by the person to whom the confession was made : : : : :
 Where objection is taken to a confession as 'involuntary' its voluntary nature

declarant' *Chamberlayne's Li* § 1579 "The view has also found representation that the prosecution must not merely in the above circumstances, but in all cases, show the absence of an inducement from any one else and not merely from the person receiving the confession (*State v Garvey*, 28 La An 301). This is an absurd extreme. A few jurists regard the confession as *prima facie* admissible, and require the defendant to show that the alleged improper inducement existed. This is the : : : : :
 reason : : : : :
 Of course : : : : :
 the Court : : : : :
layne's Li §§ 1577, 1578

Introduction of confession into Evidence "It is a natural, if not inevitable," says Mr *Chamberlayne*, "result of the rules of procedure rejecting confessions deemed, for some reason, 'involuntary', that a prisoner's counsel is tolerably certain to contend that his client's statement of guilt was not a 'voluntary' one. Usually the chance for success on the main issue of the trial is entirely dependent upon Much learning subject Nice question serves to a trial nature of the statement evidence In the absence of statutory regulation, or binding precedents presiding Judge will be called upon to consider (1) Shall he decide the question

jury or after their retirement from the counter room : (3) Would it be

confession, it is obvious that the various situations can be best grouped according to the nature of the inducement. But as the strength of the inducement depends more or less upon the power of the person offering it, the rule of law must first specify the kinds of persons from whose mouths the inducements may be

Though a too restricted person in authority" in this had authority to interfere in I be sufficient to give him that authority; *Emperor v Antul* 57 C 188=A I R 1930 Cal 633. Unless the person attempting to obtain a confession has the power (apparently to the confessor) to carry out the threat or promise, there is no reason for treating the

facts which may amount to a confession, and such statement, if not privileged by reason of the relation between the accused and the party to whom it is made may be used. For example, X, who is charged with the murder of A, is induced by the chaplain of the jail to confess his sins. He accordingly confesses the crime with which he is charged. *Reg v Gilham*, 1 voluntary. *Reg v Gilham*, 1 tried at Exeter Summer Assize prisoner to confess a murder the denunciations of scriptural it could be used against him, and *Best C J* refused to allow the clergyman to

that it was improper in the clergyman to by the prisoner, and expressed a strong *les* cited *Perke*, 78, *Williams, v Williams*,

On principle, such a promise should be of no consequence unless the promisor was one having (apparently) the power to arrest or prosecute. *Wigmore* § 829. In England the older and more usual view was that inducement to exclude must come from a person who has legal interest or authority in the arrest and prosecution. *R v Row* R & R 153, *R v Gibbons*, 1 C & P 97, *R v Warringham*, 2 Den C C 447, *R v Taylor*, 8 C & P 734. In 1839 *Lewin* in his note to his 2 Lew Cr C 125 said "The cases seem to establish the principle that where a confession is obtained through the medium of a the prisoner can have nothing to hope *R v Dunn*, *R v Slaughter*, 4 C & P telling a prisoner that it will be better confession made to him. See also *R v Spencer*, 7 C & P 776. Finally in 1852, the earlier view was confirmed, and the existence of a legal interest in the prosecution was taken as the test—not the mere existence of actual control or influence growing out of social or commercial relations of the persons. *Wigmore* § 829. In connection with an inducement held *Moore*, 2 Den Cr C 522 said (when it was

24. England without a moment's hesitation" 2 Bom L R J 237 But it must be remembered in this connection that the English practice which is based on drastic procedural rule has provoked much unfavourable comment from judges seeking to operate a rational system of judicial administration Vide *Per Br 1 Parke in R v Moore*, 2 Den Cr C 522 (527), *Chamberlayne's Ev* §§ 1007, 1033

Was the inducement sufficient by possibility to elicit an untrue confession of guilt While no one seems to have questioned the fundamental principle of exclusion of confessions, there has been a decided difference of practice in the kind of test used in applying the principle It has been seen that the reason for distrusting a confession arises when the person is placed in such a situation that an untrue confession of guilt (more correctly, a confession of guilt irreducibly to the single form of pardon) is the inducement of freedom which will recompense the false confession more attractive at the moment than the mere possibility of freedom, coupled with temporary restraint, which attends silence Again, where a mob's threat of hanging has induced a confession, the alternative of present certain and future possible safety proves naturally more attractive than present certain death Thus in both cases—a promise and a threat—the confession is untrustworthy because it has been associated with an attraction too strong to resist In general, then, the position of the confessing person which causes distrust is that of being compelled to choose between two alternatives, one of which involves a confession of guilt irrespective of its truth or falsity Each instance presents a confession (or non-confession) of what it is, averaging the three evidences (involvement, degree, and roughly, was the inducement such that there was any fair risk of confession? *Wigmore* § 824

Person in authority
procedural rule, says in

or, in other respects, to direct the course of the trial, 14 Q B 789. Authority in this connection may be delegated expressly or by implication (*R v. Garner*, 11 C & M 947). The term 'person in authority' may therefore extend so far as to designate any one who acts in the presence of the accused, and whose position or colour of his power in the matter may be delegated expressly or by implication.

on questions of this nature and among the considerations which must be taken into account in determining the admissibility of a confession depends on the relative strength of the inducement to confess falsely, as measured against the prospects attached to the confession.

24. But wherever Zamindars are directly concerned in the investigation by the direction of the Police, then they clearly are persons in authority within the meaning of s 24 of the Indian Evidence Act *Crown v Long*, 10 S L R 140. A headman is a person in authority *Zeta v Emperor*, 18 Cr L J 106=37 Ind Cas 314=10 Bur L R 270. A confession made to a police peon is invalid *Emperor v Ramadhan*, 31 Ind Cas 340=17 Bom L R 898=16 Cr. L J 742. A Lambardar is a person in authority *un, 4 Lah L J* 235=A I R 1922 : ayaldars are not persons in authority.

The expression "persons in authority" is used in the actual prosecutor and the test is, 'has the person authority to interfere in the matter and any concern or interest in it is sufficient to give him authority' *Smith v Emperor*, 43 Ind Cas 605=19 Cr. L J 189. The mere fact that the accused

185=A I R 1931 Lah 406

An Artificial Rule, repudiated person extending a misleading inducement and necessarily, to be a person in authority.

admissible. So intangible a distinction between actual and ostensible authority has, very reasonably failed to commend itself to certain distinguished courts who extend the function of "persons in authority" to include the language of the Supreme Court of

be fairly supposed by him to be coerced, or to influence the threatened

Confession made before coroner. In England, it is now the practice to admit statements or depositions of the prisoner before the coroner if properly proved. Formerly there was some doubt as to their admissibility and the cases on the subject were conflicting. *Vide 2 Russ Cr (8th ed) 265, R v Whately, 8 C & P 240, R v Owen, 9 C & P 83, 235, 134, Hanth, Greenw Coll Stat 137, R v Santh, C & Mar 315* 1m 134.

admitted by the P 110, 1, R v, & alia, subject of the R 21

A statement made on oath by the accused before the coroner at the time of the inquest is admissible in evidence at the time as a confession made by him where the accused was told he need not make any statement but he insisted upon doing so. Such a statement is a pure voluntary statement. Section 20 of the Coroner's Act provides that a coroner shall be deemed to be a Magistrate for the purposes of section 26 of the Evidence Act. *Emperor v Ram Nath*, 28 Bom L R 111-50 B 111-93 Ind C is 690-A I R 1926 Bom 151; *Emperor v Mithond*, 30 Bom L R 86. But it would be wrong of a coroner to examine an accused person on oath on the ground that he did not know that the person was an accused person and thereafter use that evidence in a trial for a charge based on that evidence. *Emperor v Khatu*, 28 Bom L R 79-50 B 56-A I R 1926 Bom 141.

Confession when caused by inducement, threat or promise. The terms of the promise or threat or inducement must be such as to make the confession involuntary. *Wallis* and first rule is to what constitutes inducement. The question is one for the discretion of the Judge, and its decision will vary in each particular case. *Nort* Ev 161. The inducement need not be express. *Cox* 69. It need not be made to the accused, but it may be made to some other person who comes to his knowledge. *R v* and does it. *Ev* 106. "Before a confession either judicial, or extra judicial can be received as such it must first be shown that it was in every respect freely and voluntarily made by any sort of threat or ever slight the hope. And while circum-

stances are usually invoked to determine whether the confession is voluntary yet as a safe general rule, it may be said that the statement will be presumed to

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subject to a choice. As between the rack and a false confession the latter would usually be considered the less disagreeable, but it is none the less voluntarily chosen. The term 'voluntary' then, is describing the absence of the vicious element which excludes a confession is, in ultimate exactness unsound. All conscious verbal utterances are and must be voluntary, and that which may impel us to distrust one is not the circumstance that it is involuntary, but the circumstance that the choice of false confession is a natural one under the conditions. The choice of false confession is associated with a prospect (namely) that it is not human nature to resist

whether the confession has been obtained by a third person to the prisoner's mind

but this after all is merely one of several tests or rules, which have been employed as representing a general principle underlying these differently phrased tests. The foundation of all rules upon this subject rests upon an anxiety to

petent is not because any wrong is done to the accused in using them, but because he may be induced, by pressure of hope or fear, to admit facts unfavourable to

24. found only in frequent
ment held out to the
one" *R. v Thomas*, 7
1 Den Cr C 331; *R*

whether there had been a *subornation* of such a nature that from fear of it the
prisoner was likely to have told an untruth. If so, the confessions should not
be admitted. Its exclusion rests on the connection with the inducement, they
stand to each other in the relation of cause and effect. If it is apparent that no
such connection exists, there is no reason for the exclusion of the evidence.
Williams v State, 63 Ark 527, *Greenl. Ev* § 219 (a). "The well recognized
misleading motives under the influence of which procedure anticipates danger to
judicial administration under certain circumstances, are hope and fear. The
risk run by a tribunal in relying upon incriminating statements so induced has
found judicial expression of great frequency. It is distinguished
as distinguished
infirmative consi
influence."

It is much more common to make them unsafe
by the use of hope or fear such as to make them unsafe.

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1 *Leach Cr C* 293, *R v Fennel* 7 Q B D 150, *R. v Thompson*, (1893) 1 Q
B 17, *State v Jones*, 54 Mo 479, *Greenl. Ev* § 219 (a).

A confession induced by a false allegation is irrelevant even if it is true.
Queen Empress v Chintaman, Rat Un Cr C 153. When the statements
made by the accused amount to saying that the other accused were really
guilty, and any share they had in the offence was owing to compulsion, they
are not confession which can be used against the other accused. *Queen v*
7 W R.

Confession was made by the accused. Judge did not disbelieve it
by the accused under the belief
this was not a confession in
is not invalid. *Public Prosecutor*

The question whether or
is being a confession or not will arise in the case of
a Police officer or
the police. *Ambar*

For a threat

as to give the accused
would gain an advantage. In this case, before the accused confessed to
Magistrate said to him "It is no use your trying to get out of it. You were
with the pair of shoes." Held that though the language used might be considered
to overcome the mind of an uneducated and inexperienced boy, yet, it was not
sufficient to overcome the mind of a man of the age, experience, education, and
position of the accused, so as to induce him to make a confession, and that it
therefore, did not invalidate the confession. *Mukherji v. Queen Empress*, L R
(1897-1901) Vol. I, 147.

A *panchayat* is not a Police officer, but only a person in authority within
the meaning of section 24 of the Evidence Act. Therefore a confession made
by an accused before a *Panchayat* is admissible in evidence, if the *Panchayat*

does not make use of any inducement to admit his guilt *Emperor v Jasha Beica*, 11 C W N 901=6 Cr L J 151 But where an inducement to confess a crime proceeds from a member of the *Panch*, the confession made in virtue of such inducement is not bad under s 24 of the Evidence Act, the member of the *Panch* not being a person in authority *Emperor v Philip Ju e Fernandez*, 4 Bom L R 785

S. 2

Even in cases where certain words used by the Police officer to the accused amounted to a threat, that fact would not render inadmissible in evidence the information given by the accused which led to the recovery of articles which are the subject matter of the offence *Emperor v Pidak*, 17 Cr L J 33=32 Ind C 221

comes out *Zeta v Emperor*, 18 Cr L J 106=37 Ind Cas 311=10 Bur L T 270

451=45 Ind Cas 284=19 Cr L J 524 When a confession was made after Police custody for several days and the investigating Police officers the confession was made under duress *Moharaj Ali v Emperor*, 23 C W N 886=53 Ind Cas 929, *Emperor v Pramatha*, 30 C L J 503; *Rusna Peli v Emperor*, 54 Ind Cas 881=21 Cr L J 177

When the confession was made was called him were made freely, then drawn up that at the time, that the hand cuffs told the accused that he was arrested, held that the confession voluntary and truthful *Daulat* made by an accused person the officer in a subtle way in the Magistrate is inadmissible in

imprisonment made a statement the offence for which he had a witness he denied implication made to the Magistrate was was convicted *Held*, that the *Khan v Emperor*, 18 A L J

18=54 Ind Cas 893, see also *Emperor v Gunna*, 59 Ind Cas 321=22 Bom L R 1247=22 Cr L J 68

and informs it becomes in admiss-

24

Misleading Inducements—Hope The real question is whether there has been any threat or promise of to tell an untruth from fear of thr
v Reason, 12 Cox Cr 229 “
 be seen that his mind is entirely free from every false hope or fear that would be likely to operate upon his mind and induce him to say that which is not true That is the principle upon which all these cases are decided *R Hornbrook* 1 Cox Cr 54

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 may possess many of the elements of terror and render a declaration affe and
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general principles to withdraw the confession from the jury In like man
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centuries It is the subordination of reason exercised on the facts of jur
 cases to reliance upon a general rule for which certain instances furnish a r ason
 A hearsay statement may mislead a jury, therefore all hearsay state ment
 whether actually pro
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of a confession, can be regulated or measured In *Hoyle v People*, 110
 the Court observed, “The admissibility of such evidence so largely d p and

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or promise The ex., age, disposition, education, experience, character, intelligence and previous training of the prisoner are elements to be considered in Williams geous and nity, in a State, 97

Ma 1 6, 7, *Linterhall Cr Lv* § 178

Inducement at an end 'If the impression produced by the promise or threat is clearly shown to have been removed *q*, by lapse of time or by intervening caution given by some person of superior (but not of equal or inferior) authority to the person holding out the inducement, a confession subsequently made will be strictly received *Phup Lv* 255 *R v Cleves*, 4 C & P 224, *R v Hones*, 6 C & P 404 *R v Richards*, 5 C & P 318, section 28, *infra*

Having reference to the charge against the accused The charge here means a criminal charge or a charge of an offence in a criminal proceeding The words "having reference to the charge against the accused" read with the words "in a criminal proceeding antecedent and the words 'in reference to the proceedings against him' following imply that the inducement, threat or promise must be with reference to the charge of an offence in the Criminal Courts of the country, and the language is wide enough to admit of the construction that the charge need not have been framed nor any criminal proceedings begun at the time of the confession In other words, the object of the person to gain a confession of having committed which will be the subject of a with the intent that the confession may be used in the subsequent criminal proceedings In this view it is difficult to understand *Queen v Hicks* 10 B L R App 1, 5 M L J Art p 26 The inducement must have reference to any charge against the accused person *R v Mohan Lal*, 4 A 46, *R v Garner*, 2 C & K 920 A promise or threat to render a confession irrelevant, obviously imply that the prisoner is worse according as he confesses 2d 310 302 An inducement to confession as to another and different one *R v Warner* 3 Russ Cr 6th Ed 459 (*n*) But this rule is not applicable where the two offences are so blended together as to form in fact but one transaction *R v Hearn*, 1 C & M 109 *Id* *Lv* § 591 Where a confession has been obtained by an inducement having no connection with the charge

without the charge being stated upon a confession was made, it was 1 D & P 245=6 Cox C C 213

been obtained from the accused by an inducement relating to some collateral matter unconnected with the charge *Roscoe Cr Lv* 43

out the inducement or threat

But a rule has been laid down in different

24. precedents by which we are bound, and that is, that if the threat or inducement is held out actually or constructively by a person in authority, it cannot be rejected, however slight the threat or inducement, and the prosecutor, Magistrate, or constable, is such a person and so the matter or mistake may be. If not held out by one in authority they are clearly admissible." So also section 24, whilst offered by a person in authority, leaves it entirely an opinion as to whether the inducement, threat or the prisoner to suppose he would derive some temporal nature by confessing. *Per Sargent C J* in *Reg v Navroji*, 9 B H C R 353 (367); see also *Per Parke J* in *R v Gurney* 2 C & K 920.

Sufficient to give accused grounds . . . avoid any evil. The Courts have construed these words liberally in favour of prisoners. Considering the ignorance of the people of this country and their dread of persons in authority, the

holding out a hope of forgiveness from God would therefore be admissible evidence. In *Empress v Mohan Lal*, 4 A 46, the threat employed was excommunication from caste for life. This was an evil probably temporal. L J J 29

Misleading inducements—Hope and Fear—Necessity for determining Actual mental State. For several reasons, it may be essential to determine in any particular case, the actual effect produced upon the mind of the declarant by the inducement or threat. It may have been held out to him, and what judicial authority

offered that the falsifying motive actually operated on the mind of the accused. Logically considered however, it is frequently essential to determine the actual influence exerted upon him.

in order to involute on the who has the actual result produced, under the circumstances disclosed, the influence exerted. A secondary consideration, also requiring the determination of this question of actual mental state, is that it may become the province of the jury, to find the probative weight to be accorded to the confession, in view of the infirmity consideration arising out of the inducements. Should the question be submitted to the psychological effect to his will in view of the inducement. *Per S 1489*

or was deterred with the view calculated to create such an impression may be considered by the jury and the confession made under the influence of each other in the relation of cause and effect.

Such an enquiry will divide itself roughly, into three main lines (a) A consideration of the resisting power of the declarant's mind (b) Examination of the kind and strength of pressure brought to bear upon it (c) What administrative or procedural assumptions may properly be made as to the continuance of any mental state once shown to exist. In other words, the effect of a misleading inducement upon the mind in any given case is a result of two factors—

its objective aspect. It will then remain to examine the extent, if any, to which an inducing inducement may be taken to have affected the mind at the time of making his

(A) Subjective considerations. In deciding in any given case, what was the actual effect of a misleading inducement it is necessary to consider not only the quantity and quality of the pressure but the resisting power of the person whose confession is offered in evidence. The logical test of admissibility is the question: Have the emotions of fear or hope, either as aroused by himself or by others, been such as to render him incapable of resisting the inducement?

direct or coerced it into a particular channel. While a statement if made on account of its truth, is not rendered incompetent because it is the utterance of a person labouring under some mental disability, natural or superinduced by his voluntary act, in judging whether a given statement is true the mental capacity of the declarant to resist the inducement may be natural, as in the case of feeble minded persons, or induced by intoxication, or by other causes. —*Chamberlaine's Ex* § 1490

Children, Feeble minded etc. Whether a confession of guilt made by a child shall be deemed relevant because truthful, is a question for the decision of the Court in view of the special facts of each particular case under proper circumstances, the incriminating statement of a child legally competent to make a confession is admissible. —*People v. ...*

will be fail to notice
confession by one of

it is probably less

feeble minded persons
tion very similar to that occup
is such that the presence of

Subjective considerations—Intoxication. A confession is not rendered

was furnished him by one in authority for the express purpose of inducing him to talk, and by leading the conversation in certain directions, to persuade him to confess, do not suffice to exclude a declaration so secured. Such a course of conduct ranks as a mere deception like any other, and, unless more appears than the mere fact of unguarded loquacity brought about by intoxication, no ground for rejecting the confession is furnished. In other words,

24

loosening the
sufficient to
So long as the
is talking about,
187) When the later stages
longer knows the effect of
because entirely untrustworthy

the brain is not
and the accomplice
knows what he
is doing, 7 (C & P)

(B) Objective considerations—Hope The objective strength of the inducement which operates by way of hope or fear to bring about a confession may be as varied as is the subjective strength of individual accused to resist them. Things promised may range, in intrinsic value from those less highly desirable by persons of well balanced judgment down to considerations so slight as to render the conduct in question practically unmotivated. If the hope should in any case be regarded as having induced a confession it is essential that the latter should have been made at such a time that the inducement may fairly be regarded as still operative. It is further necessary if hope is to be regarded as inaction, that some benefit, not necessarily a material one, should have been distinctly presented to the mind of the declarant and his ability to obtain it conditioned upon his confessing. Any mere suggestion as to the general desirability of confession or of confessing of guilt is not sufficient to show the influence of hope. Should the declarant be told a promise of benefit had been made by confessing his guilt and that he had to have acted in accordance therewith. As intimated it is not essential that the inducement should be

'worse off
way of hope
something
if he speaks
left in mind
sion because it is right and the value promise
event is not in all cases one easy to draw

in connection with the
need not be specified it may be
between a mere exhortation to confess
of material benefit in the case
Chamberlayne v Dy § 1490

Inducement must be material The thing hoped for must be of a material nature. Admonition to speak out based on moral grounds, e.g., that confession is a better thing than guilty silence is not, legally speaking, an inducement. *R v Akshlesnar* 4 P 646-89 Ind Crs 961. The words used in the section are of a temporal nature. The word "temporal" is opposed to spiritual or religious. A confession induced by holding out a hope of forgiveness from God would therefore be admissible. In *Pratt v Mohan Lal* 4 A 46, the threat employed was excommunication from caste for life. This was an evil probably temporal. 5 M L J 99. But confession induced by moral or religious exhortation will not be excluded. *R v Gilham* 1 Moo C C 186 *R v J. L. R. 1 C C 1196* *R v Lee* 1 R 1 C C R 362, *R v Hill* 1 Moo C C 452, *R v Sleeman* 1 Cox C C 245. A simple request for a confession in a given matter, though made to the accused by the person aggrieved in the matter, is not a subsequent confession made in accordance with it. *Layne v Fy* § 1496

Influence of a religious or of a moral nature In *R v Relford* 1 Moo C C 192 a clergyman had by him on the benchness of the crime charged the denunciations of thereby. But Best J. held dangerous after

crime of which he was not guilty, or that a man under a spiritual relation with God could hope to please God by a falsehood, or that a confidence created between him and his pastor, or the being thrown off his guard by his confidence should induce him, not to confess (that it is not naturally so if he were guilty), but to induce him to confess falsely. Such a spiritual

convictions, or 'spiritual exhortations', stem from the nature of religion, the most likely of all motives to produce truth. They are therefore of a class entirely different from those that exclude confessions. A confession is excluded because the motive which induces it is calculated to produce untruth because it is likely to lead to falsehood. If temporal hope exists, they may lead to falsehood. Spiritual hope can lead to nothing but truth." *Joy Confessions*, 11, *R v Gilham*, 1 Mood. Cr C 186, *R v. Guiney* Jobb Cr C 15, *R v. Hild*, 1 Mood Cr C 152; *R v. Stearns*, 6 Cox Cr 245. Proof that an incriminating statement was made by one accused of crime under the influence of a moral or religious inducement to make a statement, is in reality a negation of its probative force.

Exhortation to tell the truth by
Emperor v. Whilesnar, 89
1 R 1925 Pat 772. The fear
trustworthiness of a confes-

Threats made but not influencing the accused. Where threats are made to the accused but the accused made the statement deliberately, & uninfluenced by the threats this section does not apply. *Emperor v. Inandarao*, 19 B 613 = 27 Bom L. R. 1034 = 89 Ind C. 1016 = 26 Cr L J 1478.

Advice that it would be better to tell the truth. 'On principle says *Prof Wigmore* the advice by any person whatever that it would be better to tell the truth cannot possibly vitiate the confession, since by hypothesis the worst that it can evoke is the truth, and there is thus no risk of accepting a false confession. The confessor is not obliged to choose between silence and false confession but

utterance of
is nothing in it
for if it has

But that theory does not obtain in England. A confession obtained after the advice that it would be better to tell the truth is excluded in England. *R v. Enoch*, 11 C & P 539; *R v. Hearn*, C & M 109, *R v. Langley*, 2 C & K 225; *R v. Garner*, 1 Den Dr C 329, *R v. Baldry* 2 Den Cr. C 42, *R v. Waringham*, 15 Jur 318, *R v. Gellis* 11 Cox Cr C 69, *R v. Bate*, 11 Cox Cr 686, *R v. Dogherty*, 13 Cox Cr 23, *R v. Fennell* 7 Q B D 147, *R v. Enoch*, 5 Car 539, *Queen v. Uzier* 8 W R Cr 13, *R v. Thompson* (1893) 2 Q B 16, 18

'It can hardly be said
to confess what he
96 Kelly C B said
meaning that they
confessions. Some

cases have gone the length of saying that a statement is inadmissible if it is
'er tell the truth. For my part, I
that he had better tell the truth
had better confess, when you do
not know whether he is guilty or innocent.' *Per Penock J in In Nobodery*
Chandra, 1 B L R Cr 15. 'Much conflict says Mr Chamberlayne exists
among the judges as to whether an exhortation to hope or suggestion that

received in evidence a statement *prima facie* induced. The ruling seems justified, for, upon the surface the inducement if any, held out to the declarant is a moral one. It is required that no threat or promise or favour by one in authority should have accompanied the suggestion. On the contrary the use of but slightly varying expressions such as 'it will be better for you to tell all you know' or 'you had better tell the truth', has been held to exclude a confession so induced. *Chamberlayne's Ex* § 1517. A mere exhortation to

5. 24. the accused to speak the truth could not be construed into an inducement, threat or promise, and, least of all, into an inducement to make a false confession and is not enough to exclude evidence of a confession
 55, 9 P R 1891 Cr
 made by a superior
 24 of the Act
 11 Cr R 37

the moral or religious officer or other person in the presence of the latter & presence goes so far as to prove will do what he is told. The subsequent confession of the person in authority frequently both in tone & language is better for covert truth case if he is frequently in the proceedings, will accrue in the manner requested. There is plainly danger in such a situation of volition of the accused being over-powered, that he will state the truth not as it is but as he thinks will be pleasing to the officer, or other person in authority to have him say that it is. Adopting this distinction the Courts of several jurisdictions have regarded the statement of an accused person thus influenced as inadmissible under the rule, because involuntary. *Chamberlaine & Er*
 § 1516 1517

or perhaps under the violent pain of the rack, he thinks of nothing but present relief from agony which his confession will gain him. *Wignior* § 533. A confession is not admissible, which has been made immediately after the prisoner with others had been threatened with a loaded rifle. It was immaterial that the threat was not made to extort a confession, but to suppress an attempt at mutiny. *Queen v Hicks*, 10 B L R. Ap 1. It is a mistake to suppose that a confession cannot be irrelevant under section 24 unless it can be alleged that there was torture leaving marks of personal violence. Under the section the confession becomes irrelevant if the making of it appears to have been caused by any inducement, threat or promise. *Queen Empress v Narajan*, 20 B O 13= 3 Bom L R 122

Promise of pardon. A confession by promising immunity from prosecution of another case is not admissible against the confessor. *Haloo & R*, 12 P W R 1907 Cr - 5 Cr L J 437, see also *Abdul Karim v K F*, 1 A L J 110-1 Cr L J 211. *Mahommad Shafi v Emperor*, 1 P R 1899 Cr 100 v *Radha Kissen* 9 P R 1869 Cr. *R v Ishaj* 2 A 260, *Nya* 10 v *Emress* L B R (1872 189) 396. *Inda v Emperor*, 45 A 633, *Emress* 2 Infant 32 C L J 201=60 Ind C 417-22 Cr L J 225, *Queen v J* 23, C 30 (73), *Inde Kora Govindan* 11 Cox Cr 69, *O Hojan J* and the prisoner induced by a person in authority to make the information, making himself by the hope of obtaining the immunity of an approver that he was. He became a Crown witness in a reasonable expectation that he would escape punishment as a return for his accepted services in bringing offenders to justice. Where a promise of safety was made by a Police officer to whom the accused confessed, which confession was repeated before the committing Magistrate and the accused also made a confession, although different in

at the confession before the S.

It is an inducement or threat
to withhold my matter within
voluntary statement given
in evidence as against him

Reg v Alibhai, 8 B H C Cr 103

Inducements involving a higher punishment, mild treatment in prison or
a reward of money "It is scarcely conceivable" *Prof Wigmore* (1909)

they do so they will receive lenient punish-
entirely wrong impression and to be
Kang Emperor, U B R (1916) 2nd Qr.

p 113=17 Cr L J 103=35 Ind Cis 962,
820, *People v Johnson*, 41 Cal 153, *Smith*

in treatment while in confinement cannot

a false confession *R v Green*, 6 C & P 655, *Com v Dillon*, 4 Dall 116
Although
bartered
times be
Cr. 337
often con
ld be voluntarily
result has some-
Lackburn, 6 Cox,
raser offences are
he housed in

and reject absolutely a confession so induced Where the circumstances of a
obably thus induced, let it be excluded
the basis of so unusual a contingency
Evidence" *Wigmore* § 835

Promise of cessation of prosecution release from arrest etc A promise

you will tell me where my goods are I will be fore able to go
Could J
cy are
secutor
if he
o R v

Simpson, 1 Moody Cr C 410 It
was disallowed as it was obtained
do all he could Similarly in *R*
because there the prosecutor said

if you will not tell we of course can do
ient was
ch But
promise
v *Mans*
ase 6 Cr
exclude
3rd ed

Assurance that "what you say will be used for you" or "used against
you" The advice of one in authority promising that "what you say will be
used for you" was regarded in many cases as excluding a confession As
regards confessions thus obtained *Cotteridge J* said "I cannot conceive a more

Retracted confession—Corroboration of To use a confession as evidence against the accused, the Court must be satisfied (1) that it is voluntary, and (2) that it is substantially true. Moreover, it is a general rule of practice not to act upon retracted confessions, unless they are corroborated on material points by credible independent evidence. *Crown v Motan*, 2 S L R Cr 31=10 Cr L J 20; *Mahammad v Crown*, 5 P L R 1915=1 P W. R 1915 Cr=16 Cr L J 157=17 Ind Cas 221; *Hanprosad v Emperor*, 36 Ind Cas 133=17 Cr L J 453; *Sher Khan v. Crown*, 2 P W. R 1917 Cr=75 P L II 1917 Cr, *Queen Empress v Ginn*, Rat Un Cr C 817. It is a recognised rule of the Law of evidence, that a retracted confession may be used against the person making it, but not against other accused jointly with him. *Chet Singh v. Crown* 28 P W R 1907=7 Cr L J 227, *Yasin v Emperor*, 28 C. 683. A Judge should in the first instance, see whether a retracted confession is voluntary or has been improperly induced. The mere fact that prisoner puts in a plea of guilty made it by allegation

induced. That is a

If, upon weighing it appears to the

Judge that the confession has been improperly induced, no matter how true it may be, he is bound to exclude it, it then becomes evidence and liable to be appreciated and weighed with the rest of the evidence in the usual way. *Emperor v. Bhagji Vedu* 11 Bom L R 697=4 Cr L J 332, *King Emperor, v Durga* 3 Bom L R 441, *Ujaji v Emperor* A I R 1927 Lah 683=104 Ind Cas 247.

certified by a Magistrate, is not enough if unduly induced. *Queen Empress v*

by credible and independent evidence,

it is unsafe in the majority of cases to found a conviction on a retracted confession. A retracted deposition does not of itself afford a sufficient corroboration of a retracted confession. *Empress v Chutia* 13 C P L R 107 *Queen Empress v Bhaimappa*, 12 M 123=2 Weir 376, *Empress v Tila Ram*, A W N 1880, 52; *Queen Empress v Rang* 10 M 295=2 Weir 361, *Queen Empress v Ranu* 19 M 482=2 Weir 745, *Empress v Balai Ghosh* 124 Ind Cas 486=A I R 1930 Cal 141, *Safi v Emperor*, 124 Ind Cas 459=31 Cr L J 661=A I R 1930 Nag 259, *Mnan v Crown*, 30 Cr L J 340=A I R 1929 Lah 597, *Sheonarasim v Emperor*, 9 Pat 262=A I R 1929 Pat 212; *Kunya v Emperor*, 8 Pat 289=A I R 1922 Pat 27; *Ujan Singh v Emperor*, 30 Cr L J 1046

made

trial,

to deal with him as a co accused, his retracted confession would be irrelevant under s 24, notwithstanding the special provisions of cl 3 of s 339 of the Criminal Procedure Code. *Mohammad v Empress*, 1 P R 1899 Cr, *Crown v Radha Kishen*, 9 P R 1869 Cr, *Yasin v King Emperor*, 28 C 689=6 C W N 670

Where a confession was made before a Magistrate under circumstances not liable to suspicion, and, to all appearances, fulfils the requirements of the law, the fact that it is retracted in the Sessions Court does not negative the presumption of the genuineness of the confession. *Queen Empress v Banda*, A W N. 1890, 173

A confession before the Magistrate, though afterwards retracted in the Sessions Court, is evidence against the party making it. *Queen v Jema*, 8 W.

24. R. Cr 40; *Chit Sun v.* 17 W B Cr 4,
R v Gharya, 19 B
R v. Kelvie 29 A 434; *Sarkulal*, 20 A 13.
an absolute rule of law that a confession made and subsequently retracted by
a prisoner cannot be accepted as evidence of his guilt, without independent
corroboration d confession must
depend as originally given,
and the the reason given
by the prisoner for his retraction *Sayad Hussain v. Emperor*, 16 P. R 193
Cr = 153 P L R 1903; *Emperor v Bueswar Dey*, 26 C W N 1010 Patna;
Prya v Queen Empress L B R (1872-1892) 425, *Dawley v Emperor*, 134 Ind
Cas 876-A I R 1931 Oudh 412

A confession though made voluntarily by an accused person before a Magistrate, if subsequently retracted, is not sufficient by itself to justify a Sessions Court in acting upon it. *Queen Empress v. Balant*. Rat. Un Cr C 30.

A 1 R 1927 Lah 519 A retracted

Emperor, A I R 1930 Lah 89-30 Cr L J 1080; Naicab v Emperor, 6 Q
W N. 545-118 Ind Cis 757-A I R 1929 Oudh 381; Samual Das v
Emperor, 1929 M W N 791,
31 Cr L J. 26-120 Ind Cis
5. Durga v. Emperor, 132 Ind Cis

* value of confession seems to be this

the retraction, etc
withstanding its having

kind that not only confirms the general story of the crime but also, unambiguously, connects the

P. L. R 1914=15 C

R 1914 Cr: see a

Chitsun v Crown, 1

Cal. 633 Is. civ

made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence. The weight to be given

retracting them were true. An omission on the part of the Judge to
circumstance to the Jury amounts to a
misdirection. Voir 533; Queen *Ex p.*
Bhaji, Rat. 19 B. 729. If a

believes that a confession made by a prisoner although subsequently withdrawn, contains a true account of that prisoner's connection with a crime, the Judge is

S.

indicate that it is a natural narrative of what took place in the presence of the man making it, and is not at variance with any evidence in the case which is believed

mouth

224; *Queen**Empress*

W

fession

was not liable to be convicted on the confession alone. *Queen v Hardena*, 5 N W P. 217. But confession of a co accused, though subsequently retracted is admissible in evidence against his co accused. *Sardara v Emperor*, 125 Ind Crs 639=31 Cr L J 877=A I R 1930 Lah 667. Where the confession made before the police was found by the Court not to have been voluntary, it cannot be corroborated by the confession of the accused as an approver, subsequently retracted. *Safi v Emperor* 131 Ind Crs 459=31 Cr L J 661=A I R 1930 Nag 259.

In capital cases, the jury should often refrain from convicting on retracted confessions. *Queen Empress v Ruppia*, Rat Un Cr C 245=Cr Reg 12 of in a criminal case was the confession of the but subsequently retracted, and where it

the prisoners who confesse

ly retracted, such a
very good corrobora-

ground that it was
ter admission, is to be
Evidence Act, and
the proper course for

the Judge to take evidence about the circumstances before admitting the

given in the

W N 380

understood

in another

what statement was made by the accused. It is not the practice to base a conviction upon a retracted confession, unless it is corroborated. That a person,

and while not ignoring the difficulties that surround retracted confessions, it

evidence by reason of the person making it having retracted it before the committing Magistrate. *Sahib v Empress*, P L R 1900, 19 Cr. There is nothing in section 30 of the Evidence Act which would exclude, as against

5. 24. persons being jointly tried for the same offence, a confession made by one of the accused duly proved, simply because at the trial the confession is withdrawn or denied *Aung Thin v Crown*, 1 L B R 133. Certain accused persons made confessions which led to the arrest of certain other persons. The confessions were subsequently retracted, but were corroborated by the evidence of the approver. Held that the retracted confessions taken behind the back of the

rule them,
conviction
J 73=13
of J by

fracturing her skull. C made a confession before a Magistrate, which she retracted in the Court of the trying Magistrate. Except the evidence of one witness, who said he saw the two women together, there was no evidence whatever to show that C committed the crime. Held that C could not be convicted on his retracted confession. *Held also*, that production by

with

in *Mt Chandan v Crown*, 3 P W R 1304. A confession made to a Magistrate and retracted at the sessions trial, especially when that confession was not fair

Empress v Jadub, 27 C 295=4 C. where a confession was recorded under duress when it was corroborated in material particulars. *King-Emperor v Mohiuddin*, 25 M 1

made under the provisions of the Criminal Procedure Code, 1861, if retracted afterwards.

A confessing prisoner should not be condemned upon a retracted confession unless it is corroborated in material particulars. *Emperor v Mussamat Janab*, 70 P L R 1918=19 P W R Cr 1918=44 Ind Cas 179=19 Cr L J 210; *Har Prosad v Emperor*, 36 Ind Cas 133=17 Cr L J 453; *Behari v Emperor*, 60 Ind Cas 789=22 Cr L J 293.

An accused's confession subsequently retracted and not tallying with the other evidence in the case, cannot be pressed as strong evidence against him. *Emperor v Tilak*, 32 Ind Crs 331=20 L J 468=17 Cr L J 33. In the absence of corroboration in material particulars, it is not safe to convict on a retracted confession, unless from the peculiar circumstances in which it was made and judging from the reasons, alleged or apparent, of the retraction, there remains a high degree of certainty that the confession, notwithstanding its having been retracted from its genuine source, is true. *Khushi v Emperor*, 31 Ind Crs 821=16 Cr L J 815. But it cannot be laid down as an absolute rule of law that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of the plaintiff without independent corroborative evidence. The weight to be given to such a confession must depend on the circumstances under which it was made and the circumstances under which it was retracted.

N 1010=24 Cr L J 115=A I R 1923 Cr L 217; *Bassireddi v Emperor*, 9 L J 613=18 L W 667=33 M L 1 H C 37. *Manna Lal v Emperor*, 9 O & A 1 R 947, *Moti Ram v Emperor*, 75 Ind Crs 153=21 Cr L J 401.

The duty of a Judge presiding over the trial by Jury is to prevent the production of inadmissible evidence, whether it is or is not objected to by the

They will be admitted only if they are voluntary. If the Judge is satisfied as to the truth of a confession but doubts voluntary character he is bound to exclude it under the law, though such rejection amounts to excluding truth from the Court. *Imperial v Panchhari Datta* 29 C W N 300—52 C 67—86 Ind Cas 414—26 Cr L J

It cannot be and subsequently guilt without ind of a confession is a matter to be decided by the Court in the circumstances of each particular case. *Hanna Lal v Emperor*, A I R 1925 Oudh 1. In deciding whether a retracted confession is to be admitted in evidence it is necessary to examine not only the statement of the prisoner as to how he came to make it, but all the circumstances of the case. There is no rule of law which compels a Court to raise an inference of improper inducement from the mere fact that a confession is retracted. *Partab Singh v Emperor*, 6 Lah 415—7 Lah L J 482—A I R 1925 Lah 605, *Mohor Sing v Emperor*, 96 Ind Cas 747—27 Cr L J 982. Confession though retracted, although certain detailed confession explained the con-
381 Conviction based on retracted confession which was voluntary and was sufficiently corroborated is legal. *Iqbal v Emperor* 103 Ind Cas 112—28 Cr L J 656

Procedure to be followed—Where admissibility of confession is objected to—English Practice. Now the

such alleged admission. A voluntarily. It must have been made by any promise or favour, or by any threat held out by a person in authority. *R v Thompson*, (1893) 2 Q. B. at p. 15. So the only question in these cases really is—was any promise or favour or any menace or undue terror made use of, to induce the prisoner to confess? And if so was the prisoner induced by such promise or

the evidence. *R v Thompson*

It is also important to note that the question as to the admissibility or otherwise of the alleged confession is a question for the Judge and not for the Jury.

No until objection by the prosecution is made. If the Judge is satisfied of the truth of the statement, he may accept it, though the Judge in the absence of the Jury.

Very often, however especially in cases of quarter sessions it is not unusual to mention the statement to the Jury. And then when the evidence in chief is by statement, of the defence in the absence of the Jury.

It must be obvious to any person that such a procedure must be very damaging to the accused because even if the objection is sustained the Jury must naturally conclude that something not in the prisoner's favour is being withheld from them.

S. 25.

"What then is the correct procedure to be adopted in such case it is

he followed in such cases. And that procedure appears to be as follows. The prosecution, in opening, should make no reference whatever to the accused's statement, and should not even mention the fact that the accused made a statement.

"In examining his witness or witnesses, the prosecution must in the same way refrain from asking the witness whether the accused made a statement. When, however, that statement is made, the defence should state this stage of the proceedings.

"In the absence of a witness or witnesses examined and re-examined, the accused will be entitled to call witnesses in support of his defence. This seems to be a moot point. Thus, in *Salvo's case*, an application was made by the defence to call the prisoner to give evidence in support of the allegation that the confession was made involuntarily, but such application was refused by the Judge.

"It is difficult to see, however, on what grounds the Court can refuse to hear the prisoner on the question of admissibility.

"It is submitted that the prisoner is entitled to call other persons to prove that the confession was made involuntarily, persons, for example, who would say that they were present when the alleged confession was made, but that it was made in response to an inducement or the like at the time to the

If the Judge has ruled out all to the statement must be

made. If, on the other hand, he has held that the prosecution will continue their examination, such evidence stopped in order to allow the question of the evidence to be argued in the absence of the statement will, of course, be given. It will then be examined the witness again, but before the judgment was made involuntarily, the Judge will tell the Jury the reason why their retirement was requested, and also his reason for deciding to admit the evidence.

"The defence in opening will, *inter alia*, deal with the question of the

See case cited in 33 Cr L J pp 12 (Journal)

When
accused is
the truth or
form in a
were so, per

Emperor, 88 Ind C 18 283=26 Cr L J 1115

Confession to police
officer not to be
proved

25 No confession made to a police officer shall be proved as against a person accused of any offence.

Difference between English and Indian Law "Sections 25, 26 and 27 differ widely from the law of England and were inserted in the Act of 1891 (14 Geo 5)

"In the Upper Burma insert 'who is a Magistrate,' see s 4(3) (c) of the Burma Laws Act, 1893 (13 of 1893).

which they have been

police for the purpose

England confessions

of threat or promise *R v Kerr* 8 C & P 176, *R v Berriman* (1854) cited

in *Roscoe Cr Ev* 19, *R v Best*, (1909) 1 K B 692, *R v Man* 17 Cox C C

639, *R v Hershan*, 18 1 L R 357, *R v Dougal*, 67 J P 325, *R v Leibling*,

2 Cr A R 315, *Rogers v Hawkins* 19 Cox 123, *Ibrahim v R* (1914) A C

599=18 C W N 705 P C, 206, *R v*

Hirst, 18 Cox C C 374, *R v Harris*, 24

Cox C C 66, *Darling J* said be done to

induce or threaten, but short of that, if the person is not in custody, it is

certainly not the law that the constable may not make enquiries which may

lead to his getting evidence from a person which he may use against the

person" But a constable has no right to elicit admissions from those he

suspects *R v Mathews*, 11 Cr A R 23, see also *R v Vaisin*, (1918) cited

in *Roscoe Cr Ev* 51.

Reason of the Rule This law is applicable only in India. The following

extract from the First Report of the Indian Law Commissioners shows the

reasons which prompted the Legislature in enacting ss 25 and 26. The Police

in the province of Bengal are armed with very extensive powers. They are

prohibited from enquiring into cases of a petty nature but complaints in cases

of the more serious offences are usually laid before the police *darooga* who are

authorized to examine the complainant, to issue process of arrest, to summon

witnesses to examine the accused and forward the case to the Magistrate or to

submit a report of his proceedings according as the evidence may in his

sentence taken by the

sessions of 1852 and

abundantly shows

uses of extortion and

exercised by the

the conclusion that

the facilities which

session of such

Regulation XX

y confession n

ns for preventing

character of the confession confessions are frequently extorted or fabricated. A

by getting up a case against parties whose circumstances and character are such as are likely to obtain credit for an accusation of the kind against them. This is not unfrequently done by extorting or fabricating false confessions and when this step is once taken there is of course impunity for the real offenders

25. result of which is to constitute a written document. This of course will prevent a police officer from receiving any information which any one may voluntarily offer to him, but the police may statement made by a party accused.

As regards sections 25, 26 and 27

v. Babu Lal, 6 A. 509 at pp. 511-522. I have stated the effect of the observations which I am about to make that the rules contained in ss. 25, 26 and 27 of the Evidence Act were not originally treated in British India as strictly speaking rules of evidence, but rather as rules governing the action of police officers, and as matters of criminal procedure. I may take it that no such rules existed either in the Muhammadan Law or in the English rule of evidence the only two systems to which the Courts resorted for guidance on questions of evidence in criminal matters. Then after making mention of previous legislation on the subject he added it p. 523. These legislative provisions leave no doubt in my mind that the

Section 25

prisoners accused of offences

Solan v. Emperor 13 Ind. C. 1

in *Queen v. Hurulole* 1 C. 207,

4 A. 108 (204). The reason a

confession made by an accused

it be made in the immediate

apprehension that a police off

per one may unwillingly excite terror in their minds and extort false and

involuntary confessions and his duty to investigate criminal cases and to detect

offenders and bring them to justice may make him feel tempted to obtain

confessions from accused persons by threat promise or other improper influence

Queen Empress v. Brij 2 C. W. N. 71

Origin of the section As far back as the year 1817, the Legislature repealing the older rules upon the subject passed Regulation XX of that year which after all for its object the

can be
as in the rule

the said section provided that "no compulsion shall be used either towards parties or witnesses for the purpose of obtaining any

25. over
Queer.
R 11

made, in the first instance, to two policemen, and taken down in writing, and the prisoner was then brought before the Deputy Commissioner of Police Mr Lambert, in the Police Office in Calcutta, when he again affirmed the truth of his former statement to Mr Lambert, and Mr. Lambert, in his capacity of a

confession made by a prisoner in custody, to any person other than a Police Officer, shall be admissible, unless made in the presence of a Magistrate. It is of opinion that is the true meaning of the 25th section. Its humane object is

any undue
to which
for reading
R, 11 C
193, in it
cer by no
a fortiori

it is inadmissible against an accused. *Emperor v Hari Singh*, 12 Bom L R 899=8 Ind Cr 622=11 Cr L J 690; *Nga Phakin v Emperor*, 36 Ind Cas 480=17 Cr L J 512. This section is absolute. *Kodumy v Emperor*, A I R 1932 Mad 24. A confession contained in a statement made by an accused person to a stranger in the presence of a Police Officer while he was in the custody of a jailor does not fall within the purview of s 25 or s 26 of the Evidence Act and is admissible in evidence. *Nadu v Crown*, 3 P R 1314 Cr=214 P L R 1914=15 Cr L J 480=21 Ind Cas 463. A confession made by an accused to a private person in the presence of the Police is inadmissible in evidence against him. *Chanau v Emperor*, 20 Ind Cas 468=37 P W R 1913 Cr=320 P L R 1913=14 Cr L J 596. Section 25 of the Evidence Act lays down that a confession to a Police officer shall not be not say that such a confession may be used subsequent judicial confession. Ind Cas 693=6 L L J 54. "a person" in this section means only in the proof of a confession as to the matter so it should be

confession as a whole is excluded, whether by reason of the section or much of the information given by the prisoner he was an accused and in custody, as discovered becomes admissible. *Amurath v Emperor*, 41 Ind Cas 321=23 C W N 213=27 C L J 113=19 Cr L J 201. See also in the *Matter of Hiran Moya*, 1 C L R 21; *Emperor v Hari*, 21 Bom L R 721. A confession made to a Police officer is inadmissible even if the

was convicted on the evidence of the
offered them Rs 10 per bull of
large quantity of illicit opium from
had been also enrolled as Police

A confession, therefore, made to
accused of any offence is inad-

only to
section 25
the use,
to Police
statement
L T, 1=

examined this section *Empress v Jadabdas* 4 C W N 129 In that case the Court

Confession—Definition of A confession is an admission made at any
e, stating or suggesting the inference,
statements which amount to a direct
y statements which
et suggest an in
The factor deter
not the motive of
e of guilt *M Din*
11 Cr L J 153.
1 338 Confession

which it is proposed to prove against him to establish an offence *Queen*

Police officer, meaning of "In construing the 25th section of the Evidence
Act of 1872, I consider that the term 'police officer' should be read not in any
strict technical sense, but according to its more comprehensive and popular,
meaning" *Per Garth C J in Queen v Hurribole*, 1 C 207 (215) A Deputy

25. Commissioner of Police in Calcutta = a Police officer. *Ibid* Primarily the term "Police officer" in this section means the same as it does in the Police Act but it can be extended beyond the definition in section 1 of the Police Act to cover only those persons who like Police officers coming within that definition, are any member of the community for doing so. That

Police officer whoever that officer may be British territory or = Police officer in foreign territory, *v. Naqia*, 23 B 235, *Mabli v Emperor*, 87 Ind Cas. 520=26 Bom L R 706=26 C L J 984; see *Salam v Emperor*, 43 Ind Cas. 111; *Nadir v Crown* 15 Ind Cas 800. A village headman in Burma who is authorized to arrest without warrant is not a Police officer so as to make a confession made to him in admissible. *Nga Myain v Emperor*, 3 Bur L J 11=81 Ind Cas 540=20 Cr L J 924. The widest and most comprehensive extension of the term "Police officer" cannot make it include a Kotwar in the Central Province. *Sulhiana v Emperor*, 25 Cr L J 117=76 Ind Cas 291=A I R 1924 Nag 29, see also *Bhagatidin v Emperor*, 59 Ind Cas 88=21 Cr L J 568. A member of a frontier constabulary is, for the purposes of sections 25 and 26 of the Evidence Act, a Police officer, and admission made to him, and not in the presence of a Magistrate by an accused person cannot be proved against the maker. *Akhuys Hassan v Emperor*, 71 Ind Cas 360=24 Cr L J 136. In the Punjab a village Chaukidar is not a Police officer within the meaning of section 25 of the Evidence Act. *Akhuda Baksh v Emperor*, 43 Ind Cas 84=19 Cr L J 52=42 P. R. 1917 Cr. See also *Dal v Emperor*, 17 Cr L J 62=26 Ind Cas 654. A *chaukidar*, although he is not a Police officer under Act V of 1861, is one under Reg XX of 1817 and Act I of 1872, and a confession made to him is inadmissible. *Empress v Indra Chundra*, 2 C W N 637, *Nazim v R*, 9 C W N 47.

Police
to him
Sin v

21), a police Sub Inspector (*Addu Sul*
19 W R Cr 51), a darogah (*R v*
police (*R v Luchoo*, 5 N W P 86).
10 B. L. R.
v Babu Lal, 6
confession made

There is no

High Courts

excise upon having the power to detain, search, seize and arrest any person whom he believes to be guilty of any offence under the Opium Act or Bombay Abkari Act has powers which are very similar to those exercised by a Police officer.

other
in
the provisions of
L R 19, 1920
1196=51 B 75=23
L R 674=97

But the Calcutta
is admissible in
section 25 of the
v *Sio v Emperor*,
J 579=1 I R
C W N 824=45
151, *Pura Nand*

v Emperor, 52 C L J. 177; *Moh Lal v Emperor*, 36 C W N 163; *contra Ibrahim v Emperor*, 35 C W N 601; 9 Mys L J 71 following 51 B 18; *Maunisan Myin v Emperor*, 7 R 771=121 Ind Cis 715=31 Cr L J 303=A I R 1930 Rang 19 An exercise officer is not a Police officer within the meaning of section 25 of the Evidence Act *Emperor v Budhu*, 99 Ind Cis 594=A I R 1927 Sind 112, *Pillibai v Emperor*, 83 Ind Cis 151=25 Cr L J 1223; *Mechi v Emperor*, 88 Ind Cis 32=26 Cr L J 1088=A I R 1925 Nag 310; *Emperor v Wajir Singh*, 11 Ind C=588=3 P R 1918 Cr=19 Cr L J 361; *Muhammad v Emperor*, 39 Ind Cis 977=21 C W N 694=18 Cr L J 3 Cr L J 165=15 Ind Cis 305=5 Bur L.

ot a Police officer and confession made to him under s 25 of the Evidence Act *Queen Empress v Sama Papi*, 7 M 357=2 Weir 235 A confession made to Yuadungyi should not be admitted in evidence He is the head of the rural police and has police duties to perform He is, to all intents and purposes, a Police officer though he may not be so designated *Maung Wun v Queen Empress*, L B R. (1833—1900) 22

Confession made to a police officer whether admissible A confession made to a Police officer is not to be used in evidence *E v Thalun* A W N 1883, 188, *E v Pancham*, A W N 1883, 21 1 A 198 Confessions recorded

A Cr 153=106 Ind Cis 112=26 A L J 92 A confession made to another person in the presence of a Police officer, who has asked or instructed that other person to take the confession in such a way as to be his agent, where the confession takes place under such circumstances that the Police officer is in such proximity as to make his presence likely to affect the mind of the confessing person is in substance a confession to a Police officer *Emperor v Mt Har Piar*, 97 Ind Cis 44=44 A L J 958=A I R 1926 All 737, see also *Channan v Crown* 21 Ind Cis 168 Rule 195 of the Madras Councils Rules of Practice is not a rule of law but merely a rule for the guidance of village Magistrates and the police investigate the Magistrate know *Emperor*, A I R 1927

Mad 974

Where a house was searched and the recovery list, held that the fact of the recovery list is not admissible in evidence

8 Loh 326=28 P L R 119=100 Ind Cis 707=28 Cr L J 323 If after

out the route taken by them in going to commit the offence of dacoity and the

25. 178-23 Cr L J 197 A first information of murder was lodged at the Police station by the accused himself on the morning following the murder and after stating the narrative of events prior to the night of occurrence he confessed that he had committed the offence.
- Sections of section 25 of the Evidence Act in its entirety, yet, in so far as it spoke it was admissible in evidence if and in 62 Ind Crs 578-25 C W N 788-—
- Police by an accused person is admissible to prove the ownership of property in respect of which he is accused *Ganpat v Banu*, 53 Ind Crs 62-21 Cr L J 414. Statement made by the accused in the presence of a Police officer is admissible.
- R 724

Confession

v Emperor, 48 Ind Cas 883-36 P R 1918 Cr = 10 Cr L J 80. A statement made by a complainant in his first report at the Police station is not admissible as proof of the facts therein mentioned and cannot be used as evidence against the accused in his trial *Dal v Emperor*, 16 Cr L J 62-26 Ind Cas 104. Accused went to a Police station and made the report "I have killed my wife and her corpse is lying in my house," in consequence of which the Police proceeded to his house, discovered the corpse of his wife in an inner room of the house. *Held*, that the provisions of ss 25 and 26 of the Evidence Act apply to the circumstances of the case *Surendra Nath v Emperor* 16 A L J 478-47 Ind Crs.

made in an investigation must be taken to be a statement made by the accused himself or by somebody else in his presence. But incriminating statements made by accused persons while in Police custody, in answer to questions put by a Police officer, are not excluded from evidence under section 25 of the Evidence Act. *L J 106-37 Ind Crs*.

of making an admission or withdrawal of the plea can be allowed if the accused wishes to withdraw it. *Emperor v Shuldian*, 28 Ind Cas 145-44 P W R 1914 Cr.

The only evidence against the first accused was that in consequence of information given by him property was produced to the police before the police conviction of the first accused not lead directly to the recovery of the property. *In re Ippani Ram* 3 M L T 333-7 Cr L J 798. Where a confession was made before an investigating officer.

under s 25 of the Evidence Act *Lee Bein v Queen Empress*, L B 1892) 479. Confession made by an accomplice, committed to a Police officer, was in a plea of guilty was a confession of evidence of

to a Police officer and *Queen Empress v Jagan* made by an accomplice, tender of a pardon by an Assistant Commissioner acting in his

S.

337, Cr Pro Code was held to be *Empress*, 10 P R 1895 Cr Section 25 confession made to a Police officer shall not be proved as against an accused person. It does preclude an accused person from proving, on his own behalf, a confession made to a Police officer by another accused person tried jointly with him. *Ibrahim v Emperor*, 12 Cr L J 79=9 Ind Cas 419. Confession to a Police officer of having given false information cannot be admitted and charged under s 182 and s 211 of *Nga Phet*, U II R (1897 1901) Vol I, 156 or rioting. During, and, admits the

information was not a confession under s 25 of the Evidence Act, and as against the person other than the informant, it amounted to an admission of evidence against them. *Hair v King Emperor*, 11 C L J 301=5 Ind Cas 305=14 C W N 593.

Where a Police officer read over to the accused the statement which he (Police officer) had taken from others and then told him 'I know the whole thing now,' and the accused, thereupon, made a statement in consequence of which he was arrested and his confession was duly recorded, held that the confession was voluntary and was perfectly admissible. *Hanmat* 3 Bom L R 401. Accused person is not illegal for a confession which is open to grave suspicion of having been produced by ill treatment of the police. *Khair Din v Crown*, 21 P W R 1907 Cr =6 Cr L J 266.

ting statement made to a Police officer by an accused person in custody. *Queen Empress, v Mathews*, 10 C 1022.

admits

the evidence for the prosecution consisted of certain confessions made to the Police. The Police found some stolen cloth for the Police. The confession was inadmissible under s 25. The confession mentioned did not justify his conviction under the section. *Empress v Nanhe Beg*, A W N 1883, 126.

Admissions not amounting to confessions. Whether admissible when made to a Police officer. Every statement is not a confession. *Ilho v Emperor*, 19 S L R 6=A I R 1925 Sind 257. An incriminating statement to a police officer, though on the face of itself exculpatory, is inadmissible. *Emperor v Inantra*, 5 Cr R 15=49 B 612. 89 Ind Cas 1016. The question whether a particular statement whether it be positive or negative, verbal or expressed by conduct, is or is not a confession, must be decided on the facts of each case. *Umer Durang v Emperor* 86 Ind Cas 410=26 Cr L J 778=A I R 1925 Sind 237. After a fight in which death was caused, several accused drove certain cattle belonging to the deceased to the pound. Two of them made a statement to a Sub Inspector of Police that they were in the

5. 26 fight and that the deceased had attempted to interfere with the seizure of the cattle. Held that the statement did not amount to a confession inasmuch as it was only an explanatory statement of the circumstances under which the cattle had been seized and was not an admission of guilt but rather of the nature of a complaint against the deceased and was not therefore admissible in evidence. *Jotal v. Emperor* 81 Ind. C. 317—20 Cr. L. J. 811. A. I. R. 1923 Lah. 232. A statement by one accused to the police that certain property which he produced had been stolen to him by two other accused who were charged with him was being an admission. *Ac. v. Emperor v. Sher*. A statement made by a confession may nevertheless be used against him and more particularly it is a statement to it amounts to under section making the 23 Cr. L. J. confined to from which

In Gang v. Emperor 41 Ind. C. 100. The Act does not say that it includes only confession.

to them, there being which are statements which is charged. Furling leading to discovery whether such statements amount to confession. *Emperor v. Kanool Mah* 6 Ind. C. 161—15 Cr. L. J. 713—41 C. 601, *E. v. Buddhu* 3 N. I. R. person to a Police admissible in evidence 14 Cr. L. J. 202. A statement directly or indirectly to an admission of any incriminating circumstance is admissible in evidence, hence where the accused was found carrying a box at night and when asked by a policeman on duty about the ownership of the box stated that it belonged to him the statement was held admissible against him. *Confession* by a person in the commission of an offence. For such a purpose confession for other purposes would be admissible under section 21, in his character of one settling up an interest in property in litigation, or judicial enquiry and disposal. *Queen v. Empress* 5 Cr. L. J. 131.

26 No confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against him.

* *Explanation*—In this section "Magistrate" does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George or in Burma or elsewhere unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882.

*This *Explanation* was added to s. 26 by the Indian Evidence Act (Amendment Act (III) of 1891) s. 3.

† See now the Code of Criminal Procedure, 1898 (Act 5 of 1898).

used on section 149 of the Criminal S.

III of 1891, s 3 The rules cor
in British India
governing the
Queen v. Dhu

or in rules
Procedure.
35 M 397

persons through any undue
Per Gault C J in Queen
the rule seems to be that the
of coercion for extorting conf

3 section deals with confessions made in the
the custody of an accused person that is,

presence of a Magistrate, in which case the confessing person has an opportunity
of making a statement uncontrolled by any fear of the police *Per Ainslie J in*
In the matter of Hiran Miya, 1 C L R. 21 Section 26 is not to be read
as qualifying the plain meaning of s 25 *Queen v. Harribole*, 1 C 207,
Queen v. Duman, 12 W R Cr 82 Section 26, cannot be treated as an
exception or proviso to s 25, there being no words to justify such an in-
terpretation The criterion adopted in s 26 for excluding confession is the
answer to
If the ans
police officer
evidence, unless it
v *Dabu Lal*, 6 L
an accused person
v. *Mathew*, 10 C 1
makes no distinct
substantive rule
L J 290 This section does not make admission dependent upon knowledge of
the custody of a
be excluded from

M L T 1=13 Cr L J 352=35 M 397=14 Ind Crs 896 But it may be
admissible in favour of an accused *R v Pitamber* 2 B 611 The general
rule, applicable to confessions made by prisoners whilst in the custody of a
police officer is contained in section 26 and the proviso contained in section 27
Chomer Sahib 12 M 173

T to a Police Superintendent on the day next
M was arrested but neither of the other two accused was suspected of having

Confessions made in police
made to a Police officer, but not in
Queen-Empress v Ah Baksh, S
20 M L J 352=15 Cr L J

which was made by the accused when not in Police custody is admissible in
evidence *Harbans v King-Emperor*, 8 Q C 365=2 Cr L J 811, see also *Raj*
Kumar v
by an acc
his house,
back to pc

* Cr L J 524=92 Ind
he was sent by the
which involved an
examination of the patient in private Two police men took the accused from
the lock up to the dispensary At the dispensary the police men waited outside
on the verandah while the accused was inside undergoing examination at the
hands of the doctor, and during the few minutes that he was with the latter he
made a confession Held, that the confession was inadmissible in evidence under
section 20 of the Evidence Act, in as much as the accused remained in the

would be found in a heap of rubbish close to his house and after making the
statement he took out the property from the heap in the presence of two police

27. constables *held* that
admissible in evidence,
in the heap of rubbish
845=21 M L J 352=15 Cr. L J 533

Where an accused person promised, while in police custody to restore the stolen property, *held*, that the promise was an incriminating statement suggesting the inference that the 'therefore' a confession
v King-Emperor, 20 P . . .

A statement made
'if it is an admission of . . .
Queen Empress v Jaracharam, 19 B 363; *Queen Empress v Nana*, 11 B 260 & 11

Confession made in the presence of a Magistrate A confession to a Magistrate while in Police custody is not inadmissible *Nazir Singh v Emperor* 9 Ind Cas. 806=27 Cr L J 131=A I R 1925 Lah. 557, *Queen v Mani Mohan* 24 W R Cr 33, *Queen v Shahabat*, 13 W R Cr 42; *Queen v Nilma Thab*, 10 C 595 A confession made by an accused person before the Administrator in Portuguese territory, who is not a Magistrate or of the Indian Evidence Act It is immaterial that the confession was made was not himself the case *Emperor v Mhalil Rana*, 26 Bom L R 706=1924 Bom 480

Police officer, meaning of The word Police officer in this section is 'police-officer' in Native State C 855=Cr Reg 22 of 1896, 22 B 235, *Q v Sundar Si* 257 It is doubtful whether *Nazir v Emperor*, 9 C W N 174=2 Cr L J 255 The words "police officer" in this section are used in the same sense in which they occur in section 23, and

L J 931 A Deputy Commissioner *Queen v Horibole*, 1 C 215 A is not a police-officer *Queen Anand Rao*, 49 B 493=89 Ind C *Badan Singh v King Emperor*, 2 P R 1909=7 P. W. R 1909; *Lal Rao Anand Rao*, 49 B 642 A police officer in a French Territory is a police officer *R v Viraraghava*, 11 M L T 407 A police Patel is a police officer *R v Rama Birajpa*, 3 B 12

Magistrate The word 'Magistrate' Native States *Queen Empress v Kala*, 22 B 235, *Queen Empress v Ind Cas* 257, *R v Bhuma*, 17 B in the district in which he has been

Crown 8 P. W. R 1314
, see also *R v. Fakal Jell* 7
n of the French Government is a
late presence are admissible in
ted to the Magistrate exercise
Panch Nath Pillai v Emperor
Administrator is not a Magistrate

Emperor v Mhalil, 87 Ind Cas 20=26 Bom L R 706

Explanation Previous to the enactment of this explanation by Act III of 1891, it was held that a village Munsiff falls within the purview of this section and as such he was a magistrate *Empress v Ramanagitt*, 2 M 5, see also *R v Ranga* 10 M 2954

27. Provided that, when any fact is deposed to as discovered

How much of information in consequence of information received from a person accused of any offence, in the custody of a police-officer, so much of such

information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved

Principle
any circumstance
to be influenced by

been induced to say
each of the confession is
35 notes (1) to R v
197 This section was
intended not to let in confession generally, but only such particular part of it as
set the person to whom it was made in motion, and led to his ascertaining the
Per Straight C J in Queen Empress v
Certain statements, made under certain
cases, considered them unworthy of credit, but the trust is removed by the
finding upon search, of articles connected with the crime or other facts 5 *Mad*
L Jour Article at p 80 "The prisoner's statement as to his knowledge of the

the admission of the exception to the general rule The fact discovered shows
that so much of the confession is immediately related to it is true' *Queen*
Empress v Babu Lal 6 A 509 (513, 517)

supports other testimonial exclusions) and the tests worked out are often more or
less artificial, but the principle underlies the whole body of rules If now a
circumstance appears which indicates that the law's fear of untrustworthiness is
unfounded and counteracts the significance of the improper inducement by
demonstrating that after all it exercised no sinister influence, the confession
should be accepted This is the theory of confirmation by subsequent facts,
about excluding
cases on otherwise
firm it in material
points, the possible influence which through caution had been attributed to the
improper inducement is seen to have been nil, and the confession may be
accepted without hesitation' *Wignore* § 856

"But it should seem, that so much of the confession is related strictly to the

L C J. states the reason for such admission thus "Because it leads to the

Origin of the rule The section 150 of Act XXV of 1861 (The Criminal
Procedure Code) runs as follows. "When any fact is deposed to by a police

27. officer is discovered by him in consequence of information received from a person accused of any offence, so much of such information, whether it amounts to a confession or admission of guilt or not as relates distinctly to the fact discovered by it, may be received in evidence" That section was thus altered by Act VIII of 1869 "Provided that when any fact is disposed to in evidence is discovered in consequence of information received from a person accused of any offence or in the custody of a police officer, so much of such information, whether it amounts to a confession or admission of guilt or not, as relates distinctly to the fact thereby discovered may be received in evidence" Section 150 of Act XXV of 1861 was re-embodied in section 27 of the Indian Evidence Act *Queen Empress v Babu Lal*, 6 A 509

Scope of the section In *Mahmood J* held that s 27 came down in s 25, but only that Cr 13, 9 W R Cr 16, 11 C 6 A 509 (F B) the question

Empress v Kuarpal, A W N J said, at pp 520 521 "The question raised by this reference is one of interpretation of the Statute, and it may be briefly stated to be, whether the proviso contained in section 27 of the Evidence Act governs only the preceding section, or also s 25. In order to arrive at a satisfactory conclusion upon this point, it seems to me advisable to trace the history of the rules contained in ss 25 26 and 27 of the Evidence Act, so as to ascertain for these provisions find a place in the Code of Evidence for India. I have stated these facts as introductory of the observations which I am about to make that the rules contained in ss 25, 26 and 27 of the Evidence Act were not originally treated in British India as, strictly speaking rules of evidence but rather as governing the action of police officers and as matters of criminal procedure. Then stating that s 150 of Act XXV of 1861 was repealed and re-enacted by Act VIII of 1869 he went on "What was the effect of change of language introduced by the new section? Why was it introduced? What was its effect? The other questions which must be considered

rendering the language of s 150 a mere amendment of the immediately preceding section 149 which is expressly limited to confessions made by a person 'whilst he is in the custody of a police officer' they (sections 25, 26 and 27) are identical in the rules which they lay down, though the language has been improved by some verbal alterations which require no special mention except the omission of the word 'or' from the clause 'a person accused of any offence or in the custody of a police officer' in the place of the omitted word 'or' a comma has been substituted. 'officer' a parenthetical clause for 'confession' would fall under the same remarkable and, if it has any effect, proviso" But the majority of not only to section 26, but also to information given by the accused confession or not as related distinctly to the fact thereby discovered must be proved *Queen Empress v Babu Lal* 6 A 509 (F B), see also *Queen v Lallu* 19 W R 51, *Reg. v Jora Hiji*, 11 B H C R 213, *Lingress v Rana Lallu* 3 B 12, *Empress v Pancharan*, 4 A 193 *Thur v Queen*, 11 C 635 *Queen v Kamalia* 10 B 595, *Queen v Nana*, 14 B 260, *Surentra v Emperor*, 16 A 178, *Imaruddin v K E* 24, 22 C W N 213, *Supriental v Bhoo* 1 C W N 106. That the view taken by *Mahmood J* in *Queen Empress v Babu Lal*, *supra* is the correct view was reiterated by Lord Williams J in *Supriental v Bhajoo Singh*, *supra* at p 111. It has also been pointed out by *Lord*

C. J. in a very recent case, that an anomalous position has been created by follow- S. 2

express mention of it is made therein, see also *Empress v Pancham*, 4 A 198
 "The reasons given for and against the view that section 27 controls section 25
 also apply with equal force to the question whether that section like wise controls
 lous that in

t receives a
 y leads to
 ient may be
 g *Emperor*,
 ng *Emperor*
 thurm Dutt,
 peration of
 tody of the
 custody of
 confession
 or not, as relates distinctly to the fact thereby discovered may be proved *Per*
Oldfield J in Queen Empress v Babu Lal, 6 A 509 (I B) at p 513, 514 This
 police officer or by other
 an in these two sections
 of it in accordance with
 nly to the extent of the
 strictly relates to the fact

Per Straight C J in
Queen Empress v Babu Lal 6 A 509 (I B) at p 544 But *Mahmood J* said in
 the same case at p 541 "I hold that the rule laid down by the Legislature
 in s 24 (read with s 28) of the Evidence Act, is a rule absolutely independent
 of the question of discovery or on discovery to which s. 27 relates, that the
 state of things in India has induced the Legislature to frame in section 2, an
 equally absolute rule in regard to confessions made to police officers which
 are presumed to have been made under conditions prohibited by s 24 that the
 s prohibited the admission
 s by the accused whilst in
 s rules but only the last rule

so enunciated, is much subject to the saving clause contained in section 26
 rendering confession admissible, if they are not made to the police officer but to
 a third person, 'in the immediate presence of a Magistrate' which affords a
 guarantee that the confession was not extorted, that the proviso contained in
 section 27 is not intended to qualify the absolute rules contained in ss 24 and
 26, which relates

persons whilst the
 In short, I hold
 the same as the
 rule laid down by Lord Eldon in *Harvey's Case* 2 East P C 658 and that
 improperly
 a question of

in the case but indeed receives corroboration in respect of many points, then the confession should be held to be true as implicating the person making it unless he can make up a story to the contrary. It is not necessary that the confession of an accused should receive direct corroboration as to the fact that the accused was concerned in the offence. It is sufficient that there is such corroboration of the confession as to indicate that the accused had such knowledge of the circumstances of the offence as would suggest his taking

1-68 Ind Crs 17-9 O L. J.

whether by reason of s 26 or 25

information is set the pol
Amriddin v Emperor, 15 C
Crs 331 Section 27 of
also s 24 all three of which

Crown 11 P R 1915 Cr.

This section has got nothing
discovered is or is not relevant
1929 Lah 344 (F B) Recoveries etc

fact
I R
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admissible in evidence, the fact
force, independently of the confession, would be admissible in evidence In re
Choda Achanna, 11 Weir 735-3 M H. C 318

peror, 36
oint out
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S. 27.

is a result of it. That is the present case. It cannot be admitted in evidence because the man was not in custody, which of course is thoroughly absurd. The result is that the fact discovered is not a fact discovered by the accused person.

There seems to me to be nothing in section 21 or section 23 to prevent evidence being given. In consequence of something said by the accused I went to a certain place and there found the body of the deceased. In cases under section 27 the witness may go further and give the relevant part of the confession.

Any fact. The fact discovered by a statement must be a material fact and not a mental state induced in another person by that statement. *Emp*

to show how the fact that was discovered is connected with the accused so as in itself to be relevant evidence against him." *Per Straight C J in Queen v. Phipps & Habu Lal*, 11 C. 137. The test is whether the information received from an accused person in connection with the fact discovered, and how much of the information was the direct cause of the fact discovered, and is such a relevant fact? *J Mad L Jour p 80 (Article)*

Deposed to. It is necessary, in order to bring a case of discovery within section 27, that the fact discovered should be deposed to by the person to whom the statement was made. *J Mad L Jour p 80 (Article)*.

Discovered. The meaning, firstly, of known before to something, the existence of the fact.

It is in the latter, and not in the former, sense that the word is employed in section 27 of the Evidence Act, and this will be made evident upon considering the principle underlying the section. *J Mad L J p 80, 81*. From this definition of 'discovery' it follows that simple statements, or statements made while pointing out the scene where the crime was committed or while producing articles, and showing the connection of the place or thing with the offence, are not rendered admissible under section 27, but only statements preceding the finding, upon search or inquiry of articles or other facts connected with, or referable to the crime. *Ibid* see also *R v. Long Horn* 11 B H C R. 242, *R v. Latif*, 49 C 167=25 C W. N. 783. The word 'discovered' is very important. The test is that the fact discovered must be discovered in the sense, that the proof of the existence of the fact no longer rests on the credibility of the accused's statement but rests on the credibility of the witnesses who depose to the existence of the fact. The rest of the

information is not admissible. But if the accused wishes to challenge the veracity of the statement that it was on his information that the thing was discovered he

words deposed to is concerned, they are still governed by the provisions of s 27 which must be construed as favourable to the accused as possible for it is a section which makes an exception against the accused contrary to the general sections, namely 25 and 26 which are in his favour. *Karam Din v. Emperor*, A I R 1929 Lah 333

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made a statement

344 (F B)

1929 Lah 333

the word 'information' cannot be used as synonymous with the word 'statement'. There is no reason why the word 'information' should have been used instead of the word 'statement' in the section if by 'information' statement alone was intended. The word 'information' as distinct from the word 'statement' connotes two things namely a statement or other means employed for imparting

that 'information' also includes knowledge derived by the person informed from the informant.

Statements made while present at the scene of murder made to a prisoner's saying "that is the place"
11 B H C R 242, *Empress v. Rama Birappa* 3 B 12

If the prisoner himself
connected with the crime and
the act of production

or delivery its
producing statement
discovery in such
3 B 12 (17)
recorded confession
his pointing out
connected with the

Queen Empress, 11 C 635

27. In consequence of information. "Whatever be the nature of the fact covered, that fact must in all cases be itself relevant to the crime, and the connection between it and the statement made must have been such that the statement constituted the information through which the discovery was made, in order to render the statement admissible" *Pry v. Jora Hussi*, 11 B H. R. 242. It

read under section 111 c
property. In the course
the police where the pro

buried the property in the fields. It was contended
property was concealed, and with it
in which the property was kept
out the spot to the effect that he had buried the property there. It was contended
ed that the statements were in
was in custody of the police
ment and "As regards 27,
the property, it is said, was not discovered in consequence of the information
given by the accused to the police, but by the act of the accused himself on the

in accordance
the property
police in making
accused to
ing on the p
and was the natural consequence of the information they had received from
and so connect
causa causans
consideration
thereby disco

Courts in dealing with proximate and remote cause of damage, namely, what followed was the natural and reasonable result of the defendant's act. It being of great importance that the law should, in a matter of such common occurrence, be distinctly settled, I am glad that my doubts have been removed, and this Court is not divided in opinion. But to avoid our judgment being applied to circumstances beyond its meaning and beyond the policy of the law to statements that cannot be regarded as proximate cause, I would refer to Lord Blackburn's decision, where he discusses Lord Bacon's Maxim "It is re-

It is re-
sult of drawing
Q. B. at p. 267,
London and South
East case I am of
his earlier case
usual course of
section 27 was not
cular parts of it
ascertaining the
v. Babu Lal, 6 A.

R. 51, where it was held that
of the party, even there it was
no information. But in *Empress v.*
a contrary view. In *Empress v.*
laid down a distinction between
a discovery by the act of the party, and one from his information. See
also *Queen Empress v. Babu Lal*, 11 A. 509, *Queen Empress v. Aamcha*, 10
B 595.

The view as expressed in *R. v. Nana*, 14 B. 260, has also been adopted by
the Calcutta High Court. *Legal Remembrancer v. Chema Nashya*, 20 C. 413,
R. v. Pagree Saha, 19 W. R. Cr. 57.

The fact deposited as discovered in consequence of information received or confession made to the police by an accused person must be a fact relevant to the case in which the evidence is sought to be given if it is sought to be admitted in evidence under section 27. *Gokul Chamar v Emperor*, 105 Ind Crs 683=28 Cr L J 791=6 Pat 611. If arms are recovered in consequence of information supplied by the accused, the statement made by them are, admissible under section 27 of the Indian Evidence Act. *Ali Ahmed v Emperor*, 1923 Lah 134.

From a person When a fact is discovered in consequence of information
persons charged with an offence, and when others
could not be treated as discovered from the
could be deposed that a particular fact has been

information as relates distinctly
v *Ram Churn*, 24 W R Cr 36. In
J observed "I
where two persons
or 'they said that,'
that both the persons should speak at once, and it is the right of each of them to
have the witness required to depositions
individually used. And I may
constable is having been made by
covered a certain fact or certain
on the witness so that there may be
In dealing with statements of this
to the discovery it is of the essence
should be precisely and separately state
this point, and the witness refused
paid no attention to it." See also *Rama Singh v Crown* 50 P R 1915=7 Cr
L J 12. Where all the accused persons jointly pointed out the place where
blood stains were found and subsequently the place where the dead body of a
person was discovered buried such evidence is not admissible at all against any
of the accused unless it can be shown who made the discovery first. *Faqira
v Emperor* A I R 1929 Lah 665. *Adam Khan v Emperor*, 101 Ind Crs
483=28 P L R 187=28 Cr L J 456. *Ditto v Emperor* A I R 1931
Sind 154. *Emperor v Shivaputhya* A I R 1930 Bom 244=32 Bom L
R 574.

In my opinion section 27 of the Evidence Act ought to be strictly construed

were in the custody of the police it is quite clear that the statements of the
persons other than the first person who made the statement can not be used in
evidence. The statement made by the first individual under section 27 and in
the circumstances described therein may be treated as evidence against him but
it is not allowable under the provisions of the law to treat the evidence of the
other persons who may have made statements of the description referred to in
section 27 as evidence admissible under the provisions of that section. This

persons who made

27.

based on the
untrustworthy
information

police that they
rebutts that pre-
subsequent discovery
a guarantee of
If therefore the
not of both have
subsequent to the

discovery are irrelevant. *Crown v. Suleman*, 10 S L R 7=17 Cr L J 35-
36 Ind Cas 171.

Where a material fact, for instance, the manner in which a theft was committed, has already been discovered by some other means, an accused's subsequent statement relating to the same fact, while in police custody, is not admissible against him under s 27 of Act I of 1872. *Mann v. Empress*, 9 Ind Cas 232=12 Cr L J 35=3 P W R 1911

Where the Police succeeded in discovering property in consequence of information received from an accused, it is not competent to the Police to replace the property in the place where it was discovered, and to ask the other accused to produce the property, because there is no further discovery under s 27 Evidence Act as against the other accused. *Queen Empress v. Bishop*, 2 Bom L R 1089.

Accused in Police custody. The words used in section 150 of Act VIII of 1869, (which is re-enacted as section 27 of the Evidence Act, 1872) are "a person accused of any offence, or in the custody of a police officer." The only alteration in section 37 is the omission of the word "or" before "in custody," but this only shows that the operation of the provision is restricted to information from an accused person in custody of the police, and does not apply to information from accused persons not in custody of the police. *Per Oldfield J in Queen Empress v. Babu Lal* (1891) 13 Ind Cas 151. The meaning of the words in the Evidence Act appears it is not in custody of a police person.

(b) in custody but not accused besides under the circumstances mentioned

and is
Empress

tion in
“(

circumstances
person
but not accused (c) accused but not in custody, notwithstanding any discovery in consequence thereof

“(2) A confession made to a police officer by a person who is at the time (a) neither accused nor in custody (b) in custody but not accused, (c) accused but not in custody, is wholly inadmissible in consequence thereof. A confession made by a person who is not in custody of the police, could not fall under the purview of the custody of a police officer (*Queen Empress v. Babu Lal*, 6 A 100=11 Ind Cas 151=152=153=154=155=156=157=158=159=160=161=162=163=164=165=166=167=168=169=170=171=172=173=174=175=176=177=178=179=180=181=182=183=184=185=186=187=188=189=190=191=192=193=194=195=196=197=198=199=200=201=202=203=204=205=206=207=208=209=210=211=212=213=214=215=216=217=218=219=220=221=222=223=224=225=226=227=228=229=230=231=232=233=234=235=236=237=238=239=240=241=242=243=244=245=246=247=248=249=250=251=252=253=254=255=256=257=258=259=260=261=262=263=264=265=266=267=268=269=270=271=272=273=274=275=276=277=278=279=280=281=282=283=284=285=286=287=288=289=290=291=292=293=294=295=296=297=298=299=300=301=302=303=304=305=306=307=308=309=310=311=312=313=314=315=316=317=318=319=320=321=322=323=324=325=326=327=328=329=330=331=332=333=334=335=336=337=338=339=340=341=342=343=344=345=346=347=348=349=350=351=352=353=354=355=356=357=358=359=360=361=362=363=364=365=366=367=368=369=370=371=372=373=374=375=376=377=378=379=380=381=382=383=384=385=386=387=388=389=390=391=392=393=394=395=396=397=398=399=400=401=402=403=404=405=406=407=408=409=410=411=412=413=414=415=416=417=418=419=420=421=422=423=424=425=426=427=428=429=430=431=432=433=434=435=436=437=438=439=440=441=442=443=444=445=446=447=448=449=450=451=452=453=454=455=456=457=458=459=460=461=462=463=464=465=466=467=468=469=470=471=472=473=474=475=476=477=478=479=480=481=482=483=484=485=486=487=488=489=490=491=492=493=494=495=496=497=498=499=500=501=502=503=504=505=506=507=508=509=510=511=512=513=514=515=516=517=518=519=520=521=522=523=524=525=526=527=528=529=530=531=532=533=534=535=536=537=538=539=540=541=542=543=544=545=546=547=548=549=550=551=552=553=554=555=556=557=558=559=560=561=562=563=564=565=566=567=568=569=570=571=572=573=574=575=576=577=578=579=580=581=582=583=584=585=586=587=588=589=590=591=592=593=594=595=596=597=598=599=600=601=602=603=604=605=606=607=608=609=610=611=612=613=614=615=616=617=618=619=620=621=622=623=624=625=626=627=628=629=630=631=632=633=634=635=636=637=638=639=640=641=642=643=644=645=646=647=648=649=650=651=652=653=654=655=656=657=658=659=660=661=662=663=664=665=666=667=668=669=670=671=672=673=674=675=676=677=678=679=680=681=682=683=684=685=686=687=688=689=690=691=692=693=694=695=696=697=698=699=700=701=702=703=704=705=706=707=708=709=710=711=712=713=714=715=716=717=718=719=720=721=722=723=724=725=726=727=728=729=730=731=732=733=734=735=736=737=738=739=740=741=742=743=744=745=746=747=748=749=750=751=752=753=754=755=756=757=758=759=760=761=762=763=764=765=766=767=768=769=770=771=772=773=774=775=776=777=778=779=780=781=782=783=784=785=786=787=788=789=790=791=792=793=794=795=796=797=798=799=800=801=802=803=804=805=806=807=808=809=810=811=812=813=814=815=816=817=818=819=820=821=822=823=824=825=826=827=828=829=830=831=832=833=834=835=836=837=838=839=840=841=842=843=844=845=846=847=848=849=850=851=852=853=854=855=856=857=858=859=860=861=862=863=864=865=866=867=868=869=870=871=872=873=874=875=876=877=878=879=880=881=882=883=884=885=886=887=888=889=890=891=892=893=894=895=896=897=898=899=900=901=902=903=904=905=906=907=908=909=910=911=912=913=914=915=916=917=918=919=920=921=922=923=924=925=926=927=928=929=930=931=932=933=934=935=936=937=938=939=940=941=942=943=944=945=946=947=948=949=950=951=952=953=954=955=956=957=958=959=960=961=962=963=964=965=966=967=968=969=970=971=972=973=974=975=976=977=978=979=980=981=982=983=984=985=986=987=988=989=990=991=992=993=994=995=996=997=998=999=1000=1001=1002=1003=1004=1005=1006=1007=1008=1009=1010=1011=1012=1013=1014=1015=1016=1017=1018=1019=1020=1021=1022=1023=1024=1025=1026=1027=1028=1029=1030=1031=1032=1033=1034=1035=1036=1037=1038=1039=1040=1041=1042=1043=1044=1045=1046=1047=1048=1049=1050=1051=1052=1053=1054=1055=1056=1057=1058=1059=1060=1061=1062=1063=1064=1065=1066=1067=1068=1069=1070=1071=1072=1073=1074=1075=1076=1077=1078=1079=1080=1081=1082=1083=1084=1085=1086=1087=1088=1089=1090=1091=1092=1093=1094=1095=1096=1097=1098=1099=1100=1101=1102=1103=1104=1105=1106=1107=1108=1109=1110=1111=1112=1113=1114=1115=1116=1117=1118=1119=1120=1121=1122=1123=1124=1125=1126=1127=1128=1129=1130=1131=1132=1133=1134=1135=1136=1137=1138=1139=1140=1141=1142=1143=1144=1145=1146=1147=1148=1149=1150=1151=1152=1153=1154=1155=1156=1157=1158=1159=1160=1161=1162=1163=1164=1165=1166=1167=1168=1169=1170=1171=1172=1173=1174=1175=1176=1177=1178=1179=1180=1181=1182=1183=1184=1185=1186=1187=1188=1189=1190=1191=1192=1193=1194=1195=1196=1197=1198=1199=1200=1201=1202=1203=1204=1205=1206=1207=1208=1209=1210=1211=1212=1213=1214=1215=1216=1217=1218=1219=1220=1221=1222=1223=1224=1225=1226=1227=1228=1229=1230=1231=1232=1233=1234=1235=1236=1237=1238=1239=1240=1241=1242=1243=1244=1245=1246=1247=1248=1249=1250=1251=1252=1253=1254=1255=1256=1257=1258=1259=1260=1261=1262=1263=1264=1265=1266=1267=1268=1269=1270=1271=1272=1273=1274=1275=1276=1277=1278=1279=1280=1281=1282=1283=1284=1285=1286=1287=1288=1289=1290=1291=1292=1293=1294=1295=1296=1297=1298=1299=1300=1301=1302=1303=1304=1305=1306=1307=1308=1309=1310=1311=1312=1313=1314=1315=1316=1317=1318=1319=1320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and found the corpse. *Held* that the statement to the police was not admissible. S. 2

tion contained in it unless the person who confesses is a person accused of any
King Emperor v Nga Aung Bu,
 402 Ind Cis 962. For the
 does not necessarily mean detention
 or confinement, but submission to custody by word or action under s 46(1) Cr
 Pro Code may be taken to amount to custody. Where the accused, who was
 suspected after the first report had been made, made a statement and pointed
 out the dead body to the police and his name was subsequently mentioned in
 second report. *Held* that the accused was not in any kind of custody at the
 time he made the statement and that it was consequently not admissible under
 s 27. *Jalla v Emperor*, 131 Ind Cis 93-32 Cr L J 650-A I R. 1931
 Lah 278

So much of the information as relates distinctly to facts thereby dis-
 as to the extent of the informa-
 ho first view is in favour of
 clates distinctly," so as to a limit
 ectly and immediately to the

discovery of the fact that the

Superintendent v
'Relates to' means
distinctly' means
'undoubtedly'
 "clearly" or "definitely"
 In *Queen v Pagase Singh*, 19 W R Cr 51, the accused stated to the Sub-
 Inspecto (the deceased) by the neck, and
 pushed a plantain tree, and broke
 that the woman then and there
 remove the body took from it a
 concealed in the neighbouring jungle.

In consequence of this information, the accused was taken to the jungle pointed
 out by him, and he then produced from a concealed place, the necklace and

sed of the
 and might

be proved against the accused. So it is clear from this case that the Court in
 this case followed the first view. But *West J* in *Reg v Jora Hayi*, 11 B H C
 R 42, took a
 as will be
 is not all sta
 which are n

5. 27. this would
guard prison
For instance
killed Rama
went to the
confession in

prisoner has said, 'I placed a sword or knife in such a spot,' when it was found that too, though it involves an admission of a particular act on the part of the prisoner, is not admissible, because it is the information which is directly led to the discovery, and is thus directly and independently of any other statement connected with it. But if, besides this, the prisoner has said what would lead to put the knife or sword where it has been found, that part of his statements it is not furthered, much less caused, the discovery, is not admissible. T

submitted that the case of *Queen v. Pajares Siba*, 19 W. R. 51 is not reconcilable with the principle laid down in *Reg. v. Jora Haspi*, 11 B. H. O. R. 247, *Empress v. Rama Bhaya*, 3 B. 12, *Queen Empress v. Babu Lal*, I. L. R. 11 503, *Shikhar v. Queen Empress*, 11 C. 675; *Queen Empress v. Commr. Siba*, 12 W. 153, *Queen*

Adul Shikhar
to the assault.

subsequent
discovery

refers to his taking the ornaments and concealing it in the jungle" 5 *W. R.*
Four Article

In R
of views on

subject of

councils and at the Bench at the of very eminent Judges of the High Courts
in India. *A. I. R. 1929 Journal* 101

In *Sulhan v. Emperor*, A. I. R. 1929 Lah 311 (F. B.) the question of the admissibility of an incriminating statement made by an accused while he is in the custody of a police officer was considered. The prisoner in that case was tried for the murder of a boy who

his disappearance but the ornaments recovered from a well. At the trial the Superintendent of Police stated the fact that in consequence of information received from the prisoner he had recovered from one *Alah Din* silver *karas* (bangles) which were proved to be the *karas* which the boy was wearing when he was last seen. The witness was then asked to disclose the information communicated to him by the accused which caused the discovery of the fact deposed to by him, and he stated that the prisoner had during the investigation, made the following statement: "I had removed the *karas*, had pushed the boy into the well and had killed the boy with *Alah Din*." The trial Judge

Tek Chand and *Aga Haidar J.*
referred to the Full Bench, the

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S. 2

cludes, not only the physical fact which can be perceived by the senses, but also the psychological fact or mental condition of which any person is conscious. It is in the former sense that the word is used in section 27. The phrase 'fact discovered' used by the legislation refers to a material and not a mental fact. The fact discovered may be the stolen property, the instrument of the crime, the corpse of the person murdered or any other material thing, or it may be a material thing in relation to the place or the locality where it is found. Taking the present case as an illustration, the fact discovered is, not the *larcas simpliciter*, but the possession by Allah Din of the property of the accused.

possession by Allah Din

of the

s. 27

limitation

accused

fact. This condition follows from the phrase 'fact discovered' and also from the expression 'information' used by the

The information

pointed out, the wording of the section shows that the requirements of both the conditions specified above must be satisfied before an incriminating statement can be received in evidence. These conditions when combined lead us to the conclusion that the fact is provable which was the fact. Anything which is

it does, an exception to the general rule, must receive a strict construction but also conforms to the principle upon which the exception is founded. The real difficulty arises in applying the test to the facts of a particular case. To illustrate this, let us take the case of a confession. A confession must be separated from the accused by the accused. It has been held in some judgments that the

professional portion thereof given by the prisoner which relates to the fact includes not only the concrete thing discovered by the investigating officer, but also its connection with the crime of the information can be there is no legal justification for defeat the very object with

must be proved in
Emperor, A I R 1914
Man v Emperor,
 of the majority
 no hesitation in
 d the boy into

the well is wholly inadmissible, as it relates to a separate matter and had no connection with the possession of the ornaments by *Alla Din* which was the only fact discovered. Nor do I think that the statement that the prisoner had removed the *Laras* from the boy can be regarded as immediate cause of the discovery. A man may remove the ornaments from the boy, but he may not give them to

t the statement
 is admissible
ju v Emperor,

(1914)

In
 observe
 statement
 but in
 is cont

whole confession of a prisoner
 were the confession includes a
 the offences charged that part
 the discovery of the weapon
Sogamuthu Padayachi, 50 M.
Bhan v Emperor, A I R 1936

expressed by *Forde* and *Jaisil JJ* in the minority judgment of *Sukhan v.*

27. I R 1929 Loh. 311 (P B) as well as in *Mornam Singh v Emperor*. So it is clear that the Full Bench case in English Common Law the section while the *Madras* *Govt* and *Judicial* *...*

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effect of section 27, it must be a confession made to a police officer by a person in custody ■ admissible in evidence, provided the prosecution first shows that the confession has not been obtained by any improper means such as coercion, ■ Evidence Act, prohibits a confession if it comes within the ■ on the subject probably arises ■ In ■

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the part confirmed, and thus of the case, for a confirmation on material points produces ample persuasion of the whole. It can hardly be supposed that at certain part
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'If the exclusion of the confession rests altogether upon the probability that the confession is untrue, as we have seen, then if the prosecution produce evidence tending to show and sufficient to warrant the jury in finding that it is true, it ought to be received, for in such cases the reason of the exclusion is done away with. All the Courts recognize the propriety of this reasoning, but illogically decline to pursue it to its logical results. If one, accused of larceny, being put to torture, confess the crime and produce the goods from his own possession or disclose their concealment, and they are afterwards found in the place in evidence the fact of confession, but

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175 Such portion of the confession made to me as is to the disadvantage of any fact am admissible under section 37 of the Act.

Jagan & Dhanuk v Emperor, 5 Pat 63=93 Ind Cas, 881=7 Pat L T 30

also Emperor

of Police that
committed

Held that

of one transaction and the words used by the accused were admissible in evidence *Bahadur v Emperor*, 88 Ind Cas 7-26 Cr L J 1063-A I. R 1925 Sind 389

A statement made by an accused may be proved under section 27 of the Indian Evidence Act, 1872, so far as it relates to any material fact discovered in consequence, statement was made
Naina Malai ing an information by
accused under ion must have had the
direct effect of y *Ramasami Boyan*,
In re, 11 L W 8-54 Ind Cas. 479 The accused made a statement during

who is afterwards proved to be a dacoit is not the
aning of s 27 of the Evidence Act. The test of
of the Evidence Act, if an information received
from an accused person in the custody of a police officer, is whether the fact so
discovered was a direct natural and necessary consequence of the information
so received *Salam v Emperor*, 11 N L R 193-43 Ind Cas 111-19 Cr
L J 79

Under s 27 it is legitimate to record evidence that an accused person said
"I will point out certain property" if such statement leads to a discovery, but it
accused said "I will point out
are of the booty in the dacoity"
W R (1918) Cr-44 Ind Cas
The King Emperor, 155 P L R.

1908-21 P W R 1908 Cr

It is not all statements made by an accused person connected with the
production or finding of property which are admissible. It is only those
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Ilahibuz v Emperor, A I R 1915

175 Such portion of the confession made to the investigating officer as leads

to the discovery of any fact are admissible under section 27 of the Evidence Act.

Jagann Dhanuk v Emperor, 5 Pat 63-93 Ind Cas. 884-7 Pat L T 33-37

different purpose in s 27. When the Legislature wished to make an exception to the absolute rule, it did so by a separate section, namely section 28, which declares under what circumstances a confession rendered irrelevant by s. 24 may become relevant. Statements that are irrelevant under one section of the Act may be relevant under some other section of the Act. No confession made under inducement, threat or promise provided for by s 28. *King L.* a confession must be taken.

in the confession which it disbelieves

Did inducement come into existence at all. The inducement is almost always addressed to the person in question, and thus becomes known to him as a fact. It was intended to be addressed to the person, but for him as an inducement. We must determine whether it was in fact present as an inducement? This will of course be a pure question of fact for the Judge, and no ruling can serve as a precedent, the conduct and language of the person will show whether he had the inducement in mind. The important question is whether the person was directly or indirectly induced to such a course of action, and if so, is he responsible by reason of the inducement? It is said to have been held in the case of a son who hears of his father's death, and hopes that it will not be true, that he would not be responsible.

Was the inducement brought to an end? "Here" says *Prof Wigmore* "five questions may arise (1) Must it be shown clearly that an improper
Are there any situations
, and thus the inducement,
n? Can the same person
who has offered the inducement put an end to it so as to make admissible a
confession afterwards made to himself? (4) Are confessions made subsequently,
but to a person different from the one offering the inducement, to be treated
as not made under the inducement, or must it be shown to have been negruved
by the second person? (5) What suffices, in general, to end the inducement?
Wigmore § 855

Subsequent ending of improper inducement There must be strong and cogent evidence that the influence of the inducement really has ceased. In *R v Sherrington*, 2 Den C C 123, *Patteson J* said ‘There ought to be strong evidence to show that the impression, under which the first confession was made, was afterwards removed, before the second confession can be received. I am of
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receivable in evidence, as the promise of the mistress must be considered as still operating on the prisoner's mind at the time of the statement, but that if the mistress had not been present it might have been otherwise. *R v Hewitt*, 1 Car & M. 534; *R v Rur*, 13 Cox Cr 209. So the general principle is universally conceded that the subsequent ending of an improper inducement

S. 28. must be shown, it is as well to have continued until the contrary is shown *Wigmore* § 855, see also *R v Cleverton*, 2 F & F 533 This inducement may be removed by subsequent caution *R v Hornbrook*, 1 Cox Cr 51 *R v Hor* 1 Cox Cr 361, *R v Collier*, 1 Cox Cr 77; *Berjinn's Case*, 1 Ir Cr C R 171 *R v Bryan*, Jebb Cr 157, *R v House*, 6 C & P. 101

Can inducement be irrevocable? The next question raised by *Wigmore* is whether there is any situation in which it cannot be shown that inducement, once offered has been brought to an end? In an earlier question he said 'There is nothing permanently irrevocable in an inducement, whether it has been brought to an end is, in all respects, always open to inquiry' *Wigmore* § 855

A person who has offered inducement can put an end to it. It has not been decided specifically whether the same person may put an end to an inducement of his own making. But there is no reason why he cannot. *Wigmore* § 855. Where a Magistrate told a prisoner that if he did not strike the first blow and would tell all he knew, he would use his influence to protect him. He afterwards communicated to the prisoner a letter from the Secretary of State declining to give pardon. C & P 221. Nor do I think that this declaration with Magistrate after given by the Coroner must be taken to have completely put an end to all the hopes that had been held out.

Inducement offered by one person and confession made to another. 'There is on principle no reason for assuming that a promise or a threat made by one person will be treated by the accused as equally to be attributed to some other person who had no share in the other's conduct and shows no power or inclination to corroborate his promise or threat. Nevertheless, if the inducement may on the facts, prove to be in effect the second person's as much as the first one's. It should thus be a question to be determined in each case, no general rule can be laid down. *Wigmore* § 855, see also *Curly's Trial*, (Ire) 20 How St Tr 889 *R v Bell*, McNaughton Ev 13 *R v Tyler*, 1 C & P 129, *R v Cleverton* 4 C & P 223

What suffices in general to end an inducement. If the impression produced by the promise or threat is clearly shown to have been removed—e.g., by lapse of time or by an intervening caution given by some person of superior (but not of equal or inferior) authority to the person holding out the inducement—a confession subsequently made will be strictly receivable. *Philp Ev* 20. And Where a prisoner confessed some

port in 1871 *R v Bate* 11 Cox Cr 171

Magistrate had told the prisoner that, if he would make a disclosure, he would do all that he could for him. The prisoner after he was committed to the statement to the turnkey of the prison who had held out no inducement to him.

prevent the superior from carrying his promise into effect' *Russ v C* p 2184, S, see also *R v Gilham* 1 Mood 136, per *Littledale J* Where a collecting pan-

removed therefrom *Imperoi v Ganesh*, 74 Ind Crs 264=50 C 127, *Queen v Luchoo*, 3 N W P 86, *Reg v Navroji*, 9 B H C R 358

In the opinion of the Court It is for the Court to decide whether the impression caused by inducement threat or promise has been fully removed So where promises or threats have been once used of such a nature as to render a confession inadmissible, all subsequent admissions of the same or like facts will be rejected, unless from the length of time intervening, from proper warning of the consequences or from other circumstances there be good reason to presume, that the delusive hope or fear which influenced the first confession has been effectually dispelled *Joy on Conf* 69, *R v Hewitt*, C & Marsh 534, *R v Cooper*, 11 C & P 534, *R v Russ* it appears to the satisfaction away with before the confession was

Fv § 221 So, where the prisoner had been induced, by promises of favour to make a confession, which was for that cause excluded but about five months by two Magistrates that he made a full confession this Case, 5 Halst 180 In this

the length of time intervening or from proper warning of the consequences of confession, or from other circumstances, that the delusive hopes or fears under the influence of which the original confession was obtained were entirely dispelled *Guild's Case*, 5 Halst 180, *R v Chererton* 2 F & T 833 But other wise the evidence of a subsequent confession made on the basis of a prior one unduly obtained will be rejected *Com Harman* 4 Burr 269 In the absence of any such circumstances the influence of the motives proved to have been offered will be presumed to continue, and to have produced the confession, unless the contrary is shown by clear evidence, and the confession will therefore be rejected *State v Roberts* 1 Dev 259, *Greent Ev* § 221 If there

2 Q B 12=62 L J M C 93=17 Cox Cr 641, See also *R v Jose* 18 Cox Cr 717=67 L J Q B 289 *R v Smith* (1897) *Loscree Cr* Ld 47

29 If such a confession is otherwise relevant it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or

Confession otherwise relevant not to become irrelevant because of promise of secrecy, etc

29. when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.

Rule criticised. 'The rule of procedure' says *Mr. Chamberlayne* "which rejects so-called 'involuntary' confessions induced by threats or promises by those in authority is based entirely upon an assumption. In reality, like other rules of procedure, it is a mere law controlling the normal exercise of the law. As at present conducted it proceeds upon the assumption that the accused, and even, as has been suggested, frequently operates against him by substituting private, irresponsible investigation for responsible official inquiry. The rule assumes that those in authority over legal criminal proceedings ought, in the public interest, to refrain from placing pressure upon the free will of their prisoners. What injury is done by the confession of private persons is none of their business."

actually a person in he sees fit in connection by way of hope or fear he not one as to benefit or injury connected proceedings it is not important that it be held out to the accused by one in authority. Neither situation brings into operation the special work of procedure or substantive law in this connection. This consists in rejection without weighing the statement itself."—*Chamberlayne's Ev* § 1533.

Scope. Confession procured by deception or under promise of secrecy are not, on this account alone, rendered inadmissible. This, of course applies to confessions which otherwise satisfy the conditions prescribed for admissibility of obtaining a confession, regard to it *R v Shar* confession inadmissible if obtained by fraud or

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Promise of secrecy. 'If no inducement has been held out remain the charge,' says *Mr. Taylor*, "It matters not in what way the confession has been obtained." *Taylor* § 881. It is not necessary that it should have been the prisoner's own spontaneous act. So it will be received, though it were induced by a solemn promise of secrecy, even if *R v Shar*, 6 C. & P. 372; *Com v Knapp*, 9 Pick 496, (54- prisoner had been committed on a him, 'I wish you would tell me how you murdered the boy, pray prisoner said "Will you be upon your oath not to mention what I tell you. The other prisoner went upon his oath, and he hoped, if he told that he might have made a statement. It was inadmissible."

s. 1535 (a)

Deception. A free and voluntary confession is not inadmissible because it was originally obtained by an artifice practised on the accused by officers having been in charge, or by other persons, if the means employed were not calculated to cause him to make an untrue statement. *People v McMahon*, 15 N Y 384. So it is no objection that some of the artifice has been explained. *Ev* (7th Ed) also where a confession is obtained into the possession of the accused.

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Act expressly says that a confession made in consequence of deception is not to be excluded. The question, however, is of importance. The main point is, is it true? (*People v McMahon*, 15 N Y 384). It turns, not so much upon the nature of the deception, but upon the motive obtaining and the charge on the truth of the guilt of the officer, a promise made to him, or the nature of the decoy were in promise of a confession.

- 29 always been in regard to confessions made by a person when under arrest to the authority over him, they have not gone so far as to exclude them simply because they were procured by deception provided they were voluntarily made. They are careful, however, to leave the credibility of the witness who procured the deception and the circumstances under which the confession was made to the consideration of the jury. In *Imeri* it has been held that a confession procured by a person who by falsely representing himself to be an attorney obtained the confidence of the prisoner, was inadmissible. *Cotton v State*, 87 Ala. 119; *Comwealth*, 77 S W 63. "A man who will deliberately say, 'I betrayed the ... every means in confession of ... the downfall of ... of a very high thing is really good evidence' ... where *Howland* ... but as a matter of law called forth an admission Cr 228

False personation. A confession is none the less admissible because of the person to whom made ...

sympathetic fellow prisoner. *Howland* ... the inadmissibility of the confession is ... Li § 1538(b)

Confessions overheard statements made while asleep. A person who may overhear the remarks of a prisoner made to himself or to another person as his wife or an attorney or spiritual adviser, who is incompetent as a witness to privileged communications may testify to what he has heard. *Rea v State* 6 C & P 510 see also *Queen v Sajina* 7 W R Cr 36, *R v Gardner* 11 Cr A R 265—But not to incriminating declarations made during sleep for the declarant is then unconscious of what he was saying. *People v Foban* 13 Cal 40 (Am), *R v Elizabeth* Kent Sum Ass 1839, *Gore v Gibson* 13 W & W 623, *Best* 11th Ed 511. A confession constituting a part of a prayer may be proved by one who overheard it, though he may not be able to prove the whole prayer. *Woodford v State* 85 Ga 69 (Am). A confession made to another prisoner, under the erroneous impression that one prisoner cannot testify against the other, is not for that reason inadmissible. *State v Mitell*, Phil (N Car) p 147 (Am). A confession to a fellow prisoner in jail, procured by the latter's spirit to be rejected. *v State*, 50 Ga was again charging H were read by a sergeant to the three together, purposely to the admissions, though evidence of what then took place is strictly admissible to the trial Judge, if satisfied of such a purpose ought to exclude it. *R v Gardner* 11 Cr A R 265, *R v Grayson* 16 Cr A R 7, *R v Pilley* 16 Cr A R 100. *R v Turner*, 19 Cr A R 191

Misleading inducements. Illegality. Not only may deception, treachery, any unfair treatment says Mr Chamberlaine 'be employed for the attainment of an

reliable and trustworthy, merely, because obtained by means of an ... violation of the prisoner's privilege against compulsory self incrimination is

entirely without support in legal analogy. The confession, viewed as extorted by one act of duress, stands in a different position. It is not the act of the declarant. Accordingly, he is not responsible for it." *Chamberlayne's Ev* § 1539

S. 2

When he was drunk. Confessions made by the accused when under the influence of liquor are not thereby rendered inadmissible. *R v Spilsbury*, 7 C & P 187. In the last named case *Coleridge J* said: "I am of opinion that a statement made by a prisoner while he was drunk is not therefore inadmissible, it must be obtained either by hope or fear. This is matter of observation for me, upon the weight that ought to attach to this statement when it is considered by the jury." This is the rule, even where the intoxication was produced by liquor given to him by the officers having him in charge for the sole purpose of

cated as to be incapable of understanding what he says or does his confession should not be used against him. *Com v Howe* 9 Gray (Mass) 110. *Eschwege v State*, 25 Ala 30. The question as to the mental condition of the accused at the

the confession the Court would not submit the confession to the jury at all. *McKelvey's Ev* § 92

Some recent cases of America, however reject confessions thus obtained because of the trick practised. But the general rule has been sustained even where the accused was suffering from *delirium tremens* if he was mentally and physically able to describe past events and to state his own participation in the crime. The intoxication of the accused at the time of making a confession may

be used as evidence

It is by no means for with men of a moral exaggerated state permitted to show that statements made with him he has done this the him speaking that he appear
11 Cr Ev § 136

this is subject to some exceptions which will be found collected in the case of *Volton v Cimroux*, 2 Exch 487, *Best Ev* § 529

Confession in answer to questions. A confession is also not to be rejected merely because it has been elicited by questions put to the prisoner. *Taylor* § 841. But this statement of law must be read subject to the provisions of sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000

form of the question is immaterial even though it is sure the prisoner. *R v Hill* 1 Moo C C 152, *R v Thornton* 1 Moo C C 27, *R v Kerr* 9 C & P 179, per *Park J*. A confession, in other respects admissible is not invalid because it is not the spontaneous utterance of the prisoner. The fact that confession was obtained by the employment of persistent questioning alone excludes it, (*State v Pennell*, 113 Iowa, 691) but the practice of confession by putting questions after questions to the accused is conducive to the procurement of truth, and the mode in which the

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was elicited may always be considered by the jury to determine what they shall hold it. *Underhill Cr Ev* § 110. In *R v Ellis, Ry & Moo* 12, *Littledale J* admitted a statement of an accused on examination before a Magistrate without threat or promise but upon questioning and after refusal to allow counsel. The case was decided by following an unreported ruling of *Hobbs J* and disapproving *Wilson's Case* 1 & *R v Wilson*, Holt. N P 30, where *Richard C B* is following such statements and 'An examination of itself implies an admission to speak the truth, if a prisoner will confess that to so voluntarily. *Mr J*, also relies his authority as to the practice in *habeas corpus* confession. *Joy Croft* 104, 10 also *o R v Tully*, 5 C & P 550, *R v Lucas* 7 C & P 177, *R v Wheel*, 8 C & P 30, where this practice was accepted indirectly. An answer given by the prisoner to a question put to him by a Magistrate was rejected by *Parke C J* in *R v Lister* 111, 6 Cox Cr 303. *Queen v Adair* 1 B L R 15.

The mere fact that a statement in a confession was elicited by a question put to the Magistrate or that it does not make it irrelevant as a confession. But the fact may be very material to an enquiry as to whether the confession is voluntary or not. *Bhartha Kumar v The Emperor*, 14 C W N 1114-37 C 467. In *King Emperor v Promotha* 30 C L J 503 the Court in rejecting a confession obtained by continued questioning observed: 'His confession in our opinion cannot upon the evidence made by the prosecution, be said to be voluntary. The evidence is that he was kept at a little distance from the Post Office in charge of a head constable and was being questioned by the Sub-Inspector and that after being in that condition for 3 or 4 hours, to the words of the learned Judge 'and the continued questioning to which he was subjected he finally broke down'. If there is reason to think that the confession was induced by the pressure of questions by one in authority or in order to escape from his custody it should be rejected. *R v Knight* 20 Cox 711-69 J P 168.

In England the controversy on this point is now closed by *Reg v East* (1900) 1 K B 692-76 L J K B 658 where Lord Alverstone C J said: 'In our opinion it is quite impossible to say that the fact that a question of this kind has been asked invalidates the trial. There are many cases in which the prisoner is entitled to give an explanation as to anything found upon him, and he may be able in answering the question to say and show that the thing found was his own property. In our opinion *Reg v Grim* 15 Cox C C 626 was not properly decided. It is commented on in a note printed at the end of the report. The decision has not been followed to its full extent as appears from *Reg v Drachenbury* 17 Cox C C 678. The statement of law as set out in the report is too wide and requires qualification. So this case practically overrules *Reg v Gaim* 15 Cox C C 556 and *Reg v Vab* 17 Cox C C 589. In *R v Miller* 18 Cox Cr C 54 *Hankins J* said that it was impossible to discover the facts of a crime without asking questions, and as he held that the questions were properly put after due warning he admitted evidence of defendant answers, saying that every case must be decided according to the whole of the circumstances. *Roscoe Cr Ev* 10, see also *R v Hirst* 18 Cox Cr C 374. *R v Hirst* 19 Cox Cr C 16, *Lewis v Harris* 24 Cox Cr C 66-110 L T 337. All these authorities were considered in *Abraham v Reg*, 83 L J P C 185-(1914) A C 590-91 Cox C C 174. A private in an Indian regiment murdered one of the officers. Shortly afterwards, while he was in custody the commanding officer asked him 'why have you done such a senseless act?' and he replied 'Some three or four days he has been abusing me, and without doubt I killed him'. The confession was admitted. Lord Sumner in delivering the judgment of the Judicial Committee (Lord Haldane L C Lord Atkinson, Lord Shaw Lord Moulton and Lord Sumner) said 'if the matter is one for the (trial) Judge's discretion depending largely on his views of the impropriety of the questioner's conduct and the general circumstances of the case' it was not improperly excluded. 'Then after reviewing a large number of cases, he added The English law is still unsettled strange as it may seem since the point is one which constantly occurs in criminal trials. Many Judges, in their discretion, exclude such evidence, for they fear nothing less than that the exclusion of all such statements can prevent improper questioning of prisoners by removing the inducement to resort to it. Having regard to the particular position in which their Lordships stand to criminal proceedings, they do not propose to intimate what they think the rule of English Law ought to be, much as it is to be

desired, that the point should be settled by authority, so far as a general rule can be laid down where circumstances so greatly vary. S.

Want of warning. A voluntary confession is evidence, to whomsoever it may have been made, that what he might say was not so warned. *R v Long*, 6 C & P 179; *R v Empress v Ucer*, 10 C

of the duty of a Magistrate to tell an accused person that anything he may say will go as evidence against him." See also *Queen v Nobodoe*, 1 R. L. R. Cr 15-15 W R Cr 71. Answers to questions under that section are admissible in evidence, even if the Magistrate has omitted to warn the accused that he need not answer. *Dinoo Roy and others*, 16 W R Cr 21, 5 Mad H C. App 9. But sub-section (3) of section 161 of Criminal Procedure Code enacts "A magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence

shall record any such confession unless, upon

he has reason to believe that it was made

Act XVIII of 1923

§ 775 Now the

Balram Singh v

1, 6 Lah 183-26

Hari, 30 C W N

Luc Sin v King

Lah 325 A state-

ment of an accused, a suspect, made at an inquest before a Coroner is clearly admissible, either as a confession under s 16 or as a statement made by a party to proceeding under ss 18 and 21 of the Evidence Act. As regards the objection that such a confession is not relevant in as much as the Coroner did not warn

Pendse referred to section 161 of the Criminal Procedure Code as containing a general principle to the contrary. But that is a special enactment applying only to certain statements made in particular circumstances contemplated by s 161.

R v Ellis, Ry & Moo 432 and *R v Gilham*, 1 Mood Cr C 186, 191 are more

30. When more persons than one are being tried jointly

Consideration of proved confession affecting person making it and others jointly under trial for same offence

for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such

S. 30. confession as against such other persons as well as against the person who makes such confession.

* *Explanation.*—"Offence" as used in this section, includes the abetment of, or attempt, to commit the offence.

Illustrations

(a) A and B are jointly tried for the murder of C. It is proved that A and B murdered C. The Court may consider the effect of this confession as against B.

(b) A is on his trial for the murder of C, and it is proved that C was murdered by A and B, and if

This statement may not be taken into consideration as against B as B is not being jointly tried.

Principle. This section is entirely new. There was no such provision either in Act II of 1857, or in Act II of 1861 and 1872. Before the passing of the Indian Evidence Act, 1872, the confession of an accused person was only evidence against him-self. (*Queen v. Hall, 11 Cr. 181*; *Queen v. W. R. 51 (1)*) and it could not be taken as corroborative evidence at all, against any body other than him-self. (*Queen v. Brindley, 11 Cr. 183 (1)*). So the confession of one prisoner could not be used as corroborative evidence against another. ("Until the confession of one prisoner could not be used as corroborative evidence against another.")

by the confessing person
it were of the sanction

* This *Explanation* was inserted in s. 30 by the Indian Evidence Act Amendment Act, 1891 (3 of 1891) s. 4.

another, but
 confessions
 guaranteed
 The reason
 character is :
 Judges are
 provision, that, when more persons than one are tried for an offence, and one of
 them makes a confession affecting himself and any other of the accused, the

for the Indian Evidence Act, ho
 ion, in fact, was one of those rules
 which though well adopted to
 trials for Jury, are meaningless and out of place on occasions where the functions
 of Judge and Jury are con
 to consider whether the

prosecutors and under the present system it is better to follow the wise advice
 of the writer cited by Justice Cunningham, where he says 'The policy of the

dangerous innovation *Per Glover J in Queen v Jaffir Ali*, 19 W R. 57 (64) Cr ;
Queen v Sadhu Mundle, 21 W R 69 (79) *per Phear J in Mad J Journal*
 and was a
 confession
Lalaram, 81 Ind Cas 817

Sadhu Mund

N S. 19

section 30, Act I of 1872, be 'considered' as against other parties then on their
 trial with them, but such confessions, when used as evidence against others,

trial jointly for the same offence, can be used under s 30 of the Evidence Act

30. The section is not to be treated as though the words "at the trial" were inserted after "made" and the word "recorded" substituted for "proved." *Queen Empress v Tunga*, Rat. Un Cr C 510 = Cr. Rg 30 of 1890. Confessions made by an accused person may be considered against persons who are tried with him, but they cannot be accepted as evidence of any fact necessary to constitute the offence. *In re Kalyappa Goundan*, 2 Weir 711. In order that a confession of an accused person may be admissible as against the other accused tried with him, it is not necessary that the confession should have been made in the latter's presence. 2 Weir 745. When this section lays down that the Judge may consider a fact in certain circumstances it plainly declares that fact to be relevant in those circumstances. *Gobraya v. Emperor*, A. I. R. 1330 Nag. 243 (F B) = 26 N L R 229 = 125 Ind Cas. 673.

Section 30 does not refer to statements made at the trial but the statements made before and proved at the trial. *Gounda v. Emperor*, A. I. R. 1929 Mad. 28; *Emperor v Mahadev Prosad*, A. I. R. 1928 All 322 = 45 A. 323, *Empress v Ashutosh Chakravarty*, 1 C 183 = 3 C L R 270, but see *In re Bal Reddi*, 33 M 302 = 22 Ind Cas 167 = 15 Cr L J 13, where *Auling J* held that there was no reason why confessions taken into consideration in *J. in Emperor v Mahadev*.
 accused person is entitled
 called upon for a defence
 in no mere form but with certain exceptions closes the door to any further evidence against him. "If a prior confession is to be proved, he can attack it by cross examination of the witness who proved it."
 the dock after the prosecution case has closed.
Per Waller J in Gound v Emperor, sup.
 Act is not limited to cases where the

stances of each case
 tion of the confession
 accomplice evidence
 K. B 658, a c
 to lay down r
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 tion does not
 the accomplice
 3 Cox C C 1
 Magistrate w
 evidence thus
 person to wh

Magistrate's Court when examined as a witness in the Sessions Court. *Queen Empress v Nagu*, A. W. N 1891, 184. Section 30 merely enacts a special exception to the general rule that a confession (admission) can be proved (only) against the person who made it. It does not limit the operation of s. 32. *Illius ratioc* (b) to section 30 cannot be construed to have this effect. *Aga Po Im v King Emperor*, U B R 1906, Evidence 3 = 5 Cr L J 300. Where an accused person makes a confession, the most that could be taken into consideration on such a statement against a co-accused would be, under sections 27 and 30 of the Evidence Act, so much of the information as was the immediate cause of the discovery of

some relevant fact against him. *In re Sankappa Rao*, 18 M. L. J. 66-31 M. L. J. 127-3 M. L. T. 270-7 Cr. L. J. 325. Prior to the Evidence Act the rule not

accused. *Shambhu v. Emperor* A. I. R. 1933 All. 228-1932 A. L. J. 163

L. W. 474

confession of one prisoner
the confession, applies
prisoner tried at the

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the other accused and the confession was evidence against them all. *King Emperor v. Dep*, 37 A. 347

A person escaping from custody during the trial but, before charge, who has been tried separately after re-arrest, cannot be said to have been jointly tried with the person whose trial, from a stage prior to the charge, was separate. *Hassan*

abatement of it
before hand and being present during its commission, were held to be jointly

S. 30. tried for the same offence within the meaning of a 30 P R person;

mitted the murder
ed upon his trial—the
used the statement of
the first. Held that
accused person's statement was not admissible against the first, either under
section 327, Cr Pro Code, 1872, or ss 30 and 133, Evidence Act. *Croft v*
Jhobu, 13 P R 1878 Cr.

s when the confes-
he be called still join
this section again t
co-accused. In *Acq v Kaku Patel* 11 B R C R 116 Cr et al. cited.

when the Assistant Judge, in framing his judgment took his evidence into con-
sideration. *Imperatrix v Dalu Patel*, 5 B 63; *Venka Sams v Queen*, 7 W 10
Imper 1895.

in *Acq v* *Pachiy*, 19 E
Purbhu, 1895 A

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the trial without convicting those of the accused who pleaded guilty, yet, it is
unfair to defer convicting them merely in order that their confessions may be
considered against the other accused who are being tried with them. *Queen v*
Empress v Paltua, 23 A 52=A W N 1900, 192; *Emperor v Akoraj*,
30 A 540.

Where the statements of two of several co-accused persons followed their
plea of guilty, held they were not entitled to be considered as evidence against
the other accused persons and that, in those circumstances, they ceased to be
statements of persons. *Queen v Shuldham*, 44 P.

Acq v *Acq v*, 33 C 410, 1895 A

essarily end as soon as he pleads guilty

of these courses has been expli
guilty is left in the dock merely to
him, though the Court intends
In such a case, it will not be fair to allow his confession to be considered as

taken into consideration against them under s. 30, Evidence Act, appears to

he is still an accused person and is, therefore, not a competent witness against

trial was good. *Sukdev v. Emperor*, 9 C. L. J. 291=13 C. W. N. 552.

A. I. R. 1928 Lab. 880=111 Ind. Cas. 387=29 Cr. L. J. 835; *Kanhaya v. Emperor*, 15 P. R. 1911=12 Ind. Cas. 381=51 P. W. R. Cr. 1911; *Fakhruddin v. Emperor* 302;

A
confessed
Judge subsequently conceded the charge against A into one of abetment B,
who was
new trial.
Evidence

could not be allowed in appeal since the two charges were so nearly related, and
there was no such material prejudice as would under ss. 447 to 449 of the

S. 30.

is tried but of a minor offence, it does not satisfy the requirements of the Evidence Act. In a case but not in the present case the confession was inadmissible. 70 = 61 Ind Cas 793 of the Cr Procedure (co-accused, the provision to a case like the present. *Ambirulla v Empress*, 22 C W N 403.

Two persons were jointly tried, the former for criminal breach of trust and the latter for the abetment of that offence. The only evidence against the latter was the confession made by the co-accused, such unsupportable evidence made the trial alone, *Thalur Singh v Jita Singh*, A W N 1831, 164.

An accused person and another co-accused were tried together for an offence. The accused, though only liable for abetment of the offence, was found to have been present at the time of the commission of the offence. Held, that under s. 114 I P Code, the accused stood in the same position as if he himself had committed the offence; that his trial with the co-accused was proper, and that the confession made by the co-accused in such trial could be taken into consideration under s. 30 of the Evidence Act against the accused. *Thalur Singh v*

having before it the definition of an abettor in enacting s. 30 Evidence Act and in the latter section included the "abetment of an offence" also if the intention really was that section 30 was to be so understood. But if the offence abetted is committed as the result of an abetment and the abettor is present at its commission, the abettor must be held to have committed the substantive offence. *Queen Empress v Kaldin*, S C 143 Oudh (but now this objection has been removed by adding of the explanation by Act 3 of 1891); but see *Teja v Empress*, 51 P R

pa, Rat Un Cr ~
Cr. C 450

3 tried under s. 411 I P
457, cannot be considered
P. Code, are distinct of now

within the meaning of s. 30, Evidence Act. *Nga Po Tok v K E, U B. & R 1911*,
4th Cr 159 = 20 Ind Cas 136 = 14 Cr I, J 376. Where two persons were

, though it appeared to the Magistrate
charged with abetment of the offence with which
Empress v Hira Lal, A W N 1893, 63, see also

Maya Singh v. Empress, 9 P R 1886 Cr.; *Nur Ahmed v Crown*, 8 P R 1874
Cr., *Badri v. Queen Empress*, 7 M. 579, *Empress v Bala Patel*, B 63 = 5 Ind

Ghena v. Emperor, A. I. R. 1932 Lah. 180.

Confession. This section must be strictly construed. It makes a clear distinction between an admission and a confession. It is only under this section that the confession of one of two or more accused, jointly tried for the same offence, can be taken into consideration against the rest. It must be a confession to be so admissible, that is, it must affect both the person confessing and must not be a confession of being an abettor or of being an accomplice. It is one

whom it is tendered" was against
also *Empress v. Day* A 114; see
Queen v. Belat Ali, 19 W R 10.
Queen v. Khukree Oara
Queen v. Naga, 23 W
Choudhury, 25 W R.

for which they are being
to the section abettors
I. R. 1931 Mad 177

A statement by an accused person consisting of the vague accusations of a

who was not charged with
5 Cr The confession of a
he does not substantially
implicate himself to the same extent as the other accused, but on the contrary

Aeshub Bhonia, 25 W R Cr 8, see also *Kusir Bap v. Emperor*, 14 Cr L J.
586=21 Ind Cas 378 A confession must be one of guilt. The accused must
inculcate himself *Bum v. Emperor*, 107 Cr L J 67=91 Ind Cas
v. King Emperor,
Where a person
makes a confession
Evidence Act.
Emperor v. Aunaji, 26 Bom L R 614=A I R 1924 Bom 445 Merely because
a confession by one of the accused is not a complete and detailed confession up

S. 30. to hilt, it cannot be rejected against the co-accused *Lalhan v Emperor* A. I. R. 1924 A. 511. A statement by an accused that he and his co-accused and the deceased in exercise of their right of private defence, is in no way a confession and cannot be taken into consideration against the accused *Lalhan v Emperor*, 6 = 85 Ind. Cas. 371 Confes. made before a Magistrate, Cr. P. Code, even though made

the conviction of persons based solely on a retracted confession of a co-accused which does not implicate the confessor to the same extent as the co-prisoner *Uppendra v Emperor* (1918) Pat 175-46 Ind. Cas. 842. Statements made by one set of prisoners, criminating another set of prisoners, when each individual prisoner made a case for himself in which he was free from any criminal offence ought not to be taken into consideration under s. 30 of the Evidence Act against the prisoner of the second set, when the two sets although tried together were tried upon

Queen v. I
before a
this section
the confes
L. R. 201-2 Dom Cr C 102-15 Cr. L. J 433.

Made "The word 'proved' in s

hand" Per

Imperatrix v

section 30 is

word 'made' and the word 'recorded' substituted for 'proved'. that therefore

Cr. L. J 305-21 A. L. J 179-(1923) A. I. R. All. 323-45 A. 823, see *Queen Empress v Pirbhu*, 17 A. 524; *Queen Empress v Pailua*, 23 A. 53. It seems to me that evidence at the trial confession, and to by the section "At before a charge in restricted to an unretracted confession on which a confession is proved it is

v. P. & 1911 Cr. = 22 P. W. R. 1911 Cr. = 13 Cr. L. J 267, *Sri Ram v* 2 A. L. J 100-2 Cr. L. J 59.

accused *Raj Kumar v. Emperor*, A. I. R. 1929 Pat 473-9 P. L. Ind. Cas. 721.

v. *Queen Empress*, L. B. R. (1893-1900) 7. The rule that the statement of one

extent as he implicates the other co-accused and who tries to throw the entire blame on the other co-accused is of very little value at least as against the other co-accused. *Kunja Subudhi v. Emperor*, A I R 1929 Pat 275=8 Pat 289, *Topandas v. Emperor*, 25 Cr L J 761=81 Ind Cas 249=A I R 1925 Sind. 116 It is not the law that unless a confessing prisoner implicates himself as fully as his co-accused the statement will not be admissible, the

is the accused. *Suka Raut v. Emperor*, 4 Pat L T 505 A confession in order to be admissible under this section, must implicate the confessing prisoner

Bag Shah v. Crown, 3 P. R 1879 Cr.

E. I. A.—62.

S. 30. to him, it cannot be rejected against the co-accused. *Lakhan v. Emperor*, A. I. R. 1921 A. 511. A statement by an accused that he and his co-accused met

against the person making the statement, but it may be unsafe to use it against a co-accused *Jasola v. Emperor*, 53 Ind. Cas. 691. It is not safe to base the conviction of persons based solely on a retracted confession of a co-accused which does not implicate the confessor to the same extent as the co-prisoner. *Upendra v. Emperor* (1918) Pat. 175-46 Ind. Cas. 812. Statements made by one set of prisoners, criminating another set of prisoners when each individual prisoner made ought not to be tried upon it. *Queen v. Khur*, before a Magistrate, this section. the confession. L. R. 261-2 Bom. Cr. C. 192-15 Cr. L. J. 433.

Made "The word 'proved' in s. 30 must refer to a confession made before hand" *Per Gaj*. *Imperatrix v. Tari* section 30 is no word 'made' and confession made trial for the same the other accused. The duty of the the guilt of the accused in existence at the time when the charge is made, and the expression 'a confession' is to my mind, inapplicable to the procedure where the Judge asks questions and an accused person gives explanations under a special provision for that purpose" *Mahadeo Prasad v. Emperor*, 76 Ind. Cas. 1025-47 Cr. L. J. 305-21 A. L. J. 179-(1923) A. I. R. All. 323-45 A. 323, see 47.

under section 24 of the Evidence Act cannot be taken into consideration a co-accused as well. *Emperor v. Umda*, 166 P. L. R. 1911-10 Ind. Cas. 111 P. H. 1911 Cr. = 22 P. W. R. 1911 Cr. = 12 Cr. L. J. 267, *Sri Ram v. Emperor* 3 A. L. J. 100-2 Cr. L. J. 59.

accused *May Kumar v. Emperor*, A. I. R. 1928 Pat. 473-9 P. L. Ind. Cas. 721.

Chunder Bhattacharyee, 24 W. R. 42. The expression "proving a confession" is applicable to the question and answer under a 361 Cr. Pro. Code. *Mihadeo Prasad v. Emperor*, 15 A. 323-24 A. L. J. 179-A. I. R. 1923 All. 322. When a confession is taken in the absence of other prisoners and the latter have no opportunity of denying or even of knowing what their fellow prisoner has said, and when it has not even been read over to them afterwards, it cannot be proved. *Empress v. Chundhanath*, 7 C. 65; 121. After proper proof, such confession can be proved. *Ess v. Lakshmin*, 6 B. 121. The word "proved" in this section means proved before the case for the prosecution comes to the Court or proved in some accused's mind from the confession taken into consideration by the Court and such confession cannot be made the basis of the conviction of the other accused. *Muralimuthu Palayachi, In re*, 51 M. 783-61 M. L. J. 378-1931 Mad. 820, *Mihadeo v. Emperor*, 15 A. 323 but see *Ganpat v. Emperor*, 27 N. L. R. 163-33 Cr. L. J. 1222-A. I. R. 1931 Nag. 160-131 Ind. Cas. 656.

Court. The word "Court" in this section means and includes in a trial by jury, both Judges and Jury. *Empress v. Ishutosh Chuckerbutty*, 1 C. 318-3 C. L. R. 70 (F. B.)-1 Shone, L. R. Cr. 79.

Every confession is of that the word "may" consideration if it is so on must be exercised giving it a decision that confession to exclude a confession by an accused altogether from consideration against the co-accused if it is so disposed. *Gobraya v. Emperor*, A. I. R. 1930 Nag. 212 (F. B.)-20 N. L. R. 229-125 Ind. Cas. 673.

May take into consideration The words "take into consideration" in

partial or qualified admission of guilt on the part of the accused himself and by a limited physical facts pointing to his connection with the crime imputed to him, they are not precluded by law, any more than by reason, from finding of guilty thus sustained. *Queen Empress v. Bayaji*, Rat. Un. Cr. C. 311-Cr. Rg. 64 of 1850. The words "may take into consideration" mean may treat as evidence, the weight to be attached to it is evidence against the accused,

Khanjan v.
section does
confession in
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J in *Queen v. Chunder Bhattacharyee*, 24 W. R. Cr. 42. This section does not say that the confession referred to therein is relevant but only says that the Court

30. may take it into consideration against the co-accused. The Court may take into consideration such confession with or without supplementary to relevant facts which may form the basis of a judgment. As a matter of judicial prudence a confession implicating others must be regarded with suspicion. *Sallu v. Emperor*, A I R 1922 Nag 146-65 Ind Cas 561-23 Cr L J 129. The confession of a co-accused can be taken into consideration, but the Court requires corroboration before acting upon such a confession. *King Emperor v. Barker* 11 21 C L J 192=19 C W N 34=42 C 789=28 Ind Cas 657=16 Cr L J 321, *W. v. Crown*, 19 P W R 1916 Cr L J 158=33 Ind Cas 136, *Glavin v. Crown*, 31 Ind Cas 332; see also *Daulat v. Emperor*, A I R 1933 Nag 190 1 2 Cr 721.

rated as evidence of a defective character, and that they require special scrutiny before they can be safely relied on. *Queen v. Sathu Pandit*, 21 W R Cr 69.

definition

Empress

S 384, *Queen v. Ahluwalia*, 21

Weir 3rd Ed 491 *Queen*

C R App 15, *R v. Dymaram*, 37 A 217

In *Queen Empress v. Naga*, 23 W R 21 Cr Phear J said: "We find the Legislature avoids saying that confessions of this sort are evidence and may be used as evidence. It says merely the Court may take into consideration such confession." *Jac' son J* in *Queen v. Chunder Bhat Acharye*, 21 W R 47 and *Marlby and Morris JJ* in *Queen v. Naram Tel*, 27th May 1875 (mentioned and overruled in 4 C 185) also took the same view. But in *Empress v. Ahluwalia* (Chunderbutt) 1 C 483 the Full Bench said that the Legislature has not any intention of calling the confession of an accused person evidence against a co-prisoner. It has no intention of making the confession of the accused evidence against a co-prisoner. So according to the F.

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Rathagan v. ...

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J in *ibid*. The confession of a

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a joint trial for

11, 42 C 789

and if uncorrobo

Anur Hossein, 2 C W N 749. A confession under section 20, taken into consideration but cannot be treated as substantial evidence. *The words*

matter of Ram Mulla, 1 I G 77.

'taken into consideration' in the

accused are not to have the

fact and though it is not

connection with the crime imputed to him, they are not precluded by law any more than by reason from finding of guilty thus sustained *R v Kanyan Kom* S. 30.
Indu, 11 Ind Jur N S 331; see also *Imperial v Suntra*, A W N 1881, 33

sions which affected the accused by connecting or tending to connect him with the crime *Scott C J* remarked (p 469, 170).—'If the confession (of a co-accused) is corroborated by other evidence it matters not whether, in proving the case at the trial, the confession precedes the other evidence, or the

of each case.' On this point *Scott C J* differed from a doctrine of *Macleod J* in *Emperor v Gangappa Kardeja*, 38 B 156=21 Ind Cas 673=15 Bom L R

evidence Both decisions agree that the confession of co-accused could not
In Emperor v
 is nothing in s 30,
 after taking the
 Courts of India
 had laid down a rule of practice which had all the reverence of law that a

a as leading
 based on the
Attacharya v
 A I R 1927
 If evidence of

degree of proof referred to in section 8 of the Evidence Act has been received or not *King Emperor v Nga Lo Tha* U R II 1913, 2nd Qr 170=21 Ind Cas 166=14 Cr L J 566, *The Nayan v Queen Empress*, L B R (1893 1900) 368 No higher value can be put upon such a confession than upon the statement of an accomplice *Emperor v Abani*, 8 Ind Cas 770=15 C W N 25=11 Cr L J. 710=38 C 169

S. 30. although such evidence is admissible in evidence under section 30 no confession can be given to it unless it is corroborated. *Queen v Jaffar Ali*, 19 W R Cr 57. *Queen v Kunjo*, 20 W R Cr 1, *Queen v Salhu Mantal*, 21 W R Cr 69. *Queen v Naja*, 23 W R 21, *Queen Empress v Dosa Jiva*, 10 B 231. So, such a confession must be rejected upon. *Queen v Imperatrix v Gasparina*, 11 Ind Jur N S 20, Weir 3rd Ed 499. *Queen v Bayoo Choukhury*, 25 W R 63; *Queen Empress v Khanlu*, 15 B Cr Empress v Bhaurani 1 A 664; *Empress v Panichan* 1 A 675, *Keher v Emperor*, 59 Ind Cas 913, *In re Lalayam*, 81 Ind Cas 817, *Reg v Indigera* 1 M 163=2 Weir 740, *In re Kuppam*, 9 Cr L J 30=5 M L T 300. *Prudat v Anur Hossein*, 2 C W N 741, *Rajshubir v Emperor*, 11 O C 38. *In re Ramaswami Boyan* 54 Ind Cas 479, *Queen v Malaya* 11 B H C R 19, *Queen Empress v Jadal Dis* 27 C 295=4 C W N 129, *Falaiah v Emperor* 10 C W N XVI, *Munja Behari v Empress* 5 C W N 913. *Emperor v Gangappa*, 39 B 156. *Aja Po Kanu v Emperor*, 95 Ind Cas 71. *Cr L J 718=1 I R 1926 Ruz*, 127, *Aja Po Kya v Emperor* 12 Cr L J 465=11 Ind Cas 1001, *Queen v Dwarbaroo*, 13 W R Cr 14, *Ranah v Emperor*, A I R 1932 I R 73. Confession is not sufficient evidence of corrected guilt. *Manna Lal v Emperor*, A I R 1925 Outh 1. The confession of a co-prisoner can not per se sustain conviction and in order to achieve that object it must be corroborated at least by independent evidence in some material circumstance. *Aher Singh v Emperor*, 59 Ind Cas 913=22 Cr L J 161. It must be corroborated by independent testimony and in material particulars. *Ramaswami Boyan In re*, 11 L W 8=54 Ind Cas 469=1 Cr L J 79, see also *Emperor v Ammulun* 57 Ind Cas 462=21 Cr L J 678. *Emperor v Sabit Khan* 51 Ind Cas 537=43 B 739=21 Bom L R 449. 20 Cr L J 479. But there is no rule as to what constitutes sufficient independent corroboration in a particular case. That must depend upon the circumstances. The statement must contain some corroboration when those confessions are retracted at the trial is very low, as pointed out in *Lasin v King Emperor*, 28 C 689=5 C W N 670 and in *Lalit Mohan* case (*Emperor v Lalit Mohan*, 10 Ind Cas 1593=38 C 509=10 C W N 95. *Per Heaton J* in *Emperor v Sabit Khan supra* *Ugappa v Emperor* 30 L W 403=1929 M W N 272=A I R 1929 Mad 491. "Very possible that there may be material to the case." Reasoning is not

21 W R 69. *Reg v Balhu* 1 B 475, *R v Kahappa* Weir 3rd Ed 424. *Reg v Dosa*, 10 B 231, *Queen Empress v Rama Sara*, 8 A 306, *Pam M J*, *Emperor*, 89 Ind Cas 889=26 Cr L J 185. The rule as I understand it, is not

of eye witnesses or of admissions by the co-accused. The difficulty arises in cases where the evidence is circumstantial evidence when it consists of circum-

stantial evidence it was sufficient corroboration. A similar view seems to have been

expressed in *Mad L J Article 97*. But in *Empress v Ashulosh Chakra-*

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all, *In re*, 20 L W 203=25 Cr L J 1041=81
The self inculpatory confession of an accused
upon which alone the conviction of his
Nor can such a confession even if it be
corroborated by other evidence which is insignificant

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by the confession of another accused as against the accused person who has
not confessed at all; but the confession of one co-accused may furnish the
corroboration of the confession of another co-accused as against the latter
and vice versa *Gangaram v Crown*, 60 Ind Crs 786=22 Cr L J 290,
Emperor v Gangapa, 15 Bom L R 975=2 Bom Cr C 143=21 Ind
Crs 673=14 Cr L J 625=28 B 156 *Emperor v Budhu*, A W N 1881
18 The conviction based on the confession of a co-accused not corroborated
in material particulars by independent evidence is illegal *Amir Shah v*
Empress, 20 P. R 1880, *Empress v Pura*, A W N. 1885, 320, *Empress*
v. Bhauani, 1 A 664; *In re Kappan*, 5 M. L. T 300=9 Cr L J 303=7 Ind
Crs. 547.

the only evidence
evidence, which,
in *Kishen v King-*

S. 30.

There is
uncorroborated
evidence against him
caution and care
on its truth or falsity

Agarwal v Emperor, 11 Cr L J 179=19 Ind Cas 179=6 Bur L 147

Value of retracted confession

is sufficient evidence for conviction

it to be true As regards the person

any corroborative evidence from

127 Ind Cas 871=A I R 1930

Ind Cas 155

Retracted confession and co accused. And retracted confession is admissible but should have no weight attached to it unless either corroborated in material particulars or unless the tribunal comes to the conclusion that the statement as a whole is a truthful statement. In either of these cases the retracted statement is

co accused *Sharma*

The Evidence Act

retracted confession

declaration against the accused though it may be that the weight would be

to a retracted confession *Gour Chandra v Emperor*, A I R 1930 C 11

Mahomed v Emperor 81 Ind Cas 62 A retracted confession is evidence and

there is no provision in this section by which a confession is to be received in

any or another The use to be made by a Court of a confession whether

retracted or not is a matter of procedure rather than law, the business of the

Court being to make up its mind in accordance with the dictates of common sense

whether it is wise to believe the confession or not. *M. Laxmi v Emperor* 100

Ind Cas 641=A I R 1931 Lah 196

But a mere retracted confession of a co accused cannot be sufficient to

sustain the conviction of another accused *Pala Singh v Emperor*, A I R 1930

Lah 329=29 Cr L J 267=107 Ind Cas 614 Because 'experience and

common sense show that in the absence of corroboration in material particulars

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v Emperor, 8 Pat L T 566=101 Ind Cas 881=28 Cr L J 497=A I R 1930

Pat 257 A retracted confession is not the

meaning of section 133 of the Evidence Act

40 C L J 551=A I R 1925 Cal 406

law with regard to a retracted confession

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v Emperor, 2 Pat L T 776=60 Ind Cas 56=22 Cr L J 200

"series of cases of which
the 23 C 689 and *E. P. v Emperor*
the confession should carry
it is

Where a confession made by an accused person is subsequently retracted by him and he does not implicate himself one of the conspirators, *held* the confession

S. 30

v. Emperor, 62 Ind Cas 515=22 Cr L J 529, *Emperor v. Narain*, A. I. R. 1931 Oudh 53=131 Ind Cas 72. Where the confession of a co-accused retracted before the trial, was not corroborated in a material particular, the connection of the other accused with the cause of the death, that other accused must be acquitted. *In re Manicha Padayachi*, 11 L W 171.

The retracted confession of accomplices may be taken into consideration under s. 30, where there is evidence tending to conviction, but they cannot form the basis of a conviction when there is no evidence whatever. *Reg v. Timaya*, Rat Un Cr C 104, *Queen Empress v. Sahadu*, Rat Un Cr C 771, *Atiya v. Crown*, 5 P. R. 1911 (F=11 P. L. R. 1911=27 P. W. R. 1911, *Emperor v. Kheshri*, 29 A. 931. So the retracted confession alone of an accused is not sufficient to justify a conviction of a co-accused but where such confession

reasons
is known
used, the

evidence is admissible and is a strong piece of evidence against the co-accused. *Waid v. Emperor*, 32 Cr L J 12=A. I. R. 1930 Oudh 412, see also *Sheo Balan v. Emperor*, 111 Ind Cas 771=A. I. R. 1929 Oudh 162, *Aryan Singh v. Emperor*, 30 P. L. R. 616=119 Ind Cas 325, *Rahmat v. Emperor*, 11 Lah. L. J. 5=113 Ind Cas 65, *Sordona v. Emperor*, 125 Ind Cas 638. Confessional statements of accused cannot be used in corroboration of the evidence of the approver in as much as tainted evidence is not made better by being corroborated by other tainted evidence. *Daulat v. Emperor*, A. I. R. 1930 Nag 97=31 Cr L J 153.

Against such other persons as well as against the person making the confession. A confession by one of several prisoners which is irrelevant or

latter *Imperatrix v. Istambar*, 2 admissible under ss. 24-26, against (provided it otherwise satisfies its

Four Article 103 In the case of a maker under s. 27, it is admissible, only when the admissible part is a confession of himself and other persons. If the

as against the co-prisoner, on the ground that the whole confession was unduly

corroborated and the mere discovery of conviction of A, in the first case also from evidence to show that properly put there by him) corroborate A theft. *Ibid*

Confession of of an accused person considered as the same to in section 133 of the

for the f (apart ad prob- in the

30. be examined as a witness. This being so, the provision that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an

the wordings of the latter section that it contemplates that the accomplice be examined as a witness not illegal merely accomplice, has no effect into consideration as against a co-accused jointly tried with accused under s 30. All the Chartered High Courts of India have held that an accused person cannot be convicted solely on such a confession made by an accused. *Empress v Karimbuz*, 11 C P L R 37 Cr, *Empress v Gorrado*, 9 C P L R Cr 35. So it is clear that such a statement cannot alone form the basis of a conviction but that it could only be taken into consideration along with other evidence in the case. *Emperor v Lalit Mohan*, 38 C 559-10 Ind Crs 582-15 C W N, 593; *Queen v Chunder Bhattacharya*, 94 W R Cr 42.

testimony
probable

Gangappa Kandeppa, 21 Ind Crs 673-38 B 156-15 Bom L R, 510-50 W R Cr C 143-14 Cr L J
'I think it will be a
Reading, L C J in R v
115 L J 473-25 Cr

ation as lending support to other evidence in the case. But if there is evidence in the case, it is not a proper basis for a conviction. It is not strengthened by the fact that it is supported by the other confessions whether they have been made in such circumstances as to preclude the theory that there has been connivance between the persons making the confessions or not. *Agarwal v King-Emperor*, U B R (1917) 1st Cr. Statements of co-accused persons are not entitled to even as much consideration as the testimony of an accomplice. *Queen Empress v Aana Raju* Rnt Un Cr C 463-Cr Reg of 1889, *Queen Empress v Uma*, Rnt Un Cr C 370-Cr Reg of 1889, *Empress v Ganapabhat*, Rnt Un Cr C 456. The practice when there is a joint trial, of refusing to accept the plea of guilty and proceeding to try the accused in order that his confession may be taken into consideration against his co-accused is illegal and an abuse of the process of the Court. *Muhammad v The Emperor*, 35 C W N 490, *Queen Empress v Lakshma Raja*, 23 M 491, *Q E v Pirbhu*, 17 A 599, *Q E v Paltua*, 23 A 53, *Emperor v Kheorje*, 19 B 195, *Q E v Subramanya*, 25 M 61, *contra Q E v Patonola*, 23 M 151, *Suldeb v K E*, 13 C W N 552, *Ascho v Emperor*, 13 C L J 742.

Explanation—Under the explanation to section the word 'offence' always includes abettments and attempts. In *Periya suami Alopam*, 51 W 75-53 M L J 471-129 Ind Crs 645.

desire to obtain
wise produce. But this course is not essential. *Muhammad v*
C W N 490-A I R 1931 C 341

Admissions not conclusive proof, but may stop.

31. Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provision hereinafter contained.

S. 3

Admission—meaning of. The word "admission" as used in this and in the previous sections is rather misleading. "The law of Evidence" says *Prof. Wigmore*, "has suffered in its most vital parts, from an ailment almost incur-

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sions may operate as a waiver relieving the opposing party from the need of any evidence and any party may at any stage of a suit, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the Court for such judgment or order as upon such admission he may be entitled to (Rule Order XII, rule 6, Civil Procedure Code) So judicial admission

ment of parties which become in themselves the foundation of independent right for other persons, by virtue of some doctrine of substantive law, — in other words from binding estoppels, warranties and representations *Wigmore* § 1057.

at liberty to prove that such admissions were mistaken or untrue, and is not induced by them in disputing their and that transaction *v Ram Sebul, enath v Bundo* 13 M I A 525; 18 W R 485, 21 W R 422, 1 Cas 33 An

estoppels of judicial admissions have no quality of conclusiveness, and on principle cannot have. *Wigmore* § 1059, *Loveridge v. Bolham*, 1 B & P. 49;

§. 30. be examined as a witness. This being so, the provision that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice, has no application to the case of an uncorroborated confession taken into consideration as against a co-accused jointly tried with the confessor.

the wordings of the latter section that it contemplates that the accomplice may be examined as a witness and not illegal merely.

an accomplice, has no application into consideration as against a co-accused jointly tried with the confessor under § 30. All the Chartered High Courts of India have held that an accused person cannot be convicted solely on such a confession made by an accused. *Empress v Karimbur*, 9 C P. L. R. 37 Cr; *Empress v Gorunda*, 9 C P. L. R. Cr 35. So it is clear that such a statement cannot alone form the basis of a conviction but that it could only be taken into consideration along with other evidence in the case. *Emperor v Lalit Mohan*, 21

Gangamma Karendra, 21 Ind Cas 673=38 R 156=15 Bom L. R. 460=20

ened by the fact that it is supported by the other confessions, which have been made in such been connivance between

Nyeen v King Emperor, persons are not entitle

accomplice. *Queen Empress v Nana Raju*, Rat Un Cr C 468=Cr. 19 of 1889, *Queen Empress v Uma*, Rat Un Cr C 370=Cr. Rg. 19 of 1889, *Empress v. Ganapabhat*, Rat Un Cr C 456. The practice when there is a joint trial, of refusing to accept the plea of guilty and proceeding to try the accused in order that his confession may be taken into consideration against his co-accused is illegal and an abuse of the process of the Court. *Muhammad v The Emperor*, 35 C W N 490, Q. F. *Empress v Lakshmanappa*, 22 M 491; *Q. E. v Pirbhu*, 17 A 529, P. J. v. *Paltua*, 23 A 53; *Emperor v Kheorje*, 19 B 195, *Q. E. v Paltua*, 19 B 195, *Subramanyam v K. E.*, 25 M 61; *contra Q. E. v Paltua*, 19 B 195, *Patonohu*, 23 M 151; *Suldeb v K. E.*, 13 C W N 552; *Kesho v Emperor*, 13 Cr L. J. 742.

Explanation—Under the explanation to section the word 'offence' always includes abettments and attempts. *In re Periya suami Moopan*, 61 M. L. J. 471=129 Ind Cas 645.

pass a sentence completely joint trial to give evidence his evidence with a mind being punishment and the

desire to obtain immunity to himself at the expense of the prisoner might otherwise produce. But this course is not essential. *Muhammad v Emperor*, 35 C W. N. 490=A. L. R. 1931 Cal 341.

Admissions not conclusive proof, but may stop.

31 Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provision hereinafter contained

Admission—meaning of. The word 'admission' as used in this and in the previous sections is rather misleading. "The law of Evidence" says Prof Wigmore, 'has suffered in its most vital parts, from in ailment almost incurable,—that of confusion of nomenclature. The term 'admissions' exhibits this misfortune in one of its notable aspects.' Wigmore § 1049. According to that learned author the term "admissions" as mentioned in these sections should be termed "quasi admission". The true admissions, in the fullest sense of the term" says Prof

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sions may operate as a waiver of any evidence and any party may, after facts have been made, either for such judgment or order as upon such admission he may be entitled to (Wade Order XII, rule 6, Civil Procedure Code). So judicial admission, is a formal act, done in the course of judicial proceedings, which waives or

ment of parties which become in themselves the foundation of independent right for other persons, by virtue of some doctrine of substantive law, —in other words from binding estoppels, warranties and representations. Wigmore § 1057.

admissions, in greater or less

at liberty to prove that such admissions were mistaken or untrue, and are not induced by them in disputing their and that trans in v Ram Sebak, enath v Bindo, 13 M I A 585, 18 W R 185, 21 W R 423, 3 Cas 33 An

estoppels of judicial admissions have no quality of conclusiveness, and on principle cannot have. Wigmore § 1059, Lovelidge v Bolham, 1 H & P. 49;

31. *Neulton v Belcher*, 12 Q. B. D. 921, 921, *Neulton v Luldiar*, 12 Q. B. D. 921
Such an admission does

where it has been acted upon by the party to whom it is made. *Jinan Chou Ihury v Doolar*, 18 W. R. 347, *1 rojendra v Chairman Dacca Municipality* 20 W. R. 233, *Ja Sant v Paltu* 14 B. 312, *Chandra Kant v Pearce Mohan*, 5 W. R. 209. Admissions resemble admissions in the party again explain the of an estoppel that the party who is estopped cannot bring forward any evidence to contradict his former conduct—in other words, an estoppel is a conclusive admission. *Cf R. v Pyllem* (1896) 2 Q. B. at p. 270, *Poult on Evidence* p. 477. *Dharm v Gurjar*, 10 B. H. C. 311.

Scope of the section. Admissions by a party to the record out of Court are evidence and primary evidence, of the facts so admitted. *Roscoe N. P. Fr* 61. The value of the admission lies in the circumstances under which it was made, and further to *Ev* 61.

within sections 115 to 117 of the Evidence Act, they are not conclusive, but are open to rebuttal or explanation. And this applies equally with the circumstances established, and must

be held binding. The party may confess its untruth, he may show in such a manner that the response which formed the admission was made not in a serious but in a joking manner or that the admission was made in ignorance of the true state of the facts.

Rep. 220, *Thornes v White* 1 Fyfe & G. 110. Express admissions of a party to the suit or admissions implied from his conduct are evidence and strong evidence against him, but he is at liberty to prove that such admissions were mistaken, that the admission was made in ignorance of the true state of the facts.

Abdul Karim v Rashuddin 131 Ind. Cas. 903—A. If R. 1331. On Admissions made at another time, for such other statements are not admissible for that purpose, unless they form part of *res gestae*. *Lee v Hamilton* 3 Ala. 59. *Roberts v Trawick* 22 Ala. 490. *Burn Jones* § 296. Informal admissions may be either in writing or oral or even by conduct. They may have been made in business correspondence or casual conversation long before any litigation began or was even contemplated, and with no intention of making a binding admission. They are therefore more easily explained away than formal admissions, but if sufficiently clear they shift the onus of proof. *Poult on Evidence*, 430.

This section declares that admissions are not conclusive proofs of the fact. An admission is the evidence of the fact, the witnesses are the evidence of the fact, the admissions may operate as an estoppel of saying that an admission is not

The person to whom the admission was made was mistaken and untrue. When the admission is duly proved and the person against whom it is proved does not satisfy the Court that it was mistaken or untrue, there is nothing in the

Evidence Act, and there is no general principle or rule of law, to prevent the Court from deciding the case in accordance with it. *Mumy Muz v Ma Thi Yi*, U. R. R. (1897-1901) Vol. II, 377, see also *Sayajullim v Johar Jan*, 131 Ind. Cas. 555=53 C. L. J. 222, *Abul Karim v Rishulalun*, 131 Ind. Cas. 563=8 O. W. N. 266=A. I. R. 1931 Outh 216. What a party himself admits to be true may reasonably be presumed to be so. Where the defendant is not a party to the deed, and there is, therefore, no estoppel, the party making the admission may give evidence to rebut this presumption, but unless and until this is satisfactorily done, the fact admitted must be taken to be established. The expressions of a party to the suit, or admissions implied from his conduct, are evidence and strong evidence against him, but he is at liberty to prove that such admissions were mistaken.

When a case is taken up by a party, and that party admits, but as to third parties he is not bound. *Jain Chandra v Chaudhary* 9 Bom. L. R. 267=11 C. W. N. 321=4 A. L. J. 102=5 C. L. J. 115=17 M. L. J. 103=2 M. L. F. 109. Those admissions which have not been acted upon, either because they were originally made without any intention of being acted upon, or because for any other reason they, in fact, remain unacted upon, or have not altered the situation of the opposite party are not conclusive, though they are receivable in evidence.

whether the person who made the admission was or was not acquainted with the incidents of the property when he made the statement. *Dunabindu v Minnu Lal*, 52 Ir. L. Cas. 443. An admission by one defendant against another, which admission the Court finds to be conclusive, cannot relieve the plaintiff from the burden of stating his case against the admitting defendant, nor can it shift the burden of proof to the shoulders of the latter from of the plaintiff. *Shankar v Mubhar Hussain* 6 W. R. 299. Where there is no privity of contract between the parties an admission made by one party will not bind another. *Ganesha Das v. Dularani* 1 P. Ind. Cas. 7=12 L. L. J. 137.

Admissions not conclusive proof. Under this section admissions are not conclusive evidence of the matters admitted. *Jaganmuth v Kalilar*, 8 Pat. 776=10 Pat. L. T. 191=A. I. R. 1919 Pat. 245, see also *Sali v Jala*, 131 Ind. Cas. 128=32 P. L. R. 245, *Secretary of State v Fildybatu*, A. I. R. 1929 Lah. 743, *Darindar v Lachmi*, A. I. R. 1930 Lah. 9=5. A party is not bound by his own representation when If treated as admissions that they were not true. Admission is conclusive only, made *Janan Choudhur* where its circumstances. *Ramabek*, 12 W. R.

Where the defendant wants to make of the transaction. *Musammal Lotufunnissa v Gour Saran*, 18 W. R. 455=493. An admission not explained, though not conclusive, is strong evidence. *Hunsa Kour v Sheo Gehind*, 24 W. R. 431; *Sankarachariya v Manali*, 51 Ind. Cas. 876; *Ambar Ali v Lutfe Ali*, 21 C. W. N. 996. A deliberate confession though not operating as an estoppel case is upon the making it, the burden of explaining is not averted was not the fact. 5 B. L. R. 329; *Greenath v*, 21 W. R. 431; *Vir v Harnam*, 184=11 C. W. N. 331 P. C.

THE INDIAN EVIDENCE ACT

S. 32. If the defendant admits any sum to be due, that admission, irrespective of the proof offered by the plaintiff, is sufficient to warrant a decree for that amount in the plaintiff's favour. *Ishan Chunder v Nobodutep* 6 W R 132 See also *Dhur v Sreenath* 18 W R 331. If in a suit for specific performance of an agreement, the defendant admits the terms of the agreement and its execution, the plaintiff need not put the document in evidence nor prove its execution. *Burjuri v Mancherji* 5 B 153, *Mc Gowan v Smith* 26 L J Ch 8, see also *Alexander v Mr Mahomed* 5 B L R 59 (P C) = 11 W R P C 29-13 W I A 438.

The weight to be given to such admissions depends on various circumstances. If the pleading is sworn to and hence it is deliberate and solemn statement of the party, its admissions may afford evidence, and it is not easily rebutted. When the allegations are made on information and belief they are still admissible in evidence, as this fact only detracts from the weight of the testimony. *Doe v Steel*, 3 Camp 115, *Pope v Illie* 1 U S 363.

Admissions made in Court or in appeal, where properly proved in a transcript or case made so long as they remain a part of the record and the statements or admissions were made by himself or by his counsel and not honest mistake or misapprehension of what the facts really were, and he desires to be relieved from the effect of such admissions, the Court for leave to withdraw such admissions to do so make a showing of good faith should be granted or denied in the discretion of the Court. In that action conclusive evidence is in the pleadings, or expressly makes in the pleadings, or are formally entered into for the purpose of dispensing with proofs. *Bar J* 23 § 274.

Admissions made in another suit, and from their solemn character are entitled to great weight, but they are not conclusive against the party and do not constitute an estoppel. *Doe v Steel*, 3 Camp 115. *Canero v Light foot* 2 W Black 1190, *Sturdy v Sanlers*, 2 Dowd & R 315, *De 117* 12-13 *dale v Milburn* 5 Price 185.

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STATEMENTS BY PERSONS WHO CANNOT BE CALLED AS WITNESSES.

32. Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases :—

(1) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

(2) When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty ; or of any acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind ; or of a document or receipt in commerce written or signed by him ; or of the date of a letter or other document usually dated, written or signed by him.

(3) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages.

(4) When the statement gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter has arisen.

(5) When statement relates to the existence of any relationship* [by blood, marriage or adoption] between persons as to whose relationship* [by blood, marriage or adoption] the person

* These words in s 32, cls (5) and (6), were inserted by the Indian Evidence Act Amendment Act (18 of 1872), s 2

32. Making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised

(6) When the statement relates to the existence of any relationship [by blood, marriage or adoption] between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised

or in document relating to transaction mentioned in section 13 clause (a),

(7) When the statement is contained in any deed, will or other document which relates to any such transaction as is mentioned in section 13, clause (a).

or is made by several persons and expresses feelings relevant to matter in question

(8) When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.

Illustrations

(a) The question is whether A was murdered by B, or

or

directly to the murder, the rape and the actionable wrong under consideration, — relevant facts

(b)

An business, of a son is a relevant fact

Kept in the course of her and delivered her

(c) The question is, whether A was in Calcutta on a given day
A statement in the diary of a deceased solicitor, regularly kept in the course of business, that on a given day the solicitor attended A at a place mentioned in Calcutta, for the purpose of conferring with him upon specified business is a relevant fact

(d) The question is, whether a ship sailed from Bombay harbour on a given day

A letter written by a deceased member of a merchant's firm, by which she was chartered, to their correspondents in London, to whom the cargo was consigned, stating that the ship sailed on a given day from Bombay harbour, is a relevant fact

(e) The question is, whether rent was paid to A for certain land

A letter from A's deceased agent to A saying that he had received the rent on

and

on a certain day The fact that a letter written by him is dated on such day is relevant.

* These words in s 32, cls (5) and (6), were inserted by the Indian Evidence Act Amendment Act (18 of 1872), s 2

(h) The question is, what was the cause of the wreck of a ship
A protest made by the Captain, whose attendance cannot be procured, is a relevant fact

The question is, whether a given road is a public way
statement by A, a deceased headman of the village, that the road was is a relevant fact

(i) The question is, what was the price of grain on a certain day in a particular market A statement of the price, made by a deceased banyan in the course of his business, is a relevant fact

(k) The question is, whether A, who is dead, was the father of B.

A statement by A that B was his son, is a relevant fact.

(l) The question is, what was the date of the birth of A

A letter from A's deceased father to a friend, announcing the birth of A on a given day, is a relevant fact.

(m) The question is, whether, and when, A and B were married

An entry in a memorandum book by C, the deceased father of B, of his daughter's marriage with A on a given date is a relevant fact

(n) A sues B for a libel expressed in a printed caricature exposed in a shop window The question is as to the similarity of the caricature and its libellous character The remarks of a crowd of spectators on these points may be proved

as witnesses Sections 32 and which exclude hearsay The possibility of getting the person, or that he may be examined

is a witness in the regular way But this is practically impossible in many cases *Markby Ev* 32 So the first principle on which these statements are admissible is

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Nature of Hearsay as an Extra Judicial Testimonial Assertion

utterance in his hearing
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testimony to it In other words,

S. 32 been asserted on the extra judicial occasion in question by the extrajudicially stating or narrating witness" Book VI, Ch IV of *Bentham's Rationale of Judicial Evidence*. The Hearsay rule tells us that B's assertion cannot be accepted because it has not been made at a time and place where it could be subjected to certain essential tests or investigations calculated to demonstrate its real value by exposing such latent sources of error. *Wigmore* § 1561

Form of Hearsay In respect to form hearsay statements may properly be regarded in one of two ways. The rule of exclusion applies indifferently to them all. As distinguished from each other by the nature of their source—unsworn statements in their assertive capacity may be treated as composite or individual.

Composite hearsay may be defined as a compound or blended extrajudicial declaration of an indeterminate number of people so mingled that the separate voices can no longer be distinguished.

Individual hearsay, on the contrary, may be regarded as an extrajudicial statement shown to have been made by a particular person or set of persons. So far as classified by means of the which through which the utterance is presented to the tribunal they may be conveniently considered as being oral, printed or written. *Chamberlayne's Lx* § 2737

Composite Hearsay Composite hearsay, as above defined, usually presents itself to the tribunal, with increasing vagueness as Reputation, Rumour or Tradition. Individual expressions of opinion, though persistent, do not constitute reputation. *Chamberlayne's Lx* § 2738

Hearsay Rule and its exceptions—its Historical development etc Then is a great head of the law of Evidence' says *Prof James B. Ailey Tluyer* "comprising indeed, with its exceptions much the largest part of all that truly belongs there forbidding the introduction of hearsay. The true historical nature of the rule is hinted by the remark of an English Court, two centuries ago and over when they checked the attempt of a woman to testify what another woman had told her. 'The Court,' it was quietly remarked 'are of opinion that it will be proper for Wells' ... *Chamberlayne's Lx* § 2739

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evidence to the jury in 1721. Such declarations in early times, and even in ...

times, had a way seems always to have been followed, used to know what the statement was.

the aspect of family reputation, and reputation was often reckoned an adequate ground for judicial action. In the thirteenth century we find a witness, in proving another person's age, giving as the basis of his testimony the fact of the mother's recording the age in the records of a P'riory, which record he had seen. In matters affecting a whole parish or a large number of persons, the hearsay and reputation of those belonging in the given community was always regarded as good.

"There was another class of unwritten statements which had always been resorted to in judicial proceedings and admitted to the jury, namely, written ones, entries in registers, in a person's books, in the account books of the stewards, in a merchant's books, in contracts, deeds, wills, and other documents. Documents had always been shown to juries,—long before witnesses were required to testify to them. In the early days they did not stick, it would seem, at showing the jury any document that bore on the case, without even thinking of how the writer knew what he said.

authenticated were one.

It appears, then, that libelation came in under it, or rather, so to speak, stayed in, simply because they had always been received, and no rule against hearsay had ever been formulated or suggested as applying to them. Such things, continuing at the present day, are e. g., the admission of old entries and writings in proof of ancient matters, written declarations of deceased persons against interest, and in the course of duty or business; and, to

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in their turn, these deceased persons of law the made; or of such same fact

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"I have my judgment upon this that no document could be received, and within the general rule that hearsay evidence is not admissible" (*Clark v. Freeman*, 16 App. Cas. 623). On the other hand, *Sir George Jessel*, in a very different time, in 1876, had declared it to be the Court's duty to extend the exceptions to the hearsay rule, out of regard to the reasons and principles which have induced the tribunals of this country to admit exceptions in the other cases" (*Stephen v. R. Leonard*, 1 Prob. Div. 154). It seems a sound general principle to say that in all cases a main rule is to have extension, rather than exceptions to the rule; that exceptions should be applied only within strict bounds, and that the main rule should apply in cases not clearly within the exception. But then comes the question, what is the rule, and what the exceptions? There lies a difficulty. A true analysis would probably tentatively state the law so as to make what we call the hearsay rule the exception, and make our main rule this, namely, that whatsoever

S. 32 been asserted on the extra judicial occasion in question by the extra judicially stating or narrating witness" Book VI, Ch IV of *Bentham's Principles of Judicial Evidence*. The Hearsay rule tells us that B's assertion cannot be accepted because it has not been made at a time and place where it could be subjected to certain essential tests or investigations calculated to demonstrate a real value by exposing such latent sources of error. *Wigmore* § 1361

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Hearsay Rule and its exceptions—its Historical development etc. There is a great head of the law of Evidence" says *Prof James Bradley Thayer* "comprising indeed, with its exceptions, much the largest part of all that truly belongs there forbidding the introduction of hearsay. The true historical nature of this rule is hinted by the remark of an English Court, two centuries ago and over when they checked the attempt of a woman to testify what another woman had told her. The proper for *Wells* if opinion that it will be *the Canning's Case* 10 went to the medium of ordinary testimony. But it must be understood that it must be a statement of a person who could say as the witnesses to Courts in older times always had to say *quod videtur* *audiri*, it must not be themselves originally with testimony of other witness of what they were saying. When a witness who were by the

state it if they did, were not to say inferred from what between the function of a criminal and a fact

now call circumstantial

doctrine, rules which were coeval with the doctrine itself or much example, it seems always to have been true, in cases of homicide, that the declarations of persons killed were reported and acted on in judicial proceedings. We find these used by a complaint witness as far back as 1202, and used in evidence to the jury in 1721. Such declarations in early times, and even in law

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 of old entries and writings in proof of ancient matters, written declarations of

persons against interest were received, and, in England even oral declarations of
 deceased persons in the course of duty or business And not only has the
 scope of these old titles been enlarged, but now exceptions have been made; or
 perhaps they are rather old ones coming to be recognized and formulated; such

whether and how far
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S. 32. is relevant in adm exceptions, but this classification rule would have that it shows a sp particular instances, while rejecting it generally. For example there is, son &

to say the contrary or as part of a series of statements or a class of them which are usually careful and accurate and the like; credit amply enough in point of reason to entitle them to be received as evidence, though once the absence of the

fact itself *pari passu* lying under the course of hearsay, but received, by way of exception, on account of this special intimacy of connection with the admissible fact. This part of the subject presents an instructive spectacle of confusion resulting from the desire on the one hand to hold to the just historical theory of our cases and on the other to be aware of the size and complexity upon *Thayer's Prel Treat*

Theory of Hearsay Rule The principle of exclusion of hearsay evidence Credit being derived from attestation fountain from whence it flows and when there was such a speech made for rat rely

to be affected by it, had no opportunity of cross examining him' *Idem* in *Wignior* § 1362 "It seems agreed that what a stranger has been heard to say is in strictness no manner of evidence either for or against a prisoner not only because it is not upon oath but also because the other side, hath no opportunity of a cross-examination" *Haul in's Pleas of the Crown* C. II C. 46 § 41 In also the objection of *Peckham* in *Wright v Tatham*, 7 A. & E. 313, Co an oath furnishes some guarantee for value of it' In the same case *Alderson* B said "The general rule is that facts are to be proved by testimony of persons on oath and subjected to cross examination In *Grasham Hotel v Manning* Ir R 1 C J 125, O'Brien J said "The statements and declarations of opinion received in evidence in this case were made by parties not examined upon oath or subject to cross examination and would not be exempted from the general rule excluding hearsay evidence

In some of the cases great stress is put on the right of cross examination In *Dyball Peerage Case*, L R 11 App Cas 503, Lord Blackburn observed "In

the evidence of a man who is not pro-
not be cross examined, as a general rule
Key v. Pirt of Inglesea, 17 How St Tr
... So "the general rule is that
that such statements are

the author of the statements not being exposed to cross examination in the presence of a Court of justice, and not speaking under the penal sanction of an oath, with no opportunity to investigate his character and motives, and his deportment not subject to observations" *Marshall v. R. Co.*, 48 Ill 476, see also *Berkeley Peccage Case*, 4 Camp 406; *Doe v. Judgady*, 4 B & All 51; *R. v. Darlin*, Jobb Cr C 127; *Smith v. Blake*, L. R 2 Q B 326, *R. v. Jenkins*, L. R. 1 C C. R 193; *Suglen v. St. Leonards*, L. R. 1 P D 154.

'Of the two main facts' says *Mr Chamberlayne* which impair the probative force of an unsworn statement used as hearsay, lack of oath and the absence of cross-examination probably the latter is, at the present time regarded as being by far the more serious. Indeed, the importance of the oath is more frequently regarded as an incident of cross examination, than as a valuable guarantee for truth in itself considered. While, therefore, lack of sanction of an oath is spoken of by judges as being an infirmative consideration in relation to hearsay of practically co-ordinate importance with absence of cross-examination, such can scarcely be regarded as the fact. The real reason for thus joining the two requirements of oath and cross examination is that cross-examination, in a juristical sense, takes place under oath. An extra judicial statement given under oath, is as objectionable to the present rule, if not tested by cross examination, as an unsworn statement would be" *Chamberlayne's Ev* § 2712.

Reason for Hearsay Rule—Inherent weakness—Absence of cross examination. The absence of a cross-examination is a more serious matter. Not without

withstood the probing of a well conducted cross examination. A proponent whose witness in stating the truth can ask for no better help for the establishment of

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is composed is sound or rotten. In much the same way, in the absence of the searching test which cross-examination alone makes practically possible, the

tribunal has, as a rule, no satisfactory data upon which to estimate the probative

being misled. A presiding Judge

ring that such a statement was irre-

levant, without probative force, or that the jury could not reasonably act

upon it.

On the other hand, the use of a rigid rule of procedure to the effect that

however necessary the extra judicial statement may be to the proponent in prov-

S. 32. that instance, that the statement offered is free from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of

for the evidence—may be examined more closely, taking first the latter

(1) Where the test of cross examination is impossible of application by reason of the declarant's death or some other cause rendering him now unavailable as witness statements &c
The question
the latter or the
policy of the

test of cross-examination

(2) There are many situations in which it can be easily seen that such required test would add little as a security, because its purposes had been already substantially accomplished. If a statement has been made under such circumstances that even a deep ordinary instance) in on a test whose chief object exists, the statement comes from that person was

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all cases where they were made under circumstances in which such evidence ought properly to have been admitted, that is, where the person who made them had no interest to the contrary, and where they were made before the commencement of the litigation. That is not, however, our law. As a rule the declarations, on, are not admissible on this subject, so frequently entirely could it have been. A most crying and intolerable injustice, that a large number of exceptions have been made to the general rule. Now I take it the principle which underlies all these exceptions is the same. In the first place, the case must be one in which it is difficult to obtain other evidence, for no doubt the ground for admitting the exceptions was that very difficulty. In the next place the declarant must be disinterested, that is, disinterested in the sense that the declaration was not made in favour of his interests. And, thirdly, the declaration must be made before a dispute or litigation, so that it is made without bias on account of the existence of a dispute or litigation which the declarant might be supposed to favour. Lastly, and this appears to me one of the strongest reasons for admitting the declaration must have had peculiar means of knowledge not possessed in ordinary cases." *Chamberlaynes Ex* § 2763 notes

he is dead

a greater or less necessity for more than (1) The person whose statement offered may now be unavailable for the palpable reason. It seven ensuing ones out in the rules, but the general notion is clear and unmisleading

acknowledged in these exceptions with more or less directness and strictness
 but we cannot expect, again or at this time, to
 the same or other sources. This appears

 of less duty in the exception
 section 6), for reputation, and is
 (as in the first case) with the entire
 some valuable source of evidence

. convenience, can be predicated. But the
 1121, *Chamberlayne's Ev* § 2761. Hearsay
 here is better evidence. There are certain
 their very nature, admit of the production
 relationship, character, custom, prescription and
 R. Act X Rule. 30.

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 second principle
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 accuracy and
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 not quite
 the cir-

stances presuppose. It is merely that common sense and experience have from
 time to time pointed them out as practically adequate substitutes for the ordinary
 test, at least, in view of the necessity of the situation. *Wigmore* § 1422

Witness qualifications, and other Rules, also to be applied to statements
 admitted under these exceptions. The Hearsay rule is merely an additional
 test or safeguard to be applied to testimonial evidence otherwise admissible.

declarations. The English rule in *R v Phipps* 509 according to

ion it is relevant, though, possibly

Scope of Section 32. This section provides an exception to the general

may have spoken hastily, inaccurately or even falsely. Moreover the person who
 is really responsible for the statement did not make it on oath; he was not

S. 32. cross-examined upon it, and the Court had no opportunity of observing his conduct when he made it. It is a fundamental principle of our law that evidence is not admissible unless it is given by a person who is not a party to the suit, and who is not a witness therein.

are as follows:—Statements written or verbal, of relevant facts when made by a person (a) incapable of being impeached by cross-examination, or (b) incapable of being impeached by cross-examination.

to the Court unreasonably, and inadmissible: (1) when it relates to the cause of his death or (2) when it is made in course of business, or (3) when it is made against the interest of the maker; or (4) when it gives opinion as to public right or custom, or matters of general interest; or (5) when it relates to existence of relationship, or (6) when it is made in will or deed relating to family matter, or (7) when it is made in document relating to transaction mentioned in section 13, clause (a); or (8) when it is made by several persons and expresses feelings relevant to the matter in question. In the absence of the conditions prescribed by section 32 of the Evidence Act a plaintiff filed in a prior litigation a statement to prove a statement by a superior landlord *Lakshmi v. Tahir*, 39 C. L. J. 90-29 C. W. N. 1033-80 Ind. C. 357. A recital in a document is admissible in evidence against parties who are not parties to the document, only where the conditions laid down in section 32 of the Evidence Act are fulfilled. *Ram Sarup v. Bhajant Prasad* he admitted as corroborative of collection of rent at a certain

the corroboration required by *Charlter R. v. R.* 41 Ind. Cas. 422

Requisites of admissibility under section 32. Statements oral and written made by persons not parties to the suit, and not witnesses therein, are not admissible.

of the rule itself. The first of these is that of necessity; i.e. the situation in which it is no longer possible to subject the person to oath and cross-examination, so that if his statements are to be had at all, they must be had without applying these securities (i.e. securities guaranteed by oath and cross-examination) for trustworthiness. The law on the subject is thus laid down by Tillyer in *C. J. in Garwood v. Dennis*, 4 Bing 328. "It is objected that however impressive the declaration of a man of character may be, yet the law admits the word of no man in evidence without oath. The general rule certainly is so, but subject to relaxation in cases of necessity or extreme inconvenience. The second notion is that, even though a necessity exists for relaxing the hearsay rule, nevertheless this is not to be done unless there is in the particular case of declarations offered, some shall—in some degree, at otherwise required. *Green v. Conn* 507, *Loomis J.* said oath and the test of cross-examination as a pre-requisite to verbal testimony, unless it discloses the nature of the case, and the truth. So statements elicited from being cross-examined under section 32 and 33. *Stechling* hearsay is relaxed under section 32 and 33. The whole

that shows her sanction by persons who are

possible in the 17 "Section 32 of persons who The object of those restrictions and the reasons for them are plain The basic principle of legal evidence being that the Court must always have the best, it follows that where persons can be, they must be brought before the Court to tell what they know at first hand Their veracity can then be best tested by the art of cross-examination Where however witnesses cannot be brought before the Court evidence of a kind that a Court The conditions which when no imposed upon its admission truth As there is no tement will not be t ordinary course, a true statement,"

Per Beaman J in ibid

Written or verbal The rule as regarding hearsay is so sweeping that it excludes all written hearsay irrespective of the mode in which it is presented—very often in the form of official records, but more frequently according to the particular commercial transaction to which it relates Of course the fact that the written hearsay is in the form of letters or telegrams does not avail to make it admissible The fact that hearsay is printed no matter in what form, does not alter the application of the rule *Burr Jones* § 298 So considered as hearsay, an unsworn consideration of the writ Temporary, against hearsay § 2756 As it is but proof of the exceptions to that rule

"Verbal" means by words, it is not necessary that the words should be spoken If the term used in the section were 'orally', it might be that the statement must be 'confined to words spoken by the mouth' But the meaning of the word 'verbal' is something wider the words of another person may be so adopted by a witness as to be properly treated as the words of the witness himself *Per Petheram C J in Queen Empress v Abdulla* 7 A 385 (397) F B In the same case *Straight J* said 'I am also of opinion that the signs made by the deceased *Dulari* in response to the question put to her, may be given in evidence from which the inference may be drawn that she assented or negatived the matter of such questions As is established satisfactorily to the that such questions taken with her assent or titute a verbal statement is to the cause 32 of the Evidence Act I am not rely technical distinction is to say that while questions adopted or negatived by a mere 'yes' or 'no' constitute a 'verbal statement' within s 32, they become inadmissible when assent or dissent is expressed by a nod or a shake of the head' But *Mahmood J* expressed a different view in the same case At page 398 he said 'I should accept the not to interpret the the meaning of word' to me

'verbal' cannot mean more than 'by means of a word or words' Nodding the head or waving the hand is not a word As regards dying declarations *Prof Greenleaf* observes "The testimony here spoken of may be given as well by signs as by words, thus, where one, being at the point of death and conscious of her situation, but received, was asked the wounds, and, if squeezed his hand, consideration of the jury" *Greenleaf Ev* § 159(b) In *Mochabau v Com*, 78 Ky.

- S. 32. 382 *Hines J* said "Dying declarations are not necessarily either spoken or written. Any method of communication between mind and matter adopted that will develop the thought, is the pressure of the hand or the nod of the head or a glance of the eye" See also *R v Lowe*, 10 Br C 1, 39, R 12 Cox Cr C 168

Rejection of evidence by the lower Court When the Court below rejected the evidence of certain witnesses on the ground that it was false and had not conformed with section 32 of the Evidence Act, and on the other hand the evidence it was sometimes uncertain whether the witnesses were from their own personal knowledge or from information derived from others, but the Court had considered it from both points of view and held it admissible. The Judicial Committee saw no reason to differ from the estimate which the lower Court had formed as to the credibility of the witnesses in the former case, nor, in the latter case, to question the manner in which the Court below applied the provisions of section 32. *Shafiq-un-Nissa v Shabon Ali Khan*, 26 A 581-9 C 105-6 Bom L R 750

Relevant facts. This section lays down that the statement, whether written or verbal, in Queen-Empress v. *Per Pithers* examination" says employed as hearsay, or, more properly, determinate, evidentiary value to a declaration not so tested, has led to its administration as is most clearly seen in connection with the exception of hearsay rule. subjective, vancay objective evidence a to be received the absence of a demonstration of overwhelming forensic necessity on the part of the prosecution would warrant incurring some hazard by way of misleading the Chamberlayne's Ex. § 272. Facts which are objectively relevant are relevant and 5 *Blusana* not relevant "If a fact Facts are learned 16, relevant

I cannot see that the other portions of the Examinations is to the declaration undoubtedly the identity of the murderer is a fact in issue in a trial for murder. These would not have been the intention of the Legislature. Facts in issue are facts about which there is a question in issue, I cannot understand how the facts that are in issue can be other relevant to the determination of the suit, and this I think is clear from language of section 5. But see *Patel v Patel*, 15 E 365

Subjective relevancy If the objective relevancy of a hearsay statement is tacitly assumed as a matter of course the question of subjective relevancy stands in quite a different position

much more. In connection with two conditions of subjective

Adequate Knowledge and Absence of Controlling Motive to Misrepresent, this difficulty is almost entirely confined, in case of hearsay, to other statements, to the latter. Adequate Knowledge like Objective Relevancy, raises in practice, but little difficulty in its determination. It can be finally settled, once for all almost on inspection. But in the case of Absence of Controlling Motive to Misrepresent, the situation is quite different. *Chamberlayne's Ex* § 2731

Subjective Relevancy—Adequate knowledge—A qualification required in case of every witness is that he should be shown or can reasonably be assumed to possess a knowledge commensurate with, sufficient to give evidentiary value to, the evidence which he proposes to offer. Should the matter be one covered by direct observation, it must

facilities and opportunities to

Where the fact to be stated is

appear or be justifiably assumed

knowledge helpful to the jury. Should it appear that the proposed testimony is not based upon adequate personal knowledge gained from observation or otherwise, it is subjectively irrelevant and should be rejected. The fact may be established but cannot be credited. The requirements are no means restricted to the judicial use of unsworn statements. But it is naturally insisted on in such a connection so far as can reasonably be done. *Chamberlayne's Ex* § 2732

Subjective relevancy—Absence of controlling Motive to misrepresent—"The credibility and consequent admissibility of an unsworn statement is thus seen to rest upon its subjective relevancy and this in turn, upon the existence of the motive to misrepresent. The question is a crucial one and of some nicety and difficulty when viewed from the strict point of Procedure. To exhibit to the jury by the aid of cross examination facts out of which may be thought to arise motives tending to pervert, consciously or unconsciously, the desire to truthfully narrate facts known to the declarant is a comparatively easy matter. The provisions of Procedure have been greatly taxed in an attempt to formulate general rules as to what may or may not have been omitted which may to a certain extent supply the place of judicial testing. *Chamberlayne's Ex* § 2733

"Secondary evidence In considering the use of hearsay statements at the present day under enlightened judicial administration by the use of reason it would be natural in case of a hearsay statement to adopt the rule that in order for the declaration to be subjectively relevant it must appear that the declarant was not so far under the influence of bias, self interest or other controlling motive to misrepresent as to render it irrational that the jury should credit his story. *Chamberlayne's Ex* 2733

"In dealing, however, with the exceptions to the hearsay rule where the assertive unsworn statement is treated as secondary evidence, it is important to bear in mind that we are dealing, as it were with the stone age of judicial evolution. The temper of the times during which the hearsay rule and its exceptions were formulated is procedural rather than administrative. Preappointed equivalences, the ability to state one fact in the terms of another like the place to which the judgment deduced by reason from legal principles might more properly lay claim. Thus in relation to subjective relevancy Adequate Knowledge in case of a declaration regarding Pedigree must be shown by membership in the family. Absence of controlling motive to misrepresent is established by the fact that the assertion was made before the warmth of partisanship or the beguiling of self interest had been aroused by a *Lis Motu*. In other words, to secure admissibility on account of subjective relevancy the hearsay statement must have been made *ante litem motam*. *Chamberlayne's Ex* § 2733

Primary Evidence
equivalences characteristic
cases in which modern jury

sufficient guarantee

In course of legal evolution the existence of one of two forces was found to furnish a sufficient guarantee to this effect. These are (1) the Force of Spontaneity and in certain cases (2) the Force of Habit. In either case, experience showed that the

S. 32.

is the probative force of assertive judicial decisions as happened to modern judicial administration that the evidence is not secondary as originally regarded by procedure but is, under modern conditions, primary there being no species of proof of a superior grade in connection with matters to which they relate." *Chamberlayne's Ld* § 2733

Person "This argument was based entirely upon the provisions of the General Clauses Act which says that 'person' shall include 'persons', it was contended that 'person' in section 32 must be read as 'persons'. I do not think that this ingenious argument is entitled to succeed." *Per Maclean C J in Chandra Nath v Nilmudhub* 3 C W N 88(89)=26 C 236 (237) as a statement relating to the existence of a person signed by several persons some only under clause 5 of section 32 of the Evidence Act. If the document is dead, the statement made by it is not admissible under section 32, if it comes under one or other of its clauses, being thus the statement of a person who is dead. *And*

...dered to be sufficient to satisfy an, 10 Conn 11, *Williams J* 241

...writing by such a person filed before him was held to be inadmissible in evidence as *Agat Lal v Jogeshwar*, 25 A 149 P C Before *Queen v Govalao* 19 W R 236=3 C W N 83 So as to persons who has been fully

adm

Cr

also the case examined and cross examined the suit In such a case

for the admission of the previous statement made by the witness *Kusum Kumari* 46 Ind Cr 929=5 Pat L J 161 Where a person making a dying declaration chances to live, his statement is not admissible *Emperur v Ram Sattu*, 1 Bom L R 434

Who cannot be found is in effect unavailable if disappearance is shown by search The only objection to the possibility of collusion between to be satisfied that there had been *bona fide*, this objection loses its force find a witness, then he is as it were dead

may be read "so is the party make oath that he did his endeavour to find a witness, but that he could not see him nor hear of him" *Anon Godbold* 3 B In *Oates trial* 10 How St Tr 1237, 1285, *Oates* "My lord, I will try to produce what he swore at another trial; L C J *Jeffereys* "Why, where is he? Is he dead?" *Oates* "My lord, it has cost a great deal of money to search for him; but I cannot anywhere meet with him and that makes my case so much worse that I cannot, when I have done all that man can do to get my case better, when I thought my trial would be of him" L C J, "Look at it, my lord, to admit of any will

indulge you so far

found within the jurisdiction of the court residence or in the country is not sufficient *Thomas v State*, 130 Ind 171 A *Pope v State*, 130 Ind 171 A

making a dying declaration chances to live, his statement cannot be admitted in evidence as dying declaration under s 32 of the Evidence Act, but it may be relied on, under s 157 of the Evidence Act, to corroborate the testimony of the complainant when examined in the case *Emperor v Rama Sattu, 1 Bom L R 191*

Incapable to give evidence. In a murder case one of the witnesses for the

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ments of relevant facts made by persons whose attendance could not be procured without unreasonable delay and expense, such statements having been made in the ordinary course, and written or signed

238 But the mere

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previous statement made by him on the ground that his evidence cannot be procured without unreasonable delay or expense *Kadappa v Tirupathi, 80 Ind Crs 576-21 L W 210-A I N 1925 Mad 111* Vide also under section 33

CLAUSE I.

Dying declarations—Principle of Admission The grounds of admission of dying declarations are (1) death, (2) necessity, for the victim being generally the only eye witness to such crimes, and (3) the sense of impending death, which creates a sanction equal to the obligations of death *R v Woodcock, 1 Leach 500 (504); R v Perry, (1909) 2 K B 697, Phip Ld 308*

The injured person being dead, any proof, the testimony of these witnesses the charge could scarcely be

made out except by the facts of the transactions of the real facts The

received unless there is to be a failure or miscarriage of justice While these

S 32

is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice. *Per Erle C B. in R v Woodcock*, 1 Leach 500 501 "Taking men as they are at present the will of the witnesses for truth telling in case so high as early administrative was argument in favour of the establishment of the exception that a sense of impending death created a sanction equal to that of the administration of an oath may be conceded. Is it quite certain however that the sanction of the oath remains the same at the present time as in early days? Christies in a religious belief in a growing disbelief in the once universal accepted doctrine of eternal punishment registered in the registers of the fact that the punishment is still insisted on no period of its utility have the result. Perjury has always been a curse of judicial administration. If the law is to be a deterrent rather than a trial Even so the present state of the law therefore

that it is in a species of oath under which a man is by truth telling in judicial service. *— L. J. M. 1819*

Dying declarations when admissible under English Law A declaration made by a declarant as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death is deemed, to be relevant only in trials for murder. A declaration is shown to the jury of death and to have given a reason was made. *Steph Dig Ev tri 21* So declarations are admissible upon charges other than homicide or as to homicides other than that of the declarant. The deceased must be proved to the satisfaction of the Judge to be in actual danger of death at the time of the declaration. *R v Pray, (1909) 2 K B 100* So the application of the law is strictly and absolutely limited to cases in which the death of the declarant is the subject of enquiry, or is part of the transaction. *R v Maudslayi B & C 605* So dying declaration is not admissible on an indictment of perjury. *Ibid* So when on an indictment for administering poison to a woman pregnant but not quick with child the intent to procure the declaration made by the woman being the declaration made by the woman were admitted in an enquiry of enquiry. *L J M* has been are also 337 In in evidence, and his maid servant who was present and had made the cake, and not afraid of it, and thereupon ate of it, and was in consequence poisoned and died. Her dying declarations (made after she knew of her master's death and was conscious of her own approaching death) as to the manner in which she made the cake, and that she put nothing but in it and that the present eating his breakfast at one end of the table while she was making the cake at the other end of it, were tendered in evidence, and objected to on the ground that the only person whose dying declarations could be received in evidence was the person whose death formed the subject of enquiry. But *Coleman J* after consulting *Parke B* admitted the evidence on the ground

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ed equal to an oath, but they are nevertheless open to observation. For though

the evidence of such declarant inadmissible? If the above conditions concur, it is immaterial under the English law that the declarant lingered for several days, or even weeks (*R v Burnadotti*, 11 Cox 316, *R v Craten* 1 Law 77) or

of the name of *Edwards*, very much
been recently executed for a high way

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evidence

this subject had proceeded from the solemn declaration of a dying man, it was admissible evidence in favour of the prisoner. The Court observed "It would be inconsistent with the rules of evidence which are rules of justice, to examine a witness to the declaration of a person dying under the circumstances described

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acts under a sanction

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und convict, would be

carrying the rule of evidence beyond its possible extent, even if the person were alive, for as an attainted convict, he could not have been admitted to give testimony upon oath, and the dying declarations of such a person cannot, consistently with the principles of justice, be considered as better evidence than his testimony on oath would have been if he had been alive. The fact, however, that a man resembling the person of a prisoner was executed, may be g
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danger existed

The deceased clearly thought he was dying, and had no hope of recovery.

Bissorunjun Mookerjee, 6 W R Cr. 75, *Lalji v. Emperor*, 6 P. 717, *Queen v. Ugrail*, 2 N. W P 212 In that case where in admitting dying declarations in a case of rape the Court consisting of *Kemp* and *Markby JJ* said, "It seems pretty certain that the law in England on the subject has been much narrowed of late years. There are instances in the older books in which dying declarations have been admitted in civil cases, and in no

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apply with equal force to its admissibility in
which dying declarations are admissible
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put on a level with a deposition, technically so called, which is admissible in

is it the reason why this evidence is admitted, but, even if it were so, that
necessity is just as likely to exist where the deceased person has been robbed, or
raped or assaulted, as where he has been murdered see also *Queen v. Ugrail*,
3 N W P 212 In England, to render a dying declaration admissible, the
declarant must have been in actual danger of death, he must have been fully
aware of this danger, and death must have ensued *Taylor Ex* § 718, *Sussex*
Peerage Case, 11 Cl & F 108, *R v Curtis*, 21 T L R 87, *R v Woodcock*, 1
Leach, 500, *R v Osman* 15 Cox 1; *R v Gloster*, 16 Cox 471, *R v Forster*,
It is not necessary

John, 1 East P C 337; *R v Woodcock* 1 Leach 500; *R v Morgan*, 14 Cox,
337 But in India the statement
was or was not at the time when
v Digamber, 19 W R Cr 44,
v Premananda, 52 C 987-29 C
dying declarations for under a
facts made by persons who are dead are themselves relevant facts when the
statement is made by a person as to the cause of his death and as to the nature
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S. 32. examined in Court before the presiding Judge S. 32 provides an exception to the rule that a declaration made by a person in the Indian Penal Code must be given in Court by the person himself. 1932 Lah 14. Before the passing of the Indian Evidence Act XXV of 1861, the declaration of a deceased person, if made at the time of making such declaration, believed himself to be in danger of approaching death, although he was not in danger of death, was admissible in evidence. 29 of Act II. The declaration, and then thought himself to be in the danger of approaching death, etc. "Both these enactments, then required that, before a dying declaration is received in evidence, it should be proved that the person making it

statement shall be received in evidence. 15 W. R. 11 at p. 13. See 76, *R. v. Synder Singh*, 9 W. R. 11. point even with the English law. entertain no hope of recovery (XXV of 1861) and the old Evidence Act

provided a hope of recovery. By the present Act it matters not whether there existed even any exception of death at the time of making the declaration. *Ev. 175; Empress v. Bitchyuden*, 6 C. L. R. 278. A dying declaration made at the time when a person is in a precarious condition does not cease to be admissible and become inadmissible under s. 32 of the Evidence Act merely because a few days more. *Thakur Singh*, 1 L. R. 1929 Lah 64. According to the declarations are admissible when a person has died in a hospital after being injured by the injuries but was cured by medical treatment. *Ev. 175*, held that the dying statement of a person is not admissible in evidence in a trial of the person who made the statement deceased under s. 32. *Wali Mohammed v. Emperor*, 126 Ind. Cas. 311 (1930) L. J. 1903 = A. I. R. 1930 Oudh 249. So also where a woman who was alleged to have been raped and who committed suicide three days after the incident was proved to have made a statement shortly after the rape to one of her relatives. *Held* that the rape not being the cause of death her statement was not admissible in evidence under s. 32 (1). *Kappinayah v. Emperor*, A. I. R. 1931 Mad 1000 (1930) 11 W. N. 702.

the necessity from any of the declarations

the necessity from any of the declarations

(c) Its limitations are heresies of the last century which have no sanction of antiquity. They should be wholly abolished by legislation. *Ev. § 1436*

Subject matter of dying declaration A declaration made by a declarant S. 3

It 509 The deceased declarant must be the person whose death is subject of the charge *R v Mead* 2 B & C 605, *R v Hind*, 3 Cox 300=23 L J M C 117 In *R v Mead*, the dying declaration of *Lau* after giving an account of the circumstances under which he was shot by *Mead*, proceeded to negative his having been present at, or having had any concern whatever in, the smuggling transaction deposed to delivering the opium cannot be received
ed to a confession by the party himself of a very heinous offence he had committed The same observation applies to the case of *Wright v Tetter*, 3

of the charge, and the circumstances of the death the subject of the dying declaration See also *R v Hichison*, 2 B & C 608 (notes) *R v Murton* 3 L & L 492 So the statements of a deceased person made prior to his death as to the cause of his death, or as to any of the circumstances of transaction which brought about his death are relevant as against all the accused *Alama v Crown* 67 P L R 1905=2 Cr L J 237; see also *Mur v Emperor* 81 Ind Cas 964=4 Lah 151 *Wali Mahomed v Emperor* 126 Ind Cas 511=A I R 1930 Oudh 749 The reason of the rule is thus stated by *Angman, C J* in *State v Lohan*, 15 Kan 413 Mr *Pelfield* states that this evidence is not received upon any other ground than that of necessity, in order to prevent murder going unpunished Its admission can be justified only on

an extent, where the death of any one else than the declarant is the subject of the inquiry, as to justify the adoption of rule admitting such testimony So the declaration may not concern any and all topics It must concern facts leading up to or causing or attending the injurious act which has resulted in the supposed necessity for the foregoing limitations it will as introduced by *Sergeant*

East in Pleas of the Crown Vol I p 303, where he said Besides the usual evidence of guilt in general cases of felony there is one kind of evidence more particular to the case of homicide which is the declaration of the deceased after the mortal blow as to the fact itself and the party by whom it is committed Evidence of this sort is admissible in this case on the fullest necessity, for it present to be an eye witness to the deed of other felonies namely, the party who further and equally necessary results

(1) If the killing was not secret, or if other and adequate testimony as to the circumstances of the death is at hand nevertheless the dying declaration is admissible even though in strictness it is not needed

(2) Where the fact of the killing is conceded the dying declaration under the spurious principle is by hypothesis unnecessary, nevertheless, this result is not recognized, the declaration is admitted even where the killing is conceded *Wigmore* § 1435

Where in committing a dacoity the dacoits caused the death of a person the latter's dying declaration as to what was done by those concerned in the dacoity, in which the murder was caused was held to be not only relevant against the person who actually caused the death but also against those concerned in the dacoity In *re P Subbu Tejan*, 2 Weir 700, see also *R v Balcer*, 2 M & R. 53

S. 32.

The dying declaration must

the mouth of a witness—c 7, 1

Taylor L. § 720, R. v. Sellers, Carr

be, it must be complete in itself;

to qualify it by other statements, which he is prevented by any cause from making, it will be received Taylor L. § 621. Section 32(1) does not cover only statement made by the person when he is dying from the result of the injury which caused his death but also covers the statement, as to the circumstances of the transaction which r

causing the death was inflicted

50 B 633-28 Bom L R 10

1924 Nag-115, Emperor v. Fariz, 20 P R 1916 Cr-35 Ind Cas 998-41 P

L R 1917, but see Amar Singh v. The Crown, 1 Lah 451-A 1 R 1924 Lab

253, where it was held that dying declarations are statements made by a dying person as to the injuries which have brought him to that condition or the circumstances under which the injuries were inflicted and as such, statements

person and that treatment is the cause though not the direct cause of the death the whole affair, ill treatment and subsequent suicide, forms one transaction and, therefore, statements, made by the deceased, as to the cause of his death are admissible in evidence under section 32(1) of the Evidence Act Emperor v. Fariz 35 Ind Cas 998-20 P R 1916 Cr-47 P L R 1917. The motive for a crime is of course a rule

Where the statement

reference to the motive

it cannot be deemed

of the circumstances, if

admissible under s. 3(1)

any act of the deceased

and her make the statement Fariz v. The Crown 35 Ind Cas 998-20 P R 1916 Cr-47 P L R 1917. Where the deceased, who had having wounded him stated that another person had committed the crime, it was held that such statement was not admissible in evidence in the proceedings.

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42-8 C L R. 273 "A statement of a witness as to what he heard from

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injured person

know more or as much about the circumstances of his death than or as any other person. So this doctrine does not apply where the object of the trial is to ascertain whether certain persons are the dacoits or not—a matter which has nothing to do with the declarant's death. Nga Te v. King Emperor, 20 Ind Cas 90-14 Cr L J 510

Surendra Nath, J. In necessity, it is that a witness and so is likely to

Dr. J.

25 Cr. L. J. 29. "The cases all S. 3
a case where the evidence would

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by the jury so that the witnesses' inferences become superfluous Now since

At § 2849, see also *Hanery v Comm*, 3 Cr Law Mag 47; *R v Scarfe*, 1
M. & R 351.

Scope of declaration—Emotion excluded. The dying declaration must be
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ment in respect thereto is therefore admissible, where deceased was in a position
to know the truth. Indeed, even where a certain element or degree of inference
is necessarily present, *e g*, where the assailant is masked, or in ambush the fact

absent, and the evidence as contained in the dying declaration will be rejected
in the absence, however, of evidence on the point, intrinsic or extrinsic the

the statement should directly charge the accused with being the assailant
Where dying declaration was as to the identity of the accused, it was held
that the declarant might be impeached by showing that the deceased was in the
habit of mistaking her friends for persons whom they did not resemble
Chamberlayne's Ev § 2851

Scope of dying declaration—Inference So far as practicable, adminis-
tration confines the dying
properly take were he a witness
or judgment, is to be excluded
employing it. Very plain is
statement by the deceased
that he had been told such was his intention. The mental state of a third
person is not subject to direct observations. The statement of a dying declar-
ation in regard thereto may therefore be rejected as an inference. The declar-
ant's own mental state, being a subject upon which he might properly testify
as a witness, may, however, be established in this way. A sufficient adminis-

S. 32. trative necessity for accepting an inference or conclusion in a dying declaration furnished where a large number of minute phenomena, often so intricate and interblending as to forbid effective individual statement, are given by the declarant in the form of a collective fact, often the only way in which the speaker can well express himself. Thus a declarant may properly state that a given shooting was an 'accident' or that he had been 'butchered' by the mad practice of a doctor, and so forth. *Chamberlayne's Ev.* §§ 2852, 2853

Testimonial qualification of the declarant is admissible only as to matters to which he is sworn in the case. *Taylor Ev.* 117. Declaration of a child of such tender age that the doctrine of a future state was rejected. See also *R v Drummond* 1 Leach 61, 338, *R v P Donnelly* 100. A witness who is sworn in *People v* ... is on the same footing as the testimony of a witness sworn in the case, and are governed by the same rules.

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under s. 118 of the Evidence Act. *Samadun v King Emperor*, 5 O C 246. where a Court could not find a competent witness.

time or by conviction of crime, or by subsequent or prior inconsistent statement. *Wigmore* § 1446. In *State v Thaulcy*, 4 Harringt. Del 562 general evidence of the declarant's intemperate habits and of his low state of health at the time.

himself responsible for his own death or that the fatal result was an accident or, as the earlier law used to say, by misadventure, may be within the proper scope of a dying declaration and even add to its probative force. To be received in evidence a self-disavowing statement must, however, fulfil the conditions laid down for the reception of a dying declaration. *Chamberlayne's Ev.* §§ 2816, 2817.

Form of dying declaration. The form to be used in making a dying declaration is as follows:

been inflicted on her, that she was at that time unable to speak, but was conscious and able to make signs. Evidence was offered by the prosecution and admitted by the Sessions Judge, to prove the questions put to the deceased, and the signs made by her in answer to such questions. Held by the Full Bench (Mahmood J dissenting) that the questions and the signs taken together might properly be regarded as "verbal statements" made by a person as to the cause of her death within the meaning of s. 32 of the Evidence Act, and were therefore admissible in evidence under that section. *Queen Empress v. Abdulka*, 7 A 385 (T. B.)

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questions put, it is admissible in evidence. In such cases, however, the statement should be a true record of what in point of fact occurred, and should bear on its face the questions put and the nature of the fluctuation made in response. *Bulla v. Empress*, 2 P. R. 1886 Cr. Where a person whose throat had been cut as a result of which death ensued later, made certain gestures in reply to questions put by the police. Held, the gestures were admissible in evidence. The interpretation of the gesture is for the Court alone and the opinion of witnesses as to their meaning is not evidence. *Chandrika v. Emperor* 1 Pat 401 = 3 Pat L. T. 771 = (1922) P. 535 = 71 Ind. Cas. 353. Where shortly after the deceased had received the injury a Magistrate proceeded to record her dying declaration in the hospital and although she could not speak in answer to questions put to her pointed out the accused as the assailant. Held that questions and answers taken together might properly be regarded as verbal statements made by a person as to the cause of her death within the meaning of section 32 of the Evidence Act and were therefore admissible. *Emperor v. Sadhu Churn*, 26 C. W. N. 111 = 49 C. 600 = A. I. R. 1922 Cal. 109 = 77 Ind. Cas. 993; see also *Ranjan*.

Ev. § 153 (b), *Mocub*
Steele, 12 Cox Cr. C.

Patchatt his story, then when dying and being asked what happened, he said, "Tell him, Patchatt" and Dr. Patchatt reported the story in declarant's presence.

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shown by the witness to have reference to the infidelity of deceased's wife. *Chamberlayne's* Ev. § 2811. So it is clear that dying declarations may be communicated by any adequate method of communication whether by words or by signs or otherwise provided the indication is positive and definite, and seems to proceed from an intelligence of its meaning. *Wigmore* § 1415.

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been made for another purpose as the message to the wife of the injured man. No requirement is imposed, for example, that the declaration should all have

the declaration to give the family of certain deceased. *Bishan Singh v. Crown*, 8 L. L. J. 296 = 96 Ind. Cas. 215. 27 P. L. R. 181 = 27 Cr. L. J. 903 = A. I. R. 1926 Loh. 196.

First Information report. The First Information Report is admissible under this section as a dying declaration where it is the statement of a person

32. who is since in death *Ra* R. 1930 Lah 400, see also *Ra* *Imperator*, A. I R 1931 Lah 103=1931 Cr C 167. which read J 475=A I Gajjan Singh

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A dying declaration is admissible where the prisoner is charged with the offence of homicide *Dusadh v Emperor*, 6 Pat 441-42 Cns 698=29 Cr L J 106=A I R. 1928 Pat 162.

Dying declarations made by an accomplice The dying declaration of an accomplice is admissible where the prisoner is charged with assisting the accomplice to commit suicide. *R v Smith*, (1897) 18 Cox 470, *R v Beziey*, (1906) 70 J P 263, *R v Stevens*, (1904) 4 N S W State Rep 727; Russ Cr 200; *R v Tucker*, 1 East P C 353 In *R v Jessop*, 16 Cox. 204, on an indictment charging with murder the survivor of two persons who had agreed to commit suicide together, *Field J* admitted statements by the deceased, made when purchasing poison in the absence of the prisoner, on the ground that the acts and words of the deceased in carrying out a pre arranged plan were evidence against the prisoner Dying declarations in favour of the party charged with influence on the

clause but is admissible under clause (3) *Sheik Shafi* Nrg 259=124 Ind Cns 459=31 Cr L J 661; see also *Unna v Emperor*, A I R 1925 P C 52=6 Lah 45=52 I A 121 P. C. 3 Lew 150, *Arribold* accomplice, as in an *Sadler*, (1911) 10 complice incriminating, admissible under the Emperor, A. I R 1930

Proof of dying declaration A dying declaration may be either verbal or written A verbal dying declaration recorded by a Magis rate cannot be received in evidence, when it has not been proved by taking the statement of the Magistrate *Shia v Crown*, 17 P R 1911 Cns 18 Ind Cns 883 When what purpose person is not taken down by the court

Boulter Ah, S C 19 000, the dying declaration of a deceased is admissible in evidence and is to be put in the document itself and is not to allow him to give evidence orally as to what he had recorded in Court that he had recorded it certified in Court that he had recorded it proof of its own contents, and it is unnecessary that the person who recorded it should repeat exactly what was said

may arise whether it is his own or otherwise approved or otherwise approved may be offered as his own the written statement of a The dying statement of a accused; if not so taken, may arise whether it is his own or otherwise approved or otherwise approved may be offered as his own the written statement of a accused; if not so taken,

the writing cannot be admitted to prove the statement made. The statement may be proved in the ordinary way by a person who heard it, and the writing may be used for the purpose of refreshing the witness's memory. *Empress v Samundlu* 8 C 211, *Sarat Chandra v Emperor*, 52 C 116=88 Ind Crs 860=26 Cr L J 1211=A. I. R. 1925 Cal 821. A declaration made by a person in expectation of

relevant fact to be proved was the statement made by the deceased person admissible under section 32 of the Evidence Act. That statement is not the document

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to refresh his memory by referring to the note made by him or read over by him at or about the time the statement was made. I would lay stress upon this because in many cases irregularities of this nature have led to a miscarriage of justice or to great delay in the trial of cases. I may note that the record by the Magistrate is in English. It clearly does not contain the exact words used by the accused which alone would detract considerably from its value as a true

v. Emperor, 67 Ind Crs 577=23 Cr L J 417=1 U P L R (L) 43. *Gowdas v Emperor*, 2 Ind Crs 841=26 C 649=13 C W N 680=10 Cr L J 186. A dying declaration was recorded in the presence of a witness, read over to the deceased in the presence of the witness and admitted by the deceased to be correct. If the witness, who heard that statement swears that the written statement correctly reproduces the words used by the deceased, that is sufficient to prove that the deceased did use the words contained in that statement. *Emperor v Balaram* 49 C 358=(1922) A I R 38. A dying declaration recorded, in the absence of the accused, by a Magistrate, who held the enquiry preliminary

289 P L R 1912=18 Ind Crs 883. The proper method of proving the oral statement is that the witness should hear it and then he should repeat it. *Cr L J* 1129. In rep should sent if

3. 32. the presence of the witness, the witness would be entitled to refresh his memory if he so wanted, by referring to such writing; otherwise the writing itself is not relevant unless it is in the nature of a deposition taken in the presence of the accused. Where the deceased dictated his statement and it was taken down and he then signed the statement after being satisfied as to its accuracy such writing may be regarded as a statement of the deceased in writing although under s. 32 of the Evidence Act. But even if what was stated was taken down by some one in writing a witness who heard the And ordinarily it would to reproduce from memory what he heard the deceased stated in addition to

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with the questions have been held to be verbal statements. If written precise statements made should be proved either by the person who recorded or by some one who saw the signature.

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M L J 401 Although a dying declaration is not recorded in writing evidence of what the deceased said is receivable. In re Hanumanth 2 W L R 1921, Kusal Singh In re A statement made by the deceased cannot be used in evidence.

deceased

ed is a witness. Lachmi v Emperor, 3 L J

A statement of a deceased person is not receivable in evidence of his not having a son.

in case of his not having a son. In re Hanumanth, 2 W L R 1921, Kusal Singh In re A statement made by the deceased cannot be used in evidence.

95 Ind Cas 385 Dying declaration of one direct about circumstances of a conspiracy is not admissible against other direct. Danna Singh v Emperor, 50 Ind Cas 613-26 Cr L J 517-A I R 1920 All 237

Section 164 of the Criminal Procedure The deceased made a full statement, about an assault which resulted in his death, before a third Magistrate. The statement was not taken into consideration by the session.

It comes in to consideration by the session where the witness who

recorded the statements was empowered under s. 161 is immaterial *Rahman v. S. Emperor*, 131 Ind. Cts. 117-32 Cr L J 1118.

Rule of Preferring Written Testimony. "The principles which determine whether a written report of another person's statement is to be preferred to oral

examination; for such a person has no duty or authority by law to report dying declarations, and it would be solely by virtue of an express duty that a Magistrate's report could be preferred to other witnesses. (b) When a written memorandum or report thus made is read over to the declarant and signed or assented to by him, the writing thus becomes a second distinct declaration by him. The first oral statement is not merged in the latter written one, because,

(c) Where the declarant makes one oral statement, and afterwards at another time a second statement, the latter being in writing or reduced to writing, there are here two distinct statements, and either one may be offered without testifying to the other; for the principle of completeness requires only that the whole of a single utterance should be offered together, and in the present instance the

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been proved; (2) that, even before or without proving the written one, the separate oral ones are admissible—though on the latter point the Courts are not always explicit. *Wigmore* § 1450, see also *R v Reason and Transfer* 16 How St Tr 83. In that case *Pratt L C J* said 'You know in the Court of Chancery when the party is examined on his oath, he gives in a first answer

the same person that enquired of him before, and all this is done in order to perfect and consummate the examination whether you will not take them both together as one entire account given by the deceased?' In the same case *Fortescue J* observed "I think we should allow what was said at other times to be given in evidence, because the first is no examination, because no Justice of the Peace was then present, so that the examination stands distinctly by itself." The opinion of *Fortescue J* prevailed. *Wigmore* § 1450

Evidence Act, to corroborate his evidence *Emperor v. Ram Sattu*, 1 Bom L R 431

32.

Stage at which dying declaration should be made The necessity of recording a dying declaration arises only when the hopes of life of the man are given up. *Uppendia v Emperor*, 129 Ind. Crs. 676=32 C L J 425

English and American following (1) The all deceit. There be furthered (2) If a belief Higher Power upon human ill doing, the fear of this punishment will outweigh any possible motive for deception, and will even counter balance the inclination to gratify a possible spirit of revenge. (3) Even without such a belief there is a natural and instinctive awe

shown (profane language) was important in another point of view It sits at the very foundation of the reasons upon which dying declarations are admitted at all There are certain guarantees of the truth of dying declarations, growing out of the solemnity of the time and circumstances under which they are made

It was clearly the right of the accused to show that the deceased in making the statement was not in that frame of mind which the law presupposes and requires in such cases that the deceased was in a reckless irreverent state of mind and entertained false views of all that he felt towards the accused

Second

then

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child

in her mind could have had that idea of a future state which is necessary

it was received heaven if he told the truth

under English and American law *Vide Woodcock's Case*, Leach Cr

think I ought not to say that I was fully convinced that the deceased was in such a state of mind as to be able to recover, as he was a kind who have no conviction that their death is near approaching, and that he felt that he was very near, and that he

I think there is no sufficient proof that he was without any hope and that I, therefore, ought to reject the evidence. But even in cases where the guarantees of the trustworthiness of dying declarations are present

must receive it with certain degree of caution. It may be seldom that a dying
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generally given by relatives and friends of the deceased who had watched by his bed side, and bias in his favour is to be expected. And even if given by police officers it should be carefully examined. The declarations are liable to be misunderstood, and to be reported by an unfaithful memory, especially if much time has elapsed since they were made, and the evidence goes to the jury with mind emotions of deep sympathy against the accused. There is credulous of the entire integrity of declarant is apt to make his own and to be rid of the importunity

and annoyance of those around him, he may say whatever they choose to suggest. So, too, as respects the declarant's statements, it is to be remarked that many persons, even in serious conversation, assert as facts those things of which they have only strong convictions and not knowledge derived from senses. If the declarant related his opportunities for observing the facts stated and they appear to be ample, this would add to the repeated his statements rationally and speech" *Moore's Weight and Value*, After a dying declaration, or any other to be given to it is a matter exclusive not believe it,

by rules of law to have been or though they do suppose him to have been thus conscious they may still not believe the statement to be true. In other words, their canons of ultimate belief are not necessarily the same as the preliminary legal conditions of admissibility whose purpose is an entirely different one. *Wigmore* § 1451. In deciding as to its credibility the jury should consider all the evidence in the case, including any which may have come to their attention during the preliminary hearing on voir dire. The credit which the jury may be disposed to give may one of fact, on the

So, as to whether a duress is a question for them. The jury may reasonably find that the probative force of the dying declaration is increased by the fact that the speaker is not possessed in favour of his own side of the contention. The facts stated in a dying declaration thus seem to be not conclusive upon the jury. *Clamberlayne v. Ly* 28 J8

Weight for the Jury—Impeachment. When the statement of a witness previously made is used as evidence under the provisions of this section then any other statement made by that witness can be used by virtue of s. 153 for the purpose of contradicting that witness as if such witness had appeared in Court

32 is clearly within the rights of the accused. The effect, however, of the most conclusive demonstration of the falsity of the dying statement in some particular case where the declarant enumerates among his assailants one who could not have been present, does not affect the admissibility of its weight. The accused may declare by showing that the other times *Niamat v Emperor*, A. I. R. 1930 Lah 409=31 P. L. J. 111. Indeed, it is his right to establish that fact if it is within his power to do so. The existence of such inconsistent statements, even that of a contradictory dying declaration does not warrant the rejection of an in evidence or require that it be stricken out, probative efficiency of the latter. Should it may, relies upon a dying declaration of the deceased to impeach the latter in any way appropriate to a witness. For this purpose, may show, if it can that the declarant has made inconsistent or contradictory statements.

The accused may at all times introduce evidence tending to show that the deceased was without a proper sense of moral accountability, or that a sense of impending death would fail to clear his mind of bitterness or falsehood leaving a controlling desire to tell the truth. That he was in the habit of using profane or indecent language or suffered from other moral obliquities e.g., the habit of drinking intoxicants to excess, may be shown. Conviction of crime may be a relevant fact in such a connection. Similarly, while evidence is not admissible to establish the general bad character of the deceased, the accused may prove as he might in case of a witness, that he believed and that this reputation for truth where he resided. That the actual state of animosity, revengefulness and thirst for revenge is also a relevant fact. Lack of belief in a future state of rewards and punishments naturally affects, as has been noticed the character and the fact may be the credibility of his statement. Disbelief of such a nature

will not be assumed but must be affirmatively shown. *Chamberlayne's Ex* §§ 2864, 2865, 2866.

Mental state of the declarant. To enable the jury properly to judge of the probative force of a dying declaration, the jury are entitled to be fully informed of the circumstances under which it was made. Prominent among these is the mental condition of the declarant. Thus they are entitled to view from all angles, reaching a conviction of their own as to an actual sense of impending death experienced by the declarant at the time of making his statement and as

declaration to be admissible, must have been the utterance of a *Chamberlayne's Ex* § 2867.

Value of declarations in *nanula*, 29 C. In the case of a dying declaration which by the law of England assumes a character very widely different from what it is under the English Law, which is relevant under the Evidence Act, whether the person who made it was or was not at the time when it was made under expectation of death, and the weight to be given to it is a guarantee which it was made of it, *Chamberlayne's Ex* § 2867.

be relied upon or not" No statements made by a dying man relating to the cause of his death are admissible in evidence against a person causing his death, but too much reliance cannot be placed upon the details of such statements as they are hearsay. *Emperor v. Sultan Bena*, 76 Ind Cas 389. It is not safe to base a conviction on the uncorroborated dying declaration of a deceased person, for it is well known that the inhabitants of the Punjab will often in a dying declaration not only accuse the actual offenders but will also include the names of other enemies. *Bikkesh Singh v. Emperor*, 86 Ind Cas 826 = A I R 1925 Lah 519, see also *Stephen's History of Cr. Law*. Mr Justice Stephen also said

known in the Peshawar division that a dying declaration as to the cause of the declarant's death is admitted in proof of the matter stated. The effect of this was that whenever a man was mortally wounded, and found himself dying

This is very far indeed from the way in which a dying Punjabi looks at the subject. His

his dying declaration
'Dying declaration'
England. Very often the murdered man himself, before his death implicates every male member of his su

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and proved by the clearest and most reliable evidence to be the exact words of the person making it, and corroborated by the surrounding circumstances, is sufficient to support a conviction for murder under s 302 I P Code. *Karim Khan v. Crown*, 4 P W R 1909 Cr = 9 Cr L J 156 = 1 Ind Cas 100. But a Court should be careful not to be misled by the violence, confusion, or the fact that the declarant is deceased.

Crown, 117 P R 1866, *Sher Ali v. Crown*, 8

202 N Y 491 (500). Much weight must be given to the dying declaration recorded by the Magistrate where it is supported by the consistent evidence led on behalf of the prosecution. *Sawan Singh v. Emperor* 10 Lah L J 281. It states itself in its various forms for the sake of argument such declaration is for all practical purposes negligible. *Inayat Ali v. Emperor*, 103 Ind Cas 526 = L E A. — 68

32.

dent corroboration of facts and circumstances to prove that offence *Battu Singh v Emperor*, A. I. R. 1929 Pat 219. In England questions of admissibility arise chiefly with respect to the mental condition of the declarant. To make such declaration admissible in England there must be a "settled hopeless expectation of death not qualified by any prospect of recovery, however slight." In India they are not under the section;

h, that statement is relevant not entitled to particular after the occurrence it may for his friend to suggest

falsehood. But if the man is in bed in hospital for four days after the event and a month before he dies and makes a statement, that statement carries no more weight than if he made it in the witness box, and rather less, because he has never been cross examined. Under these circumstances it is incumbent on the

Dying

regarded as

to questions,

& P. 238, 1.

711, *R v Bottomley*, 118 L. T. 88; *R v Fitzpatrick*, 46 Ir. L. T. 173 (1911).

But in *R v Mitchell*, 17 Cox C. C. 503, *Care J* said "Where a statement

is not the *ipsissima verba* of the person making it but is composed of a mixture

of questions and answers, there are several objections open to its reception

in evidence, which it is to be able to do so in cases in which the

person has no opportunity

may be leading to

declaration there is

without their force and effect being freely comprehended. In such circumstances

the form of the declaration should be such

was the question and what was the answer

suggested by the examining Magistrate and how much was

person making it. See also *R v*

17 T. L. R. 552. On the other hand

311-115 L. T. J. 88, *Laurence*

question and answer was admissible, although the answers only and not the

questions had been taken down. In *R v Corbett* (1903) Queensland S. R. 41

Griffith C J said, that *R v Mitchell*, unsettled what had before been the law

and followed *R v Smith* saying further that it is not essential that a dying

declaration should be proved by two or more independent sources. Pleadings

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ed told the police *Emperor v Sikandar*, A. I. R. 1910 16 Ir. L. R. 173, it was held

statement when
d contains a note
Sikandar, A. I.
it was held

the value and credibility of the declarations. Therefore, it is no objection to their admissibility that they were made in answer to leading questions, or obtained by pressing and earnest solicitation *Russ Cr.* 2092; *R v Reason*, 1 Str. 499; *R v Woodcock*, 2 Leach. 51; *R v Welburn*, 1 East P. C. 358; *R v. Smith, L & C.* 607, *R v. Steele*, 12 Cox. 168, *R v Whitmarsh*, 62 J. P. 683, 711.

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expressed by the declarant; it must be complete as far as it goes. But it is immaterial how much of the whole affair of the death is related, provided the

§ 1448 Administration by no means requires that the extra judicial statement

to appear, the dying declaration will be rejected as incomplete *Chamberlayne's*

26 Cr L J 1256=52 C 987 It must be taken as a whole and a portion of it cannot be allowed *Infr v Imperor*, A I R 1930 Cyl 211=50 C L J 584; 22 M L J 435

prisoner there seems no reason to doubt the propriety of admitting a dying declaration which is in favour of the prisoner. Indeed, almost every case of man-slaughter, in which such declarations have been admitted, is an authority

him, but rati
"Owing to
for homicide

it has sometimes been argued that the declaration cannot be used by the accused. But the argument has no foundation whatever, and has been generally repudiated. *Wigmore Ev* § 1452, see also *Mattox v U S*, 146 U S 151, *Moore v. State*, 12 Ala 767; *People v Southern* 120 Cal 645, *Com v Bednorski*, 261 Pa 124

Nature of dying declarations "Where statements are made by the deceased at different times, all may be proved as his dying declarations if all are

administrative precedence over the remainder. And one among several written statements may be proved without producing the others. Naturally, there is no

5. 32 preference between oral statements made under similar condition at different times' *Chamberlayne's Cr* § 2847

Dying declaration
 captured in a
 ration as to the
 the circumstances causing his death, and the statement is admissible to prove his own participation in the offence but was not admissible against the other accused *Dattu Singh v Emperor*, L R 5 A 201 Cr. When the declaration of a person wounded by the accused in committing dacoity was made on the 13th August 1899, and he died on the 20th of that month and there was no other evidence
 wounds received at
 his death, the High Court
 in evidence *Imperial v P. d. 25 P 15-2 R. 1 J R 331* In a case of murder the statement of a head
 1872, that section
 who made the statement of death *Qu*
 certain statements relating to the cause of the
 the investigation of a criminal case, held, in *Bahawala v Empress*, 17 P R 1886 Cr A
 was dying at the time he made it is a dying
 term and is admissible under this section, the
 lingered for six days afterwards and then died *Thakar Singh v Emperor*
 A I R 1929 Lah 61-10 L L J 163 The statement of a deceased person
 was recorded in the absence of the accused. Subsequently in the presence of
 the accused, the statement was read over and the accused were allowed to cross
 examine the dying person. Held that the statement was not a dying deposition
 under s. 33 of the Evidence Act, and was not admissible under section 37 (1)
 unless it was proved by examining the Magistrate who recorded it or so as to one
 who heard it made *Njo Po v Emperor*, 14 Cr L J 396-20 Ind Cas 200
 Bur L T 68 The statement of a deceased person that she was confined in the
 house of an accused, that he was keeping watch over her and that another accused
 had raped her on account of which she had become pregnant and that they
 were getting ready to give her medicine to miscarry and so to put an end to her
 life is admissible under s. 32 (1), as a statement made by a person as to the
 circumstances of a transaction which resulted in her death in a case in which
 the cause of death comes into question *Wahid Bux v Emperor* A I R 19
 Sind 250

CLAUSE II

facts asserted oral declarations

namely (i) the necessity that the statement should be made by a person having
 knowledge, (ii) that it should
 entry of any collateral fact
 person entering it to record
 the Legislature, so that Court
 any evidence which falls within the terms of the present section
Cr 163

Principle.
 evidence is admissible
 principle, and (2) it

Necessity principle On the principle of Necessity this exception is made
 the use of statements by persons who are competent, though not necessarily the
 sole evidence available on the subject, is yet the only testimony now available

with
 C 271 P 1
 here in the
 Engl 3 Cr
 1901

with clause (a) such
 ally, (1) the
 of Trust or

affords the greatest security for truth. Their declarations verbal or written, must, however, sometime in order to prevent a

abandoned and can no longer be traced, his extra judicial declaration made in the course of business or official duty will be received in evidence *Chamberlayne's Ev* § 2879. Section 32 provides that written or verbal statements made by a person who is dead or cannot be found are relevant facts in certain cases *Rama Sوامي v Rama Nandan*, 22 Ind Crs 627=(1914) M W N 240=1 L W 136.

ments fairly trustworthy

- (1) The habit and system of making such a record with regularity calls for the influence of races and to *Dicas*, 1 Bing what is false, ly incurred

accuracy

- (3) If, in addition to this, the entrant makes the record under a duty to an employer or other superior, there is the additional risk of censure and disgrace from the superior powerful and *Tindal C J. 811.*

could be likely such the entry false would or *Ev* § 697, *layne's Ev*. §§

32. Section 32 imposes restrictions upon the admissibility of statements made by persons who cannot be brought before the Court to give their own evidence. The object of those restrictions is the principle of legal evidence being followed that where persons can be what they know at first hand of cross-examination. Where however witnesses cannot be brought before the Court, their previous statements are at best indirect evidence, of a kind that the conditions which are imposed upon it, are truth. As there is to be no chance of testing a man by cross examination his statement will not be admitted unless it has been made under conditions which, looking to the ordinary course of human affairs raise pretty strong presumptions that it was a true statement. Thus the whole scope and object of section 32 centre upon securing the highest degree of truth possible in the circumstances for the statement. *Per Beaman J in Sethna v Utrala* 3 Bom L R. 1017 at p 1048

Statement made in ordinary course of business. This clause provides that a written statement of a relevant fact made by a person who is dead is itself a relevant fact in the ordinary course of business. The exact meaning is more than one place.

the existence of any course of business

4 Camp 193. The course plaintiff's counting house methodical cannot carry the so too by section 114 the Court it thinks likely a natural event to the facts of public and private business such a case was meant to be or business, illustration (c) its well known transaction or trade. Agg in the explanation to section 47 it is said per in per me of a broke 'Agg course of Spinning the Privy 118=4 C in evidence none of

or (as in banks) from hour to hour as transactions take place. I think, be no said) are, I think regularly kept in the course of business. Having regard, then, to the above considerations there can, I think, be no doubt that the expression 'in the ordinary course of business' in section 32(1) must be read in the same sense. It may in one sense be true that it is in the ordinary course of business, for a mortgaged deed to contain recitals of the boundaries of the land mortgaged. But that would not make the recitals evidence. The question is, whether the mortgage deed itself is a statement made in the ordinary course of business. Looking at the particulars set out in clause (1) of section 32 the nature of the statements 'made in the course of business' and

looking at the sense in which the expression is apparently used in other sections ed deed executed by an profession, trade, or business' Act) of an agriculturist *ca v Bharmappa*, 23 B 63 at pp. 65-67. In the same case *Fulton J* at p 70 observed "It can hardly be said that the execution of a mortgage deed is an act done in the ordinary course of business. Doubtless when a person has determined to mortgage his land, the

v. Jeonandan, 13 C. W. N. 71) The phrase was apparently used to indicate the current routine of business, which was usually followed by the person

W. N. 71.

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Mass 481, *State v Phair*, 48 Vt 378; *Due v Sayer*, 29 Me 119 So also in America and England
"This may be defined performed in one's mode of obtaining a l of doings kept merely for one's personal satisfaction, but it would not exclude

admitted Similarly in *R v Cope*, 7 C & P 726, an endorsement of service on an order of the aldermen, the writers duty being to serve orders and endorse

C L J 155 Where account books are admitted in evidence before the Commissioner under section 32 of the Evidence Act, as having been kept in the ordinary course of business by persons deceased, it is in the discretion of the Court to hold that they are sufficient evidence of the transaction to which the entries
L R 81 und 10 Bom
before l unately die l
Evidence Act as being statement made by a dead person in the ordinary course of business and in the discharge of his professional duty *Mohan Singh v.*

- S. 32. *Imperial, 11 R G All 19=55 Ind Cas 647=26 Cr L J 551-A I R 1930 All 413* *Jama wasil baki*, and *Jamabandi* papers can be admitted in evidence under this clause but it must be clear that the persons who made them are dead and that the papers were made in the ordinary course of business. An entry as to the rate of rent cannot be distinguished from other entries therein as are not made

usually one, nor even that it should be a secular one, it follows that a register of marriages or the like is admissible. *Reed, Doyle, 16 All Mr* "An entry made in performance of a duty is admissible than one made by a clerk, or messenger or notary or attorney or solicitor, or a physician in the course of his secular occupation."

A deed of conveyance was tendered in evidence which purported to be the mark of G, as vendor, and which was duly attested by four witnesses. However, she denied that she had ever executed the deed, and said that the mark was not hers. All the attesting witnesses were dead. A witness was called who knew

11 B 600 In a suit to recover loss sustained on the sale by plaintiffs, of goods consigned to them by the defendant for sale by their London firm accountants are good *prima facie* evidence put in

26 Bom 253. Entries in this section as the register in the case of a *jayman* cannot be admitted to pronounce affirmatively "not of such a character as to enable the Court to pronounce affirmatively" course of business. *Ma C)=18 M L J 511*

mark is that of the executant is admissible in evidence under this clause if the writer is dead and it is proved that the document is written by him. *Lah*

v *Rangayan, A I R 1923 P 111=67 Ind Cas 57* Where a family pedigree was sought to be proved by books kept by a family chronicler, held that under section 32 (2) they would be admissible as books kept in the ordinary course of business by a professional chronicler. *Ma C)=18 M L J 511* such a book *Mohan Singh v Ind. Cas 235; see also Gobind, 48 Ind Cas 375* But entries in the diary of a deceased person relating to birth and death are not admissible under this clause. *Gobordhan, (1919) Pat 352=37 Ind Cas 421=2 Pat L J 42*

Statement includes verbal statement. The statement may be written or verbal (vide s 32). The general prevailing doctrine in America requires the declarations to be in writing; the exception relates to entries strictly speaking and does not extend to oral statements. *Wigmore § 1523* In England, however, it seems settled that an oral statement is equally admissible. *Sussex Peerage Case, 11 Clark & F. 85, Lord Campbell* says at p 113 "By the law of England the declarations of deceased persons are not generally admissible unless they are against the pecuniary interest of the party making them. There are two exceptions. First, where a declaration, by word of mouth or by

writing, is made in the course of business of the individual making it, there it may be received in evidence, though it is not against his interest." See also *Stapleton v. Clough* 3 El & Bl 933, 937; *Eddie v. Kingsford*, 14 C B 759 (763). In *Reg v. Buckley*, 13 Cox Cr Cas 291, which was a trial for murder, the prosecution offered to show the verbal report of the deceased, who was a constable, to his superior officer as to where he was going on the night of the murder. It seems he had reported that he was going to watch the accused, who on a previous occasion had been convicted of larceny, chiefly on the evidence of the deceased. It was held admissible. But in a recent case it has been held by one English Court, that a declaration made by a physician

admissible, and it

reason, 22 T

Review 301

Since in that

jurisdiction the third motive of trustworthiness (*vide supra* under the head circumstantial guarantee of trustworthiness) is regarded as most important, and the statement must be made under a duty to a third person, it may be conceded that an oral statement would be scarcely inferior to a written one in trustworthiness. In this country, however, where that limitation does not obtain, the trustworthiness of an oral statement would seem to be far inferior to that of a written one, especially as affected by the second reason for the rule (*vide supra* under the head circumstantial guarantee of trustworthiness). Nevertheless, in the usual conduct of business by subordinates in mercantile or industrial houses (practically the only class of persons by whom oral reports are regularly made), the element

does exist

where it

English

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written statements and of the

made in most of the other

exceptions." The words "and in particular" in s. 32(2) seem to point to the superior force of written over verbal statements. *Natt. L.* 177

Section 32(2) and section 34. In *Rampyavabai v. Balaji*, 28 B 291=6 Bom L R 50, the plaintiff relied on entries in the hand writing of her deceased husband kept in the ordinary course of business. The lower Court rejected certain items for want of the judgment observed support of her claim.

The accounts are relevant both under section 34 and under section 32(2) of the Indian Evidence Act, 1872. The learned Judge has considered that corroborative

the accounts without corroboration the only point being that the law does not require corroboration." See also *Must. Rani v. Firm Bahadur*, 62 Ind Cas 946. So also where entries in *Jama bandi* papers began over 70 years before the action was tried, the presumption was that the person who made them was dead and could not be called and as they were made in the ordinary course of business by the land-lord's agents, they were relevant without any corroboration, as evidence against the tenant under sub-section (2) of section 33 of the Indian Evidence Act which does not require corroboration is under section 34. *Dhukha Mandal v.*

32.

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Kailash, 44 Ind
be evidence u
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v *Nauab Khaja Habibulla*, 31 C L J 63=47 C. 266=56 Ind Cas. 38, *Dulu v Jogadish*, 90 Ind Cas 564=A I R 1926 Cal 379 *Jonah Biswas v Sita Kumari* A I R 1927 Cal 855 But in *Gopeshwar* Cal 854, Mr Justice Mookerjee said "The

entry relevant under s 34 and one relevant under s 34 (2) in the former case the person who made the entry may be available as a witness while in the latter case he is not I find it very difficult to appreciate on what ground the legislature could intend to exempt entries relevant under s 34 cl (2) from the disability that it imposed on entries relevant under s 34 by the second part of that section, and personally I have always felt inclined to take the view that such entries, no matter whether they are relevant under the one section or under the other, are not to be considered as alone sufficient to charge any person with liability"

English Law A declaration is deemed to be relevant when it was made by the declarant in the ordinary course of his duty as a witness in the discharge of professional duty

3 B & Ad 82

irrelevant ex

the ordinary c

by a person duly authorised to make them *Steph art 27* The leading case on this rule is the case of *Price v Earl of Turrington*, 1 Salk 285=2 Smith L C 320 The short report of it in *Salked* is as follows "The plaintiff being a

the Earl of Turrington for beer sold and to charge the defendant was, that the usual that the drymen came every night to the clerk of the warehouse and gave an account of the beer they had delivered out which he set down in a book kept for the purpose, to which the drymen set their names, that the dryman was dead but this was his hand set to the book and this was held good evidence of singly, without more' That case

Previous to that in *Pitman v Maddox*, 1 Loru Kayn, 100, 100 v Indee the plaintiff produced a copy of a book written by one of the

to be good evidence within the year alone *Phayer Cas. Ex 511*

Origin In England, formerly a party to an action was not permitted to testify in his own behalf An apparent exception to this rule, however existed in the application of the so called "shop-book rule" In early times in England parties were permitted to show, by entries made in their books, the sale of goods or performance of labour, of 7 Jac 1, C 12 was passed relevant portion of the authority of the

before the same action brought, except he or they, their executors or

tors, shall
said debt,
or admini

year next after the same wares delivered, money due for wares delivered, or work done." Later developments narrowed the rule to the cases where the entries

less, seemed to
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he entries was

required by the clerk who made them, if living and within reach; if he was not, proof of his handwriting was considered sufficient. *Pitman v. Maddox*, 1 L. R. 732; *Price v. Earl of Torrington* 2 L. R. 873. The rule with respect

as evidence through no absolute necessity, but by reason of a presumption of necessity only, inferred from the nature of commerce. See also *Woodnath v. Lord Cobham*, Bomb 180, *Lord v. Hopkins*, continued to go in, when the entries were the deed. There is reason to think that the when made in a stranger's books grew out of the practice in the case of a party's own "shop books." *Thayer Cas. Ev* 509

jecte l on the ground that
he is responsible. *R v*
558, *Trotter v Maclean*,
or *v Walmesley*, (1904) 2
d surveyor, employed by

recorded *Smith v Blaken* L. R. 2 Q. B. 332. See also *Iolena v Gray*, L. R. 12 Ch. D. 411. *Lyell v Kennedy* 35 W. R. 725, *Stu la v Freccia*, 5 App. Cas. 623. In *Chambers v Bernasconi* 1 C. & J. 451, the Court rejected the

which the person is employ
the entry relates, and then

32. the duty must be proved by other independent evidence *Bright v Lejer* 1 Deg F & J at p 614 *The Henry Cozon* 3 P D 156, *Doe v Twiford* L R 1 Q. B at p 332, *Pere R* 347 Personal c towards any person of costs delivered by him are not admissible on the ground that it was his duty to keep proper books, or that they were made out in the course of duty *Pere R* 321 see also *Bright v Lejer* 2 Deg F & J at p 617, *Hop v Hope* 1893 W N 21, *Leroy v Coulthard* (1897) W N 25, contra *Rush v Richard* 28 Berv 370 The acts must have been done by the declarant and not by third person *Smith v Blakey*, *supra*, *Ryan v Ring* 25 L R Ir 141 In *Polini v Gray* *supra*, James L J held that entry must not be to a thing said learned or ascertained by the declarant, but something done by, or to him and in *Lyell v Kennedy* *supra* Brown L J approved the statement *Phipps v Eyre* 7th Ed 270 The office or employment to which the duty is attached may be private, as in the case of ordinary clerk or public as in that of a Sheriff (*Chambers v Bernasconi* 1 C M & R 347) or of a notary public (*Poole v Dumas* 1 Bing N C 619), or of a Magistrate (*Wills v Little* and another, 29 L J Ex 267) *Wills v Little* 2nd Ed 180 The duty must have been to record or otherwise report it at the time *Smith v Blakey* *supra*, *Polini v Gray* *supra*, *Doe v Twiford*, 3 B & A 1 890, *Pearson v Ash* 25 L R Ir 184 *The Henry Cozon*, 3 P D 159, *Poole v Dumas* (1900) 3 C 388, *Sturtevant v Neccio* (1880) 3 App Cas 623 (640) 'This limitation of *Prof Wigmore* is a reminiscence of the early history, and is needless strictly'.

Duty to a third person—Necessity under this section Under the Indian Evidence Act, the report or record need not be made in the course of a duty to a third person "The statement must relate to a

so far as the question of with the performance of

Whether this fact naturally finds a place in the narrative what is the nature of its connection with the fact the statement of which was a matter of duty and whether this connection was such as to information or observation must however

being the weight due to such evidence when

Field 7th Ed p 98 So in India the following observation was made in *Denham v Chambers v Bernasconi* 3 L J Ex 313-1 C M & R 347 has no application 'We are all of opinion that, whatever effect may be due to an entry made in the course of business any officer reporting facts necessary to the performance of a duty the statement of other circumstances however naturally they might be thought to find place in the narration, is no proof of those circumstances' A register of marriages kept by Ishahad since delivered who celebrated a marriage, and in which register was entered the amount of the dowry, was held to be admissible and relevant as evidence of the sum fixed, being an entry in a book kept in the discharge of duty within section 32, cl (2) *Zakaria v S* 19 C 689=19 I A 159

ordin
the tr

Indian Evidence Act
made at or near the time
in or before the

declarations in the course of

at the time it purp

Similarly in *Poole v Dumas*

any doubts whether

ought to go down to the

Pearson v Ash 25 L

Lyell v Kennedy 36,

1103
1104
1105
1106
1107
1108
1109
1110

not made until two days after the event it was held not contemporaneous. *The Henry Coxon*, 3 P. D 156. But in *Price v. Torrington*, 1 Salk 285 a record in the evening of an act done in the morning was admitted in evidence. The provisions of the Indian Evidence Act contain no similar restriction as to the admissibility of this kind of evidence; but in determining the weight to be allowed to it in particular cases, it will always be important to consider how far the statement or entry was contemporaneous with the fact it relates. *Fild Ev. 7th Ed 95; Can Ev 7enth Ed. 163*

Personal knowledge. The declarations are only evidence of the precise of which consequently he had
In *Brian v. Prece*, 11 M & W
£1 15s for coals alleged to have
been sold by the plaintiff's testator to the defendant. At the trial it appeared

person of the name of *Baldum* to make entries in the books from what he, *Yem*, told him. Both *Harvey* and *Yem* were dead, but in order to prove the delivery of the coals, *Baldum* was called as a witness who produced the book, and stated that he made it out from *Yem*'s directions and that every evening he read over
ness for the
There was

not apt
conclud
book
other ca
case w
dictation by another man who is dead, is widely different. As regards the case of *Price v. Lord Torrington*, it is better to adhere to that case as it stands, and

a deceased
it the entries
relate to an act or acts done by the deceased person and not by third parties." There can be no doubt that the general principle of testimonial evidence should

person who had no personal knowledge of the supposed facts recorded. *Every's Executors v. Avery*, 19 Ala 195, *Walling v. Morgan Co*, 126 Ala 326. In the

regular course of business, of a transaction lying in the personal knowledge of the latter, there is no objection to receiving that entry under the present exception.

judgment Lord Robertson at a different position. Its alleged truth. But the exhibit in question is Gurdat in a claim made by him proceeding was to make himself this admittedly was untrue. I

His relation to the document is from the personal knowledge and belief of a deceased person upon which that appears the genealogical table is

is admissible in evidence
question might never h
been entirely the worl
this observation of the
of which require "speci
To reject a declaration
would cause great incon

For aught that appears, the genealogical table in

not the entries thus made in the usual course of business of this extensive trading establishment, and as a part of it who prove them not only the best, practicable to secure? We have no hesitations and convenience require them to be admitted. The weighers, wharfingers and numerous subordinates who handled this cotton kept no books. They report to the clerks who keep the books of the concern, and their functions are performed. I remember the multitude of transactions and suppose a different rule upon the subject of justice in commerce and amount to a denial of justice."

Extrinsic proof Extrinsic proof must be given of the death or disability of the declarant. *Duke v Jagdish*, 90 Ind Cis 551, *Chatterjee v Kaulas*, 41 Ind Cis 422-4 Par I, W 513 77.
be properly
C & P
ere, how r
iced from proper custody, the hand
the one, he presumed (rule & c
been noted on in the case of declar

we have nothing to do in this case : must S. 3
also be proved by extrinsic proof
of acting therein as sufficient , , , *Phyp.*
Ex. 379

it is made in writing, there

Any mark or sign that is

North Bank v. Abbot, 13

Pick. 417; Wigmore § 1531.

Cases under clause (2). A mortgage bond purported to be executed by three persons who were all dead at the time of the suit. The signature of each of the three statements were proved to have been written by a deceased professional bond-writer who wrote the whole document in the ordinary course of business. The two attesting witnesses are also dead and the signature each of them was satisfactorily proved to be in his handwriting. Held that there was sufficient proof of the execution of the bond, and that the statement in writing of the deceased bond-writer was relevant under s 32(2) of the Evidence Act. *Haria v. Manah Chand*, 11 N L R 9 = 27 Ind Cas 866. In order to prove that a certain reply to notice had been signed and sent by the 1st defendant, plaintiff's *Kariyasthan* was called, who deposed that he was told by the writer of the notice in question that he wrote it at the request of the 1st defendant. The writer was made the statement to the plaintiff's the writer's business. Held, that the the Evidence Act. *Kolonqorath v*

On a trial of a
loading for the purpose
sent from Delhi to C
in Calcutta, advising the despatch of the goods, was tendered in evidence under
section 44 cl 2 of Act I of 1872, but the Court refused to receive it, and intimated
a doubt whether it fell within the instances specified in the section *Queen v*
Tasnee Charun Dey, 9 B L R App 42 In a suit on a bond, the defendant,

though admissible under section 32 (2) of the Evidence Act, have very little probative value when they are not signed by the transferors and are not supported by the evidence of persons who purport to sign them as witnesses. *My Po Nyein v. Maung My*, 27 Ind Cas 777 = 5 Bur L R 85. A statement made in a deed of conveyance or mortgage deed is not made in the course of business within the meaning of cl (2) of s 32. *Abdulla v Hum Behary*, 14 C L J 467. In a registered deed, the signature of a deceased person is not admissible in evidence. *Evidentiary value of a deed executed by a deceased person in the ordinary course of business and consisting of an acknowledgment written or signed by him of the receipt of money, is admissible in evidence under s. 32, and not under s. 13.* *Ahmad Sharif Jamat Ahmad*, A I R 1928 Oudh 218; but see *Abdul Ali v Rejan Ali*, 19 C W N 468 = 21 Ind Cas 618; *Soraj Kumar v Umed Ali*, A I R 1922 Cal 251. Where

ordinary course of business and they are admissible under s. 32, sub-section (2).
Abbas v. Pratul, 65 C. 1070-32 C. W. N. 759-103 Ind. Cas 585-A, I. R.

v. Kali Prasanna, 26 C 832 (839). But section 95 of the Bengal Road cess Act (IX of 1880) is not exhaustive. It was intended to restrict the operation of s 21 of the Evidence Act, and a road cess return may be admissible in evidence as made the return *Challo Singh v. Gouras Sankar*, 23 W R 192, *Hem A. 177*. The road cess return filed

by a person in his capacity is admissible in evidence in favour of him and may be regarded as a person's statement.

v. Ajodha, 39 C 1005

Swarnamoy v. Sourendra, 12 C L J 11-89 Ind C 717-A I R 1925 Cal 1189

Deposition of Patwari. A deposition made by a Patwari of a village in Bengal under the Bengal Deposition Act, 1882, is admissible in evidence under s 32 of the Evidence Act. *Man v. Duarka Prasad*, 9 Pat. L T 679-109 Ind C 136-A I R 1928 Pat 129

clause See illustration of the

CLAUSE III

Scope of clause (3) This clause makes declarations against interest admissible in evidence. Illustrations (e) and (f) apply to this clause. This section makes three classes of declarations against interest admissible in evidence, namely, 1st, where they affect the declarant's pecuniary interest, 2ndly his proprietary interest, and 3rdly his interest in office or charge.

admissible against the interest of the person through whom he claims. *Rani v. Khagendra*, 31 C 871 P C-9 C W N 71. Under this clause the tests of admissibility of statements against interest made by deceased persons are that (1) the deceased must have had personal knowledge of the facts he was stating, (2) the facts stated should have been to the immediate prejudice of the deceased, (3) the statements must have been, to the knowledge of the deceased contrary to his interest, and (4) the interest must be either pecuniary or proprietary. *Ramanathan v. Murugappa*, 33 Ind C 969-3 L W 216-(1916) 1 M W N. 208

English law According to English law declarations against interest are statements made by deceased persons adverse to their pecuniary or proprietary interest; and the guarantee of their credibility consists in the fact that they are statements made by a person who is presumed to be true. *Middleton v. Milton*, 11 C 63, 67, *Brady v. Atkinson*, (1879) 13 Ch D 1. interest in other sense as for instance an

32. *v. Exeter*, (1869) 4 Q. B. 311, *Hayes* observed: "Having regard to the great changes that have in recent times, been made in admitting the evidence of interested witnesses, when alive, it would be most objectionable to lay down any narrow restrictions upon the reception of declarations in any way against interest which have been made by persons since deceased, and which are frequently the only evidence that can be obtained on the subjects to which they refer and where the Courts are frequently obliged to supply the want of evidence by presumptions."

In *Taylor v. Witham*, 3 Ch. D. 11, no doubt an established rule is again at the interest of the man who is dead for all purposes. What is I adopt the view of *Baron Parke* in *C. 333*, that it must be *prima facie*

speaker is admissible even if upon the facts and other circumstances, it may be

making it and "not an admission which may or may not turn out at some subsequent time to have been against his interest." See also *Smith v. Blake*, L. R. 2 Q. B. 326, *Marssey*.

In *Tucker v. Olcott*, 1008, Lord Justice that the statement in this state Court of Appeal *Company*, (191

sought to be put related to an acknowledgment of paternity and a promise made by the deceased to marry the mother of the child, who claimed compensation under the "Workman's Compensation Act," as a dependant on the deceased. Lord Justice Hamilton, after making an incidental observation that as between the dicta of *Blackburn J.* in *Smith v. Blake*, 2 Q. B. 326-26 L. J. Q. B. 14, that the statement must be one which never could be made available for the person himself, and that of *Jessel M. R.* that it is sufficient that the statement is *prima facie* against the interest of the person making it, he is inclined to the former view, "if there is any real difference between them," proceeds to lay down categorically the tests of admissibility of statements against interest. According to the learned Lord Justice, (a) the deceased must have had personal knowledge of the facts he was stating, (b) the fact should have been to the deceased's immediate prejudice, (c) the statement must have been to the knowledge of the deceased, contrary to his interest, and (d), the interest must be either pecuniary or proprietary. The case went up to the House of Lords. Lords *Forchurn* and *Moulton* on neither accepted the statement of the law. to agree. A. C. this point ground.

time when she was not of sound mind, memory or understanding. Under which had been destroyed her husband took a life interest in her estate after as under an ante nuptial settlement he was, in the events that had happened.

entitled absolutely to her estate. A statement by the husband, who had died before the suit was brought, mind when she destroyed sound
disparagement of his own ing in
T. L. R. 202. ills, 27

departure from English
h would subject the declar-
ant. This seems to be the
Case, 11 C & F 108 In
that case the question was whether A was lawfully married to B A statement

injuriously affect the interest of the party making them. Nor is it true, that
s to certain
These are
in that case
be liable to
prosecution, that, therefore, the instant the grave closes over him, all that was
said by him is to be taken as evidence in every action and prosecution against
another person, is one of the most monstrous and untenable propositions that
can be advanced." *Nort Ev* 184 So "the interest involved must, according to
the English Law, be one of a pecuniary or proprietary nature, no other interest
will suffice. But the Indian Law, as laid down in sub section (3) of section 32 of
the Evidence Act, extends the scope of this exception and put a penal interest
on the same footing as a pecuniary or proprietary interest." *Per Shadi Lal C J*
in *Mahomed v Emperor*, A I R 1926 Lab 54-89 Ind Cas 252 (258) So a
statement which would have exposed the declarant to a criminal prosecution or
to a suit for damages, would be admissible as a piece of evidence in any proceed-
ing in which such evidence is relevant to the issue or issues being tried in such
proceeding. *Per Ffoides J* in *Mohammad v Emperor*, 89 Ind Cas 252 (254)

Principle The exception presupposes, like most of the others, first a neces-

untruthfully. *Wigmore* § 1455 ely to have been stated

impo
being
unavailable, his statement sho
his case being regarded as
must show that a particular fac
as here applied, signifies the
the same source, the declarant
for the witness is practically

Manley v Curtis, 1 Price 229, *Phillips v*
Cole, 10 A & E 106, *Barrows v White* 4 B & C 328, *Sjargo v Brown*, 9
B & C 936 In *Fitch v Chapman*, 10 Conn 11, *Williams J* said The cases
where such evidence is admitted seem to proceed generally upon the principle
that, by the
principle of
insanity
from jury
evidence
incompetency.

S. 32 *v Blad's*, 3 Camp 458, the declarant had suffered from an apoplectic fit and was declared by his physician to be in extremis. The question was whether the declaration of such a person
Tottenborough L C J said
 and I am afraid to establish
 patient is not all
 permitted there
 this section of the
 the declarant is -
 procured without an amount of delay or expense, which under the circumstances
 appears to be unreasonable. *Asiatic Steam N Co v Bengal Coal*, 30 C 701

of evidence is
 covered. And
 admits that when
 since could not be

Subjective relevancy—Adequate knowledge In connection with the
 with the other exceptions to the hearsay rule, judicial attention is concentrated
 upon the subjective relevancy shown by the declarant. Here is elsewhere the
 elements of such subjective relevancy are two, Adequate knowledge and Absence
 of controlling Motive to Misrepresent.

Adequate knowledge may co-
 curate with the inference or state
 sufficient, in the opinion of the pres-
 ent, in acting in accordance with
 extent on the part of the declarant must be shown in order to warrant
 reception of a declaration against interest as secondary evidence of the facts
 asserted. It is not regarded as sufficient, for example, to show that such an
 extra-judicial statement was found, after his decease, among the papers of the
 person purporting to be the declarant. He must be affirmatively shown to have
 made the statement and it must also appear that he knew what he was talking
 about. *Chamberlayne's Ex* § 2772

Circumstantial Guarantee or Absence of controlling Motive to Misrepresent
 The basis of this exception is the principle of experience that a statement
 asserting a fact distinctly against one's interest is entirely unlikely to be
 deliberately false or heedlessly incorrect, and is thus sufficiently sanctioned
 though oath and cross-examination are wanting. In *Smith v Blakely* L R
 Q B 326, *Blackburn J* said: "When the entries are against the pecuniary interest
 of the person making them, and no other evidence could be made available for the person
 himself there is such
 admitted after the
Talor & L R are,
 statement appears
 which after the death
Mercer & Almer v
 taught us that when one makes a declaration in disparagement of his own
 or interests it is generally true, and because it is so the law has deemed it
 the exception to the
 likely to make a false
 posed to be the fact
 when a person, who
 making a declaration prejudicial to his own interest says something which is
 cessat ipso facto. *Per Sir John Lubbock*
Lath 54-89 Ind Cts 303
 446-57 I A 14 (P L) = 34 C 11
 1910, 1 K B 31

making a declaration prejudicial to his own interest says something which is
 cessat ipso facto. *Per Sir John Lubbock*
Lath 54-89 Ind Cts 303
 446-57 I A 14 (P L) = 34 C 11
 1910, 1 K B 31

Origin of the rule In *John Bunbury* 16 (1719) rentals or
 wed at Winchester and Dorchester
v Brock, 3 Woodeson's Lectures
 it is said: "On a similar principle of
 evidence, because the landlord or tenant
Roe & Brun v Pauling, 1 H. & M.
 'The contents of the leasehold his
 possession of it, it diminishes his
 interest in the fine on renewal, in the same proportion as it raises the rent to be

reserved. The paper was written by a confidential agent at least, though it does not appear that he was the immediate steward of the estate at the time, but

in evidence the following entries from the day book and receiver or a man and wife who had attended the mother of William Fowden junior at his birth, and was since deceased —

Day Book Entries

' 22nd April, 1768.

38* Richard Fallows's wife Bramhall Filus circa hor 9 mututu cum forcipe, etc

paid †

Then followed in the same page the entry in question without any intervening date —

' Wm Fowden junr's † wife, 79 †
Filus circa hor 3 post merid nat etc

Ledger Entry

' Wm Fowden junr, 1768
Aprilis 22 Filus natus, etc

Wife
26th Haustus purg

£	s	d
1	6	1
0	15	0
<hr/>		
2	1	1

Pd 25th Oct, 1768"

These entries were tendered in evidence to show the precise day or the birth of Wm Fowden, jun. The evidence was objected to. But the jury found on this evidence that Wm Fowden, jun. was not born on the 2nd but on the 22nd April should would

been established for the security of life, liberty and property but in declaring our opinion upon inadmissibility of the evidence in question we shall lay down

is limite
Warren
ks of a
making
ve been
entries "

I think the evidence here was properly admitted, upon the broad principle on which receiver's books have been admitted namely that the entry

* The figure 38 referred to the ledger

† This was the designation at the time of the father of Wm Fowden jun in question

‡ These figures referred to the ledger the entry in which follows

32.

in his own handwriting repels the claim which he would otherwise have had against the father from the rest of the evidence as it now appears. Therefore the entry made by the party was to his own immediate prejudice when he had not only no interest to make it if it were not true, but he had an interest the other way, not to discharge a claim which it appears from the other evidence that he had.

beginning with *Warren v* 279, in that if a person's declaration of that fact, at his death, if he could!

Ibid But in *Gleadown v* expression reported to be is 'if he could have been not introduced in any way such qualification and I have great doubts whether I ever used the expression. If I did, *Scoble v. Lord Barrington* and *Bosworth v Colclitt*, decided in the House of Lords, are against it" *Phayer Cas* 487

Statements against pecuniary interest. Statement of a fact against pecuniary interest when its tendency is to take away or lessen the pecuniary interest.

may include both verbal or written ones, documentary evidence, and particularly in books of account. Where the books of collectors of taxes, stewards, bailiffs, or receivers subject to the inspection of others, and in which the first entry is generally of money received, within the principle of this rule. *Kington 3 Brod & Bing* 131; *Leaton, 4 T R* 669; *Short v Lee* 556; *Dean v Caldecott* 7 Burd 133; *Marks v Lalce*, 3 Bing N C 408; *Wynns v Pyrahall*, 7 B & Ald 570. *De Rutca v Farr*, 4 Al & El 53, *Plaxton v. Dare*, 10 B & C 17. But it has been extended still further, to include entries in private books also, though retained in

is not sufficient.
 attempted to be pro
 of his deceased in

this exception *Green v* \$ 150,
Rudgway, 10 East. 109; *Middleton v*
 a mere memorandum of in agreement

S. 3

nor were they made in the course of his duty or employment *R v. North*, 4
 Q B 132 In general, the interest or burden involved in the fact stated must be
 a positive one and
 of the declarant

A given fact may
 circumstances; for example, that one is a partner may or may not be against his
 interest according to the state of the firm's assets *Raines v Raines*, 30 All
 128, *Humes v. O'Bryan*, 74 All 428 In the last named case A brought a suit
 against X and Y as partners Y having died, the suit was pressed against X
 alone X denied his partnership with Y and to prove his case offered declarations
 made by Y to the effect that he (X) was not a partner It appeared that the

Y made these
 declarations
 to be noticed,
 the absence of
 that Humes
 at his interest

this is so because, if true, it would entitle, Humes to a half interest in the
 partnership assets The assertion, therefore, that Humes was not a
 partner, having been made at a time when the partnership business had failed,
 was a declaration exonerating him from a pecuniary liability for the partner
 ship debts, and, if true, to this extent doubled the ultimate amount of Glover's
 (Y's) liability So it is clear that whether a statement is against interest
 or not depends upon circumstances A statement by Y that X is not a partner
 is not against the interest of Y when the firm is solvent, but it is so when the
 firm is insolvent.

of money received by him on behalf of his *cestui que trust*, and for which he was
 liable, held admissible against the *cestui que trust* *Bright v Legerton*, 29 L. J
 Ch 802. In an action by a
 statement by the testator
 debt is admissible *Watson*
 testator the evidence against
 trator *Smith v Smith*, 7 Car & P 401 In an action of trover to recover a
 watch, the defendant pleaded that it was not the property of the plaintiff It
 appeared that the watch had formerly been the property of the father of the plain-

S 32. made it is not sufficient that it might possibly turn out afterwards to have been against his interest *Thurds Ex parte*, 14 Q B D 415

Against Proprietary interest An equal guarantee of trustworthiness furnished when the extrajudicial statement is opposed to the proprietary interest of the declarant. By declaration against proprietary interest we mean a

in the property. The principle on which these declarations are received in the presumption of absolute ownership arising from possession. When a party in possession of land claims that he holds a less estate than a fee simple, for instance, that he is tenant in tail for life for a term of years, or that he manifestly cuts down his own interest in title, and it is not likely that a man interested than he claimed or stated. *Nort 192, Peaceable v Watson & Taunt 16 R v Exeter (1869) L R 4 B 341, Gauld v Miles 27 L R v Birmingham Blackburn J said* 'It is now well settled that a statement against interest by a deceased person is admissible with certain limitations and evidence in proceedings between show that where a person prima facie evidence of a tenancy down that interest is admissible against his interest'. Similar declaration of the deceased father of the claimant who had been in the possession of the property that he only occupied and managed it for his son was held admissible as being against the interest of the person making it. *A declares on interest in the land whatever is shown by Redman 1 Q B D 11* that a person in possession of land is the owner thereof for the purpose of the rule therefore.

Ibid, see *Wills Ev 193 Welsh v Wynnwood 7 T R 397* The rule therefore is that the

to treating declarations

a question of public right was in issue, the declaration of a deceased land made whilst planting a tree stating that he planted it to show the boundary of road is not evidence of public right, for it is not a statement of general reputation but of a particular fact. *R v Bliss 7 Add & E 560 Cf Selby v Chadwick 2 Moo & Rob 507* Assertions that one's estate is a leasehold or is not a freehold or that one's possession is merely as agent or as trustee for another are admissible. *Walker v Broadstock 1 Esp 458 Doe v Hutton 1 Esp 4 Doe v Jones 1 Camp 367, Peaceable v Watson 1 Taunt 16 Nicol 1 Bing N C 430, Doe v Longfield, 16 M & W 513* A declaration by the person in possession, that his interest was less than a fee simple for his own life only, would be primary evidence that it ceased to exist at his death. *Doe v Welsh v Longfield, 16 M & W 497* To make a declaration against proprietary interest in lands evidence after the death of the declarant must have been at the time in actual possession. *La Touche v Hutton, 1 R 9 B 166* A declaration or a written entry by a deceased person when occupied as a tenant that he was tenant at so much rent and had paid it, is admissible as a declaration against proprietary interest to prove the fact of the payment of rent of the tenancy. *Rex v Exeter Guardian, 10 B & S 133* *Dalrymple v*

deceased person, claiming a limited interest under a particular Will of property of which he was in possession, are admissible to prove the fact that the Will had a legal existence, and certain persons were named executors therein *Sty v Dedge*, 19 L. J. P. 63. On an issue as to the right of L. to a fishery, entries of a deceased receiver charging himself with the receipt of rent from a sub receiver, due from

the fishery, are
L. J. Ex. 1.
admissible in
cases where made
indas v. Ayu-

to a pecuniary penalty, by way of imprisonment. *Cuel le Cas* decided, in 1844, was neither precedents, nor a backward

without bias was received
1476 So it is plain

testimony to such an admission if oral. This is the ancient rusty weapon that of procuring fabricated

a very strong tendency to make any one out side of a Court of Justice believe
L. J. A.—71

S. 32.

the admissibility of such a confession; the of the two countries do not bind us; case of declarations against interest as well against interest as a confession of murder than dying declarations, which would l

one that there is no
which declarations
is not being against
the declaration to a

against his pecuniary or proprietary interest. *Not L v 184* But in order to make such statement admissible in evidence, the fact stated in the statement must expose him, to a criminal prosecution or to a suit for damages, at the time it was made. *Stoke's Anglo. Ind. Code Vol II. 874*; see also *Nicholas v Aljar*

the evidence

firmed by th

P. L. R. 1

forgery one

trate died being

by the Session

statement was

to criminal pro

L. R. 248 f.

Daolat and to

She then died

before the committing

Magistrate and th

statements of the deceased were relevant un

she having witnessed an offence and no

officer or Magistrate exposed herself to

Emperor, 10 N. L. R. 30-56 Ind. Cas 582-21 Cr L. J. 480

Statements of sundry facts against interest. There are many facts which in their ultimate effect be against the proprietary or pecuniary interest, though in their immediate and narrow aspect there may be no such clear character. These facts, however, may never the less be facts so decidedly against interest that no one would be inclined falsely to concede their existence. If so, on the general principle they should therefore be admitted. No more precise

state the terms of the contract with B, was rejected. *Blackburn v Lye* is no more than an admission that he has the care of the three chests which arrived at the office and the possibility that this statement might make him

show the existence of the Will. In *Flood v Russel, 29 L. R. 1ra.*

high she profited
Wyn, (1914) A
 claimant was a
 the deceased's
 son *Loreborn*
 ng a legal
Wigmore
 § 1461. In *R. v. Worth*, 4 Q B 131 an entry of a hiring at a certain wages in
 the deceased master's private book with a memorandum of payment, was held

to pay conditionally = none the
 subject to some conditions imposed
 contract liability of any sort is on
 § 1461
 fact is
 of a
Wigmore

of merely the
 is because the
 likely to be
 create a liability

Preponderance of interest—Credit and debit side—No motive to misre-
 present In some cases it has been stated on the analogy of other Hearsay
 exceptions that there must be no motive to misrepresent and this has been put
 as an additional requirement *Gladwin v. Atkins*, 3 Tyrw 301; *Marks v. Lahee*,
 8 Bing N C 403 "But" says *Prof Wigmore* "there is no such additional
 requirement The real ol
 a not uncommon situation,
 interest, there is also a

increasing of the entry standing alone must be against the interest of the man
 who made it Of course, if you can prove *an unde* that the man had a
 particular reason for making it, and that it was for his interest, you may
 destroy the value of the evidence altogether, but the question of admis-
 sibility is not a question of value The entry may be utterly worthless
 when you get it, if you show any reason to believe that he had a motive
 for making it, and that though apparently against his interest, yet it was for

account in which the receipts creating liability are on the whole exceeded by the payments or credits in his favour When, in the

principle, any reference to collateral records which amounts to a repetition or an incorporation of them would make them a part of the admissible statement." Entries made at a subsequent occasion, when the original entries are complete, are clearly excluded. *Doe v Tyler*, 4 Moo & P 381, *Knight v Waterford* 4 Y & C Ex R. 283 (294)

In *Reg v Overseer of Birmingham*, 1 H & S 763—31 L J M C 63, *Cockburn J* observed "I should be prepared to say, that as soon as it is established, which it now is on the authority of *Higham v Ridgway*, *supra*, and the other cases, that you may receive the declaration of the deceased person as showing, not only something adverse to his interest, but all incidental facts contained in that declaration, so far as they are not foreign to it, it follows as a consequence that those collateral facts may be proved by the declaration." In *Davies v Humphreys*, 6 M & W 153 *Parke J* (afterwards *Baron Parke*) said "The entry of a payment against the interest of the party making it, has been held to have the effect of proving the truth of other statements contained in the

record to therein provided that the

a variety of circumstances. If the statement happens to be recorded in a docu

it came to be
making it or an
implicity in the

It is now, however, well settled that declarations of deceased persons against their interest

so much contained in the facts stated in them, as

to the declarations, and may be taken to have formed a substantial part of them

see per *Cockburn*

parol declaration

tion of a tenem

proprietor as at

Smith's Les

A statement

a property

credit and

mortgagee had
held the whole
former part alone

admissible. *Sitaram v Ahubtal* 5 Pat 168=91 Ind Cas 13=7 Pat L 7
573=A I R 1926 Pat 255 But disconnected facts though contained in the
same document or statement are inadmissible. *Doe v Betts* *supra* *Knight v*
Waterford, 4 Y & C 293, *Angama v Bharmajpa*, 23 B 63

When the statement must be against interest The fact stated must of

early engrafted upon the rule, viz. that an admission of a fact, made by a deceased person which is against the interest of a party making it at the time, is evidence of that fact as between third persons. See also *Percival v Hanson*,

3. 32. 7 Ex 1, per *Parle B*; *Lalor v Lalor*, 4 L R 681; *Ex parte Elcock & Tollemache*, 14 Q B D 115; 416, *Smith v Blakey*, L R 2 Q B 326, *McGill Allen*, 13 Ch D 326. The chief application of this rule was to the endorsement of payment on bonds or notes before the claim was time-barred. The creditor's receipt of payment, in part or in whole, was a fact against interest, hence his memorandum endorsing upon the instrument the fact of receipt of payment would be a statement of fact against interest, the fact of payment thus evidenced, would be by implication an acknowledgment (of a promise) by the debtor, and thus would at common law suffice to give a new beginning to the period of the statute of limitations. *Wigmore* § 1466, *Seele v Lord Barrington*, C J in *Addan* a motive for unimpaired.

made after the Statute had run was not evidence, and that the note was barred by the Statute. See also *Turner v Crisp*, 2 Str 827; *Glyn v Bank of England*, 2 Ves 43; *Short v Lee*, 2 J & W 488, *Gleadow v. Atkins*, 3 Tyrwh 601, *Neubold v Smith*, 29 Ch D 277.

When the declarant to be prosecuted, and so the sub section (3) were not clause 3 of section 32. *Nga To v King Emperor*, 7 L B R 33=20 Ind 90=14 Cr L J 510.

Statements begun in question stated to be judge Jur N t stances t admissibility of evidence. *Phip Ev 271*

Spontaneity not required. No administrative necessity has been put forward for requiring another general safeguard against mistake in or manufacture of evidence, i.e., guarantee of spontaneity should also be present, if a statement against interest is to be received. *Doe v Twiford*, 3 B & Ad 890, *Chamberlain*, 14 Ev § 2773.

31 L J M C 63. *Feulen v Thomson*, 13 Ch D 293. *Farmingham v T*

in the cases. See also *Jagnot v Hay*

Eseler v Warren, [1911] 1 Ch 190-191. in whose-ever has been called in the latter case it is not necessary to call

Contemporaneity of entry Declarations against interest are admissible even when they are not made contemporaneously with the facts *Doe v Tuford*, 3 B & Ad 890, *Smith v Blakey*, L R 11 Q B 326, *Whaley v Masserene* 8 Ir Jur N S 281

Personal Knowledge The qualifications of the declarant with reference to the facts as those of the ordinary witness *v Nanson* 7 Ex 1, *Tay* § 669, is held that it was not necessary knowledge of the fact stated—that if the entry charged himself, the whole of it became admissible against all weight, and not *magna*, 1 B 610 is applicable to uniform *Vide Doe v Robson*, 15 List 31, *Short v Lee* 2 Jac & W 488, *Barker v Bay*, 3 Russ 76, *Uddleton v Melton* 10 B & C 317 *Lloyd v Pouell* (1913) 2 K B 133, 137 C A *Gleadon v Atin* 3 Tyrw 302, *Marks v Lakee* 3 Bing N C 420, *Percival v Nanson* 7 Ex 1 In the above cases it was held that the declarant must be shown to have had a competent if not a peculiar knowledge of the matter of the declaration *Tay* §

of what the chest contained. Similarly in *Doe v Longfield* 16 M & W 514 the assertion of an estate by life interest only was regarded as ambiguous and inadmissible See also *Plaxton v Dare*, 10 B & C 19, *Doe v Barton* 9 C & P 254

Extrinsic Proof Extrinsic proof must be given of the declarant's death (unless it is presumed) necessitate the admission be shown to have *Short v Lee*, 2 Jac & W 467, *Plumer M R* said: In all these cases (of books by bailiffs etc) the first wrote them, if you fail in that *Phip Ev 7th Ed* 272, *Curtis* 1 Price 228, *Bullen* 1 D 58, *Doe v Deviss* 7 C

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authorised or adopted by the deceased *Lancum v Lovell* 6 C & P 437 *Bradley v Jones*, 13 C B 822, *Doe v Hawkins* 2 Q B 812, *Re Lountaine* (1909) 2 Ch 382, *Phip Ev 7th Ed* 272 Where, however, the document is thirty years old

or receiver of another, it is necessary, in addition to give some proof that he really occupied an alleged position, except (1) where the agency is a public one, or (2) perhaps where the entries are ancient produced from proper custody and bear strong internal evidence of genuineness *Tay* § 663 *Phip Ev* 311

Declarations against interest and Admissions, distinguished. Declarations against received and contrary, are of the deceased declarant, admitted as an exception to the hearsay rule *Maclellan v L* 316 Such declarations are made, being compelled by truth, and as such they are trustworthy as if made on the stand under oath and cross-examination *H. Jones* § 1170 The points of essential difference in main are

to his advantage, because apart from the existence of a Will, he in fact took no interest in the property. *Re Adams, Benton v Pouch*, (1923) P 240-127 L T. S.

within the meaning of s 32, Evidence Act and are hence inadmissible *Jagdish v Harihar*, 78 Ind Cas 219-10 C L J 39 On the death of a member of a joint Hindu family the other members sued the widow of the deceased for possession of certain properties on the ground that she had no right to them, her husband having died an undivided member The widow set up a division and relied *inter alia*, on a mortgage executed by her deceased husband and attested by the plaintiffs containing possession of the properties acknowledgment that they had

admissible in evidence as a statement against interest under s 32 of the Evidence Act *Gnanamuthu v Veilu Kanda*, 19 L W 491-79 Ind Cas 3-A I R 1924 the circumstances with the adoption under s 32 (3)

of the Evidence Act *Danopati v Balsundara*, 36 M 19-18 Ind Cas 989 The *varaspatra* in this case was admissible not only under section 32, clause (3) of the Indian Evidence Act as a declaration made by the widow against her proprietary interest, but also by reason of s 90 of the Act *Hari Chintaman v Moro Lakshman*, 11 B 89 Recitals in deeds in favour of one party to suit showing nature of some lands are admissible not only under this clause but also under s 13 (b) *Tikaram v Motilal*, A I R 1930 All 299 In a suit for account by the representatives of A, deceased, evidence was adduced of a document

his interest *Zaynub v Hadjee*, 2 Ind Jur N S 51 Where the question, whether there was partition between the ancestors of the parties or not, is in issue, the statements made by the deceased ancestors of the parties that there was partition are admissible in evidence as they are statements against proprietary interest of the persons making them *Jairam v Narottam*, A I R 1929 Nag 131

32. L J 881. A statement of a convicted person made about the time of his being hanged that the approver in the case was not involved in the crime may be admissible *Shafi v. Emperor*, A. I. R. 1930 Nag 259=124 Ind Crs 409. Statement in adoption deed that adopter's sons were suffering from leprosy is admissible to decide validity of adoption and attestation by sons being against their interest is admissible *Nangammal v. Sankarappa*, A. I. R. 1931 Mad 100. Vendors in sale deeds belong to them, but not land *Tula Ram v. Maitra*, A. I. R. 1930 All. 299; but see *Aligun Nayahars v. Perumal*, 39 L W 472.

Declarations held not admissible under this clause. An admission made by a bankrupt in his statement of affairs that a debt is due from him, is not after his death, admission of the existence of the debt after paying the same. 13 Q B D 720.

Evidence, either on the general ground of pecuniary interest, or on the ground of the audit having been made in the ordinary course of business. *Wheat v. Moot*, 45 L T 1. Business done by a creditor account, merely because the account is acknowledged by a firm of the trader acknowledged on the part of the person by whom the account is acknowledged. *Whaley v. Moot*, 45 L T 1. The day book and ledger of a firm kept by himself with no other person.

427=102 Ind Crs. 145=A. I. R. 1907 No. 133. Statements of persons under s. 32, Evidence Act, conditions specified therein are for a certain person a statement in the more than 20 years before is not admissible under s. 32. *Shan v. Hindu* is admissible in interest.

Long enjoyment of her husband's property *Dalbhadur v. Loyoy*, C. W. N. 300=A. I. R. 1930 P. C. 50=30 R. M. I. R. 497=51 C. L. J. 41.

Held, that neither the

as the statements in the Will made by the deceased that he had spent a particular S.

plaintiff, a statement

The evidence of
Act would be ad

rietary interest of the deponent, even in a
of title *Shyamanand v Rama Kanta*, 32

Will of the purchaser of the title
title *Held* that the recital of *brahmav* title in the Will was not admissible
Satindra v Krishna Kumari 36 Ind Cas 682 A statement by a plaintiff as a
witness to the effect that her father told her that he had mortgaged the land in
suit to the defendant is inadmissible under this section *Mt Nga Ma v Nga*
Lalab, 29 Ind Cas 607 = U B R (1915) 1st Qr 50 A recital in a conveyance

not admissible in evidence under this clause. *Harihar v Guwagranth*, 128 Ind
Cas 791 = A I R 1930 P C. 610

Statement as regards boundray In *Rajah Leclanund v Mt Lakhaputee*,
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proprietary interest *Karuppanna v Hanja Suami*, 107 Ind Cas 293 = A I R 1928

THE INDIAN EVIDENCE ACT

- S. 32. It is unnecessary to cite any *v. Radgway*, 2 Sm L. C 307 under the cases the
- This case *na v Bharmappa*, 23 B 63, which again was followed in the High Court in case of *Haji Bibi v. H H Sur Sultan Mahal* 11 Bom L R 409=2 Ind Cas 817, and in our Court *Kunj Behury Lal*, 16 C W 116=25 C I, 116 in Allahabad in all these cases *Sudhari Pandey*, 1 case of *Ambar Ali* 116=25 C I, 116

in the case of *Radha Krishna v Sarbeswar Nag*, A I R Cal 681 and in the case of *Choom Lal v Nilmadhab*, A I R 1925 Cal 44 C L J 587=99 Ind Cas 910=A I R 53 Ind Cas 863, *Trimbah v Ganesh*, 68 Ir

in the mahal, in which there was then zemindar many years prior to the question that the original re Mr Justice Mackay held that

possible." It is clear that the view is consonant with the principle underlying guarantee to the trustworthiness of *Couch C J* and *Auslie J* said "We c Judge that this statement was not ad which the interest in the m l a t it is against cut down the p

mount of the original no a document of this kind is, and the part which is which is against his inter

interest of the proprietor, taking the doc

favour. In the circumstances there was nothing to impeach the judgment of Mr. S. 3
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and Cis 752,
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land then conveyed was limited by certain boundaries, was an admission that their proprietary interest did not extend over any land outside the boundaries mentioned. The entire statement was consequently inadmissible (*Higham v Ridgway*, 10 East 109, *Connar v F. Nanson*, L R 2 Q B 326, and *R v Eze*).
 is that the statement is accepted, not

interest of the person
 impose boundaries may
 how a statement of

that nature can be said to be against the proprietary interest of the person making it, is some what difficult to ascertain. This view is supported by the following observation of Sir Richard Garth in *Brojesuar v Budhanudhi*, 6 C 268, where the learned Chief Justice observed 'A recital in a deed or other instruments is in some cases conclusive, and in all cases evidence as against the parties who make it. But it is no more evidence as against third persons than any other statement would be.' See also *Brojomohan v Gaya Prosad*, 30 C W N 761, *Choon v Aulmadhab*, 41 C L J 374, *Radha v Sorbesuar*, 20 C W N 469.

death as a statement against his proprietary interest. *Wills Ex 192*. And a *fortiori* if it shows that he has no interest in the land whatever. *Ibid*. This is based on the well known rule of law, that a person in possession of land is presumed, until the contrary appears, to be the owner thereof in fee simple. *Grey v Reiman*, 1
 therefore is not
 the land occupied
 against his interest to deny his possession of one close than it is to assert his

the subject matter of the document cannot be regarded as having been against the pecuniary or proprietary interest of the person making it within the meaning

S. 32 of section 32(3) of the Evidence Act and is consequently inadmissible in *Kumil Kumari v. Dilsool Roy* 101 Ind Cas 512-15 C L J 53
Dandajani In re 8 Ind Cas 968, *contra Lahu Singh v. Sahaleo Singh* 30 Ind Cas 610

CLAUSE IV

exposing them to constant contradiction *Pappu Do 7th Ev 280*

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Mansingh
 to have had a personal knowledge of the facts, and to have stood quite independent
 ed are received in evidence In case of general rights, which depend

declarations are admissible in *the Berkeley Peerage Case*, 4 C 107
 deceased persons who are entitled

intervals of time, direct proof of their existence therefore only required

Administrative requirements Necessity Before secondary evidence unsworn statements can be received as proof of the fact asserted it is essential here as in other instances of the use of secondary evidence that the proof of the oral testimony of the declarant should be shown to be unsworn and that in consequence, a sufficient administrative necessity to produce secondary evidence has been placed on the proponent A declaration of this nature is said to be admissible, 'where no better evidence can be had' *Of a the 10th Ev § 2791*

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sanction or test, deemed equivalent for ascertaining the truth of the statements

in a manner the purpose of cross examination After it is reasonably safe to accept the result as an established fact
 1191000 § 1083 So the guarantee of its credibility consists in the

of a large number of persons, all interested in and therefore likely to ascertain the truth of an opinion which if untrue, would be surely challenged. *Hill v 2nd Ed 222; Wright v Doe*, 7 A & E 313 in H L, 1 Bing N C 489; *R v Bedfordshire*, 4 E & B 535.

Origin of the Rule "At the time of the definite emergence of the Hearsay rule—that is, by the end of the 1600's there remained in existence a practice more or less loose, of receiving the reports of the common people as evidence of fact. . . . The jury could in any case have considered, had they otherwise known of it, would be unnatural and improbable. But with the final shaping of the Hearsay rule's limits, and the conscious statement of specific exceptions, in the first half of 1700's and with the progress and final doctrine that the jury could consider evidence in Court, the use of common

by the

Subjective Relevancy—Adequate knowledge Unless the situation presented to a presiding judge is such that knowledge on the part of a given declarant as

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Barrel, C M
L R Ir
cen, 75 L J
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that from their situation they probably were conversant with the matter of which they were speaking" *Bow v Allensdown*, 34 N H, 351, 366. When however, the circumstances show that the declaration is made otherwise than upon the declarant's own knowledge it will, even when relating to a public right, be inadmissible (*Devonshire v Neill supra*) *Plap Ev 286*

Scope of the Section "Evidence is to be admitted from old persons . . . of what they have heard other persons

affecting classes of the community cannot be excluded, or relaxation the

S. 32. rule against the admission

If the question were
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J in Hall v Mayo 97 M 416, *Green v Chelsea*, 21 Pick 80; *Dunbar v Llewellyn*, 15 Q B 791, *Queen v Bedfordshire*, 1 E & B 535. But the d i
tion must relate to the general right, and not to particular facts which app
or negative it. *R v Bliss*, 7 A & E, 550; *Crease v Barrel*, 1 C. M & R 919.
R v Berger (1891) 1 Q B 823, *Merce v. Denne* (1905) 2 Ch 303, 81
Ratcliff v Marsdon 72 J P 475, *Fouke v Berrington*, (1914) 2 Ch 303, 81
13, Fay § 617 *Phy Ed 7th Ed 287*

The best way to
as far back as living
regard to the preceding
is not however essen

any evidence of modern
admissibility of such evidence. *Crease v Barrel*, 1 C M & R 919, 920, 921,
raton v Llewellyn 1 Q B 791 (801); *Wills Ed 229*. Facts in issue are relevant
facts within the meaning of section 32 of the Evidence Act, and statements made
by deceased persons about facts in issue are admissible under the section.
Raghunath v Vithalaram; 34 Ind Cas 875, disapproving *Fulcher v Lewis*
15 B 565

This clause permits proof to be given of a statement of a deceased person
that in his family or in the community of the estate to which he belonged
and such a
been likely
statement to be
Parbati v C
to give his
grounds of that opinion, information derived from deceased persons, and
must be the expression of an independent opinion based on hearsay.

2 L R Ir 159 60, *Phy Ed 7th Ed 286*

Statement of an individual

was always regarded
such is always receivable

R 14. So also maps

are also receivable. *R v Milton*, 1 C. & K. 62; *Wigmore 3d Ed 111*,
Alcock v Cook, cited, 1 Ph Ed 251.

The same rule is applicable in

Dow 297; *Smith v Earl Brounlon*

2 Ch 303. Maps prepared by o

matter may also be received. *Hammond v Bradstreet*, 10 L R 111,
Fulcher 1 E & E, 111. Copies of Court rolls can also be admitted under

section. *Plaxton v Dare*, 11 B. & C 17; *Mt. Gen v. Emerson*, (1871) 1 C
649, *Flow v Parker*, 5 F. R 26. So also deeds and leases, between persons

In *Brisco v* it is as good certainly different reputation, for a jury are summoned from the country at large, and are not themselves likely to know of the matter. Yet where the matter has been before

went by default. *Neil v Devonshire, supra*. Similarly judgments, decrees, and orders of Courts and of similar bodies, if final, are admissible as evidence of reputation. *Step Dig Ev Art 30*. But here also the persons acting as Judges had no knowledge of the thing. *Rogers v Wood v. Villebois*, 13 M & W 198; but in this section it is stated that the fact that no one in the region had ever heard of the right, custom, or boundary being as alleged should be admissible as a negative reputation. *Drinkwater v Porter*, 2 C & K 182; *Anglesey v Hatherton*, 10 M & W 239; *Wigmore* § 1095.

Declarations as to public or general interest. In proof of public or general rights or customs or matters of public or general interest, statements

32. *Hickie*, 15 Q B which some class of which are based on the customs of manors (Barrett, 1 R 919), parishes (Berry v Danner, Per 106, Evans v Mithyr, 1 connected hamlets (Thomas Jenkins, 1 manors (Barnes Dawson 1 M & S 77), Wills 2nd Ed 222 For the purpose of the rule, the test what is public is as to whether the subject in question is sustained, and, as it were, spirited decisions at a correct opinion Where although it is of public interest and forms the

must be

subject matter of the suit

The question next arises, about what is received as trustworthy The principle already examined is that the nature of the reputation is an active, constant and intelligent discussion by trustworthy conclusions As a rule should be one of public, or general or public interest, and the common phrasing though it varies loosely But this is still only a rule of thumb To decide difficult cases it is necessary still to seek the living principle and ask anew whether the matter is of such general interest to the community that by the thorough sifting of active, constant and intelligent discussion a fairly trustworthy reputation is likely to arise *Wignore* 1086 see also *R v Bedfordshire*, 4 E & B 793 *R v Bedfordshire*, 4 E & B 533 Declarations made ante mortem by persons who are now dead in respect of a question relating to a matter of general or public interest even if they be no more than evidence of reputation or hearsay evidence, are admissible *Busoid v Aenay*, A I R 1929 Cal 533-534 C W N 439

Interest The term 'interest' here does not mean that which is inherent in gratifying curiosity or a love of information or amusement, but that in which a class of the community have a pecuniary interest or some interest in which their legal rights or liabilities are affected Per Lord Campbell, C J in *Queen v Bedfordshire*, 4 E & B 533 The interest spoken of in the rule is that of ownership or some lesser property in the chattels land or franchises in which an individual may possess a public more or less extended interest from ownership is no ground for assertions regarding it *Chambers v Evans*, 1 E & B 534

Boundaries An extra-jurisdictional boundary, being on a matter of public interest, to have been made by one person in an assumption may be made in favour of any person resident in the community affected by the position of a public of actual knowledge may at any time be demanded by the presumption *Chamberlayne's* 1 E & B 2793

Public custom Where a house in a village is privately sold, proof of a custom in the remainder of the village gets one-fourth of the purchase price of a similar custom with regard to the purchase of a house in a village *147 (18) F R 147*

Sivanatha, 17 N W 100 heads of districts are often accepted as evidence *Ev 190*, see also *Paul Bai v Iam Hu*, 1 N W 100 *Mahomed*, 3 N W P 204

Opinion What is offered must be in effect a reputation, not the mere assertion of an individual But reputation includes and is often learned from

witness was "What have you heard old men, now deceased, say as to the reputation on this subject?" Thus, though in form the information may be merely what deceased persons have been heard to say about a custom, yet in effect it comes or ought

Wymore § 1581, see also *Porter*,
2 C. & K 182, *Earl of* *Lebanh v*
Thompson, (1903) 2 Ch 3; *putation*
from deceased persons. But "reputation is no other than the hearsay of those who may be supposed to have been acquainted with the fact, handed down from 180 it is heard E 679.

In *Mercer v Denne* (1904) 2 Ch 534, the suit was for enforcing fishing rights. 1639, under an information by the Attorney-
ich the s-a extended was excluded In rejecting
it p 543 "I am of opinion that these deposti-

tions are not admi
right which the Crov
the depositions of
on the question to
witnesses in other actions are admissible against strangers amongst other cases,
if they relate to a custom where reputation would be evidence, but then those
putation and not of matters of
iorities .. that reputation as
also *Ireland v Powell*, cited in

Itq v Bliss, 7 Ad & E 555 In *Ireland v Powell*, *supra*, the question was
whether a turnpike stood within limits of a town, and though evidence of
reputation was received to show that the town extended to a certain point,
yet declarations by old people since dead that those houses formerly stood
he ground that those
Denne, (1905) 2 Ch

(1914) 2 Ch 303 So the reputation :
"I know the right and custom to
understand the general acceptance of the custom by the community to be such
and such" is admissible The deceased individual declarant is merely the
mouthpiece of the reputation Whenever, therefore, individual declarations are

S. 32.

Birell, 1 C M & R 925, *Drunk case*
v Porter, 7 C & P 181 But in *Barraclough v Johnson*, 8 A & E 93 Lord
Denman C J said 'I do not agree that it is necessary for persons giving an
 opinion as to the publicity of a way to state that they found them-
 reputation although
 reputation The at
 some extent' In *I*
 establish that altho
 matters of public
 an inference of fact
 allows evidence of opinion in respect of any matter of public or general interest,
 the test being whether the deceased person expressing the opinion was likely to
 have had knowledge In the case of Mobants, even if they may have had
 knowledge by means of oral tradition handed down from Mobant to Chela, the
 opinion would be relevant but not particular facts. *Rini Prasad v Shiro*
 12 Lib 497-A 1 R 1931 Lah 16

Opinion must be of competent person, The reputation to be admissible
 must obviously have been formed among a class of persons who were in a
 position to have sound sources of information and to constitute intelligently to
 the formation of the reputation *Wignmore* § 1591 In *Weeks v Sparks* 1 M &
 S 693, *Le Blanc J* said "And the only evidence of reputation which was
 received was that from persons connected with the district The rule
 generally adopted upon qu
 after a foundation is on
 the evidence of reputation
 what old persons who were in a situation to know what these rights are
 been heard to say concerning them "Evidence of reputation upon general
 points is receivable, because all mankind being interested therein, it is natural
 that they would discourse together about it
 information Per Lord Kenyon in *More*
 is thus laid down by *Parke B* in *Crease v*

hood But where the right is really public—a claim of right
 interest which seems difficult to
 which all are concerned
 but of course it would
 be shown to have some
 frequently using the
 road in dispute See also *Duke of Buccleugh v* 4 Frob 467 (469), *Daniel*

statement untrust-
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have had a personal knowledge of the facts, and to have stood quite disinterested are received in evidence. In cases of general rights, which depend upon immemorial usage, living witnesses can only speak of their own knowledge to what has passed in their own time, and to supply the deficiency, the law receives the declarations of persons who are dead. Therefore, however, the witness is

them would lead to the most dangerous consequences. Accordingly, I know no rule better established in practice than this, that such declarations shall be excluded. With respect to questions of prescription, I have known many

be made before even the existence of any actual controversy, concerning the subject matter of the declaration. *Davies v Loundes*, 6 M & G 473 (518). So

a dispute was

G, 30 L J P

eclaration, has

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(are admitted) upon public rights, made *ante litem motam*, when there was no existing dispute respecting them, is that these declarations are considered as disinterested, dispassionate and made without any intention to serve a cause or mislead posterity, but the case is entirely altered *post litem motam*, when a con-

might tend to support the declarant's own title will not of itself be sufficient to exclude them. *Doe v Davies*, 10 Q. B. 314. *Halsbury Vol 13* 469. So "there must be, not merely facts which lead to a dispute, but a *lis mota*, or suit,

Shamlal v Radha, 1 C. L. R. 173; *Anadi v Nandlal*, 16 A 665. So also where

Act *Sangram Singh v Rajan Bhai*, 12 C 219=12 I A 183 (P C). But this clause does not cover statements of facts made by interested parties in denial, in the course of litigation, of pedigrees set up by the opposite parties *Narain v. Chandt*, 9 A 467=A W N 1897, 118. "The statement declared to be relevant by the 5th clause is a statement relating to the existence of any relationship between persons alive or dead (the language imposes no restriction), is special means of by the Calcutta and corresponding rule in which the question can certain persons

Ram Chandra v Jogesua
Oriental G S Company
 Oudh Select Case 265
 admission of what for the
 whether a particular person survived another, and it is obvious that this clause does not justify the
 man was at the time
 his family *Parbati v*
 of relationship, the statements of the deceased relations, servants and dependants

every instance, it must be a question of fact as to whether the person who made the statement had special means of knowledge *Rama Krishna v Tirunarayana*, A. I R 1932 Mad 193=62 M L J 116. The effect of the section is to make a

S. 32. Scope of Clause (6).
evidence on questions of relationship.

Held, that
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five to decide is not
Similarly in a suit
tendered in
mother and
of his marri
nient on it,
that the horoscope was not admissible under s. 32, cl 6 of the Evidence Act
Ramnarain Kalia v. Monu Bibee, 9 C 613. In delivering the judgment
J. said "The document tendered is not a statement relating to the existence
of any relationship by blood, marriage, or adoption, between persons deceased
It only purports on the face of it to be a statement of relationship between
a deceased person and a living
such a case. It is not sug
to the affairs of the family
age of a person who is al
of a family pedigree. But I am of opinion that it does not come within the
words in the sub-section. But there is another objection to the admission
of the document which is fatal. Section 32 says that 'statement written or
verbal, uncorroborated' may be admitted in certain cases. On the plain face
evidence it appears that he does not write the horoscope, or the
endorsement on it, and therefore
cannot be found, or become in the
opinion that the document is
Lal, supra, Petharam C. J. observed
that in the case of a horoscope, the statement is not a statement of relationship, but a statement of fact.

which any
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made" *For*

Pedigree
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or was born, but were drawn upon a particular occasion for a specific purpose.

in a family pedigree, such statements are usually

family records handed down
few member of the family dead
mentary evidence on which the plaintiff relies is found to be reasonable, especially if
and reliable the oral evidence which consists mainly of the depositions of
the members of the family should also be accepted as trustworthy, being
consistent with the documentary evidence. On the other hand if the docu
mentary evidence is not of the character mentioned above the oral evidence

Mathura Prashad, 13 C W N 1-10 Bom L R 1088-8 C 14. Cus. 175 (P C). The point of view with which the decision of the question as to proof of a certain pedigree should be approached is that if the documentary evidence on which the plaintiff relies is found to be reasonable, especially if and reliable the oral evidence which consists mainly of the depositions of the members of the family should also be accepted as trustworthy, being consistent with the documentary evidence. On the other hand if the documentary evidence is not of the character mentioned above the oral evidence

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English Law. Declarations relating to pedigrees are allowed where they were made, before the commencement of the suit, by a deceased person provided the person making them was related by blood to the person to whom they refer, or was the husband or wife of such person. *McKilley's Est* 271, see also *Shrewsbury Peerage Case*, 7 H. L. Cas at p. 26 Under the term 'Pedigree' are but when marriage, others or 447 In even on the words the declarations of deceased persons respecting the places where their relatives were born, and where they were married, resided, went to, or died, cannot be received. But in *Shields v Boucher*, 1 De G & S 40, Sir J L Knight Bruce V C said. 'If the place of birth in *Rex v Erith*, had been a genealogical fact as it was not,—had been material namely for any genealogical purpose, which it was 's Bench might possibly have v *Deauchamp*, Hurl Est of *Monkton v Att Gen*, 1 Deg 38 So 'declarations of the

affinity only, when the pa in short, which is strictly speaking, matter of pedigree, may be proved as matter relating to the condition of the family by the declarations of deceased ously Per such rejected with, the question of pedigree, or when they are not required for some genealogical purpose (*Haines v Guthrie*, 13 Q B D 818) they will be rejected *Phip Est* 7th Ed 298

(2) like statement in a deed or will relating to the affairs of the family or in any family pedigree etc when made before the question in dispute was raised Section 50 provides that when the Court has to form an opinion as to relationship of one person to another the opinion expressed by conduct as to the existence of such relationship of any person who, as a member of the family or otherwise, has special means of knowledge on the subject is relevant Per *Mullick J* in *Bibi Fatma v Abdul Kasim*, A I R 1928 Pat 539-110 Ind Cas 428 In India it is difficult to prove such facts as the date of birth after the lapse of many years, and it would be unreasonable to demand such a class of evidence as would justly be demanded in England But the evidence must be such as to carry conviction to the mind *Nawal Sha b a Begam v Nanhi Begam* 11 C W N 130 (P C) = 1 M L T 429

(by) requiring the facts from the mouth of the witnesses who has the knowledge
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§. 32. of them In cases of pedigree, therefore, recourse is had to a secondary sort of evidence,—the best the nature of the subject will admit, enabling the descent from Peerage Case, & Camp being impossible to prove the declarations of the reputation must proceed on particular facts, such as marriages, births and the like, from the necessity of the thing, the hearsay of the family as to the particular facts is not excluded” In the same case *Laurence J* observed

the family is of which would

In *Sturges v* pose the ground

is that they were matters relating to long time past, and that it was necessary to relax the strict rules of evidence for the purpose of doing justice” so declarations under clauses 6 and 7 are admissible when the evidence is not procurable. Vide *Ram Narayan v Monce*, 9 C. 613; *Surjan v Sardar*, 5 C W 19 P. C.

Circumstantial guarantee

ness of such a statement is thus :

Ves 511 “It was not the opinion tradition, generally, is evidence persons having such a connection natural and likely, from their speaking the truth, and they could

that: declarations in the family, descriptions upon monuments, descriptions in Bibles and registry books,—all are admitted upon principle that they are the natural effusions of a party who must know the truth, and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth” In *R v Erusnell*, 3 T R 720, *Ashhurst J* said “It is natural for persons to talk of their own situations and of their families. The evidence is in its nature of an unsuspicious kind, it is generally

them are proved to be dead or incapable of giving evidence *Mahomed*, 81 Ind Cas 927=6 Lah L J 299=A L R 1925 Lah 63, see *Prohlad v Ramsaran*, 38 C. L J 213.

two points to be illustrated at differs from of a person evidence is that (5) refers to (6) refers to

of things, such as genealogical trees, tomb stones etc. Clause (5) refers to relationship between any persons (living or dead) whereas clause (6) refers to

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"not necessary that it should have been made by a person who had special means of knowledge, but it must be contained in a will or deed relating to the affairs of the family to which any such deceased person belonged, or in a family pedigree, or upon tombstone, family portrait or other thing on which statements are usually made" *Field's Evidence 6th Ed.* p 139, *Norton v* 188

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whether the statement offered be an individual's assertion or the family repute.
Wigmore § 1195; see also *Colbel's Estate*, 51 Mont 453, *Young v State*, 36 Or. 417.

Tr 1166, 1179, 1181,
son in the neighbour-
Wood, 14 East p
remember the case of

plaintiff to J F In delivering his judgment *Best C J* said "Consanguinity, or affinity by blood, therefore, is not necessary, and for this obvious reason, that to be informed of the state of the family of relation who is distantly connected by

deceased persons
to have been made
made *post litem*, in

Moo & Rob. 28) Similarly in *Crispin v Daghton*, 3 Sw & Tr 44, *Sir Cress-*

32. *well Creswell* observed "I can well understand that where a matter is likely to be discussed and well known in a family, a member of the family may be allowed to give evidence of it, but in this case the plaintiff according to his own
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and also of persons who though not related by blood or marriage to the deceased were intimately acquainted with its members and state, shall be admitted to give evidence after the death of the declarant to the extent as those of deceased members of the family.

The law presumes against a declaration made by a person who is not a member of the family, and is strongly in favour of marriage. It will not be admitted unless it is made in a ceremony is invariably insisted upon as to the class to which the parties belong. The law therefore relaxes the rules of evidence and in the absence of other evidence presume marriage on the statements of persons; the behaviour of the couple and their general reputation. 50 of the Evidence Act

Statement made during the course of a trial of trustworthiness must have been made *ante litem motam*. *Wigmore § 1451* In *the Case of Camp 401, Mansfield C J* said "In the *Inglesea Cause* many declarations of deceased persons were given in evidence, but after an attentive examination I can not find that any of these had been made after the dispute had occurred. I am not aware of any other authority upon the subject in our law, but the distinction of declarations *ante litem motam* and *post litem motam* is clearly taken in a foreign treatise of great learning, entitled *De Probationibus*. You must have now only to notice the observation that to exclude declarations you must show that the *litem mota* was known to the person who made them. There is no such rule. The line of distinction is the origin of controversy and not the commencement of the suit. After the controversy has originated all declarations are to be excluded, whether it is known or not known to the witness. If an enquiry were to be instituted in a controversy was or was not known would be wasted and great confusion. I conceive that the deposition now taken in the same case the reason for the exclusion, is thus stated by *Heath* and their manner of contest has originated and not the fact of the declaration or the other person by

& M 160 *Brougham L C* observed "If there be *litem mota* or a contestation has precisely the same effect upon a person's mind with *litem contestatio* what person's declaration ceases to be admissible. It is no longer strong if he be a party to the contestation. Lord Eldon calls it a natural effect.

Wigmore § 1483 So where declarations are made *post litem*

not admissible, and not to have in *Doc v Ranta* adoption of the question of adoption was directly in issue, such statements should not be admitted in evidence in the present suit under subsection 5 section 32, as they are not made before the question is disputed was raised *Ramkrishna v Tiru-*
M L J 116 Declarations as to the inadmissible in evidence if made *post* ore the commencement of legal proceedings, but before even the existence of any actual controversy concerning the is made in the obvious interest of the *Mahomed I. v Sarid Mahomed,*

to Roman law, but the term *lis mota* cument of the action, and was not t in our law the term *lis* is taken controversy, and by this *lis mota* in versy, and not the commencement of the suit *Tay § 692, see also Berkeley Pec age Case, 1 Crump 417 Monltou v 111 Gen 2 Russ & My 161 Gee v Warl, 7 L & B 509* The ground on which evidence of this description is excluded is the supposition that, when a ly to range themselves or to have imbibed their would become tainted
 at its very source *Goolers* *Cump 417,*
Mr Justice Laurence said 'W and even
 good will, tempt many who , to deviate
 from the truth in the laxity of conversation Can it be presumed that a man stands perfectly indifferent, upon an existing dispute respecting his kindred? His declarations *post litem motam*—not merely after the commencement of the law suit, but after the dispute has arisen, for that is the primary meaning of the word *lis*—are evidently more likely to mislead the jury than to direct them to a

by a man who has an interest

It was once said by *Baron Alderson* in *Wallis v Beauchamp* 6 C & P 561 that it was sufficient if at the time of the declaration the state of facts existed (for example the birth of a child) as to which the controversy afterwards arose is to the controversy and to
 Although the dictum of *Baron*

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facts which

may lead to a dispute, but a *lis mota* or suit, or controversy preparatory to a suit actually commenced, or dispute arisen and that upon the very same pedigree or subject matter which constitutes the question in litigation See also *Stanel v Wade, 1 Myl & Cr 338 (306), Butler v Mountgarret, 7 H L Cas 633, Fredrick v 111 Gen 41 L J P & M 1* In *Bahadur Singh v Mohar Singh, 24 A 94 (107) P C* the principal oral evidence consisted of statements made by the plaintiff as to their descent the information as to which they had received from their ancestors Objection was taken that such of these statements as were made since 1847 were inadmissible in

S. 32. evidence under clauses 5 and 6 of section 32 of the Evidence Act (I of 1872) and that they were a family dispute.

exclusion would not apply to what was done in prevention of dispute, even were it in support of the title of the declarant; and although in the belief that his title would be affected by the same circumstances as the party seeking to avail himself of the declaration. Thus in *Goodrich v Mass*, Cowper, 591, Lord Mansfield in receiving such evidence said "I have known advice given to a father and mother to make attested declarations in writing under their hand of the precise state of the truth."

In *Moncton v Att Gen*, 2 Russ & My. 161, Lord Brougham ascribed Lord Mansfield's view of admissibility to the principle that the declaration was made with a view to their own interest, but to preserve a constant record of facts peculiarly within their knowledge (which is one of the grounds of admitting such hearsay evidence); see *Forrest Peerage Case*, L R App Cas 1, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 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Narain Kaur v Chandu Din, 9 A 467. So also depositions made for the purpose of another suit are inadmissible if the same point was in issue, otherwise Wills v Wills (1870) 10 L R 101. Per Lord Freeman in *Devonshire*, whose deposition was open to him at the time it was made, was inadmissible for a party claiming through her. *Devonshire v Devonshire*, 10 L R 101.

but he admits that this principle must not be pushed too far. According to section 32, clauses (5) and (6) such evidence is admissible although the question is not directly in issue.

some feeling of interest, which will often cast suspicion on the declaration. It has never been held to render them inadmissible. Again, any controversy to exclude must be on the particular subject in issue, controversy in a merely analogous one, but not the issue itself, not necessarily carrying with it the elements of mistrust. Thus in a case respecting copy

where the point in controversy is foreign to that which was before controverted, there never has been, *a lis mota*, and consequently the objection does not apply."

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of his own personal knowledge, or as is much more frequently the case, to what he heard from others to whom he gave credit; for they are only adduced as evidence of reputation in the family, and that is the only mode in which the tradition in a family can be proved, and the subject matter of that tradition can

511 (514); *Sheddén v. Att. Gen.*, 50 L. J. P. M. 217. But if instead of being

matters within their personal knowledge *Tay.* § 639, see also *Doe v. Randall*, 2 M. & P. 20, *Staney v. Wade*, 7 Sim 611, *Robson v. Att. Gen.* 10 Cl. & Fin. 500. So also proof by one of a family, that many years before, a younger brother of the person last seised had gone abroad, that the reputation in the family was that he had died there, and that the witness had never heard in the family of his having been married, is presumptive evidence of his death without issue. *Doe v. Griffin*, 15 East. 293.

not therefore necessary. *Monkton v. Att. Gen.* 2 Russ. & M. 160; *Berkeley*

32. *Peerage Case*, 1 Camp 116. The difficulties, then that arise are concerned with the line between declarants that may fairly be supposed to be thus qualified

like? Secondly, shall any be for example, according as the consanguinity or by affinity?

be supposed to be present when, and how, and by what means, and by what facts, having an opportunity to know the facts, or holding a relation rendering it very probable that he would learn them truly? If it is so the line need not be drawn strictly at relatives. But in the language of Lord Erskine in the interest of the person in knowing the connections of the family (*Wolfe v Young*, 13 Ves 140) does require the line to be drawn there, excluding non-relatives" *Wigmore* §§ 1486, 1487. See also *Annesley v Ingless*, 17 How St Tr 1160; *Roos v Wolsey*, 2 Lee Eccl, 135; *Duchess of Kingston's Trust*, 20 How St Tr 355; *Berkeley Peerage Case*, 1 Camp 401; *Walker v Hume*, 18 Ves 443; *Johnson v Lawson*, 2 Bing 88; *Casby v O'Shaughnessy*, 1 Jur 140; *Polins v Gray*, L R 13 Ch D. 126. But "such a narrow test seems too narrow. Even in England, where so much of personal advancement and material prosperity for the individual depended upon his family rank and his rights of inheritance, it seems too much to say that only those who have an immediate property interest in learning the family history can possibly have adequate information; for family physicians and chaplains, old servants, and intimate friends may, in cases be equally and sufficiently informed." *Wigmore* § 1487. The only

Lauson, 2 Bing the family for rejection said it would be a namely, the consanguinity, affords such evidence as testimony could of intimacy or confidence that subsisted between the party and the declarant.

"It may be noted," says *Prof Wigmore* "as to this reasoning, first, that the result is inconsistent with the general language used in the earlier judicial opinions, and is supportable only on the narrow test of *Lord Fraser* before mentioned, secondly, that the special reason given, namely, the inconvenience of an investigation into sources of knowledge, is anomalous in the law of Evidence, for no Court is allowed to decline to investigate the source of a witness's qualifications so far as may be necessary, while in each case the Judge's discretion permits, and old would surely be no more found to be" *Wigmore* § 1487. A statement admits of

Special means of knowledge

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267-123 Ind. Cas 907. Family birds have special means of knowledge regarding the facts of the relationship between the different members of the families of their *jajmans*. Consequently statements made by them as regards the relationship between members of the family would be admissible in evidence under 32(5). *Anandi v Nand Lal*, 22 A L J 657-46 A 665. It is the business of a *muasi*, who is a hereditary family bard, to acquaint himself
 recounts in song
 hearsay does not
Abdul Ghafer v I
 L. J. 583 (P C)
 Court had special
 cannot be received in evidence and it cannot be accepted as evidence that he had knowledge. Proof of special source of knowledge is a pre requisite to the admission of the document in evidence and until the document is received in evidence no presumption can be made from the statement contained in it. *Bhima v M Sender*, 9 O L J 186-4 U P L R (O C) 79. Before a pedigree said to have been prepared by a deceased member of family can be admitted in evidence under section 32 (5) it must be proved that it was either prepared by the deceased or that the deceased had that personal knowledge and belief which must be presumed in any statement of the deceased person which is admissible in evidence. *Mahomed v. Sayid*, A I R 1931 Oudh 147-8 O W N 349.

Qualifications of the declarant. Upon the general principle of testimonial knowledge, the qualifications of the deceased declarant—his relationship, or whatever is relied upon as equipping him with information—must be shown in advance. *Banbury Peerage Case*, 2 Selw N P 764, see also *Taylor* § 640, *Wills* Ev 213 214. In India the existence of special means of knowledge in the

he does not come

It no where appears

that he had any other knowledge than as *mulhtear* acting for these ladies. He was not shown to have been a member of the family, to have been intimately connected with it, or to have any special means of knowledge of the family concerns. Therefore in their Lordship's opinion he does not come within the description of a person having special means of knowledge. See also *Bijay Bahadur v Bhupendra*
 declarant has sufficient
 tion is. *Wignore* § 14
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 clause 5 of section 32
Lal v Radha Bibee, 4 C
 ment Court is admissible in evidence under s 3, cl 5 of the Evidence Act,

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suit, in which she stated, "I have no issue or any near relative *Mail oral* is related to me as a daughter's son and *Khawati Lal* is my husband's younger brother. These are my relatives on the husband's side." In admitting the evidence *Lord Shaw* observed, "In this situation their Lordships are of opinion that, in the most solemn form, this lady had declared facts which must have been within the scope of her knowledge. If the facts be sound, there can in their judgment appeal from is correct."

obtained in his deposition and in affidavits filed by him are admissible evidence under section 21 (1) read with section 32 (5) of the Evidence Act, made by a person having special means of knowledge, whether personal or hearsay. *Tarathur v. Maru Gopu*, 33 Ind. C.S. 269. Where the Court below had rejected the evidence of certain witnesses on the ground that it was hearsay only and had not conformed with section 32 of the Evidence Act and on the face of the evidence it was sometimes uncertain whether the witnesses were speaking from their own knowledge or from information derived from others, it is not in law an error to admit it in whole.

nor in the latter case to question the manner in which the Court has applied the provisions of section 32. *Safimunissa v. Shaban*, 20 A. 331 = 9 C. W. N. 105 P. C. So where the witness is speaking from hearsay he must show that his knowledge is derived from the person whose statement is admissible under the section. *Vile Jugalal Singh v. Tejshutar Singh*, 25 A. 43 = 7 C. W. N. 49.

Statements are admissible to prove the facts contained in the statement on any issue. In England declarations are admissible only in cases in which the pedigree to which it is only relevant to the issue is only admissible in England, not where they are admissible in Scotland. Thus in *James v. Guthrie*, 13 Q. B. D. 318, see also *James v. Guthrie*, 11 L. J. Q. B. 46. This rule thus interpreted, says that declarations otherwise satisfactory, can nevertheless be used in those cases only where the issue involves a material question of pedigree, or genealogy, or the therefore inheritance cases. *Higmore* § 1503. This view seems to have its origin in the observation of *Lord Ellenborough, C. J.* in *R. v. Enth*, 5 East 56, where he observed, "This was a case in which the question was, whether the declaration of the father of a bastard child, as the place of his birth, the bastard's birth was competent of that fact? The only doubt which has been introduced into this case has arisen from improperly considering it as a question of pedigree. The controversy was not as in a case of pedigree, from what parents the child has derived its birth, but in what place an undisputed birth derived from known and acknowledged parents, has happened. The point thus stated turns on a fact, and is therefore not falling within the rule." and is

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to make.

These declarations were first made in England in inheritance cases directly a part of the issue, but in litigation ought to have no bearing on the admission or exclusion of evidence. A deceased father's entry in a family Bible is equally trustworthy, whether the issue subsequently arising happens to be framed upon a

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pedigree, and when the incidents of

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Similarly in the colonies the ru
D. 818, was not followed In

section 32(5) of the Indian Evidence Act such evidence is admissible In
Dhanumal v Ram Chunder, 1 C W N 270=24 C 265, a plaint in a former
suit, verified by a deceased member of a family and as such having special
knowledge, was held admissible under section 32(5) of the Evidence Act, to prove
the order in which certain persons were born and their ages In delivering the
judgment of the Court *Pelham C J* said It was contended on the part of
the plaintiff on the authority of the English cases that as the question at issue
in this case did not relate to the existence of any relationship by blood marriage
the statements were excluded by the
at point the law in India under
England, and that the effect of the

sons of Sumbho Nath were born and their ages, and when admitted to my mind,
satisfactorily proves that the defendant was the son who was born on the 6th
June, 1868 Similarly in *Ram Chandra v Jogeswar* 20 C 753, for the purpose
of the decision of a question of limitation it was necessary to prove the date of
the plaintiff's birth The plaintiff and one of his witnesses each spoke to
statements made to him by relations of the plaintiff who were since deceased
relating to the date of the plaintiff's birth The defendant objected to such

Bipan Behary Dey v Sreedam Chunder, 13 C 42 has been practically overruled
by *Dhanumal v Ram Chandra*, *supra*

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s. 32.

Stephens, Kent Assizes .
 it has been said "Here
 when he married, and what children he had, etc., of which it is not necessary
 to presume I have better evidence. So to prove my father, mother, cousin &
 other relations, beyond the set, dead; and the common reputation and belief
 of it in the family gives credit to such evidence." On the authority of *R v*
Frith 5 East 539, the place of birth or death—something more than the fact
 birth or death—has by some Courts been thought to be inadmissible. But
 question was finally settled in England in *Shields v Boucher*, 1 Dig & Sm
 where *Knight Bruce* said "If the place of birth in *Rex v Frith* had been a
 genealogical fact, as it was not,—had been material, namely, for any general
 purpose which it was not. *Lord Ellenborough* and the Court of King's Bench
 differently." See also *Lord*
 & M 176 where he observed

ship of consanguinity or of affinity only,
 are not admissible;
 pedigree,
 the declaration
 have been previously connected with the family respecting which their
 tions are tendered." Moreover since the proof of a particular relation here
 depends on the proof of some specific fact, such as birth, marriage or death,
 the date or place of
 place of residence;
 history these facts
 of the rule when
Wills 12 212, *Monkton v 1st Gen 2 Russ & Myl* 147, 150; *Dell v*
Ir, C L 17, A statement as to the age of a member of a family, made by a

ceased person having special
 onship within the meaning of section 2
Narasimha Chari, 25 M 183, 219-21
 see also *Ram Chandra v Jogeswar Narain*, 20 C. 758; *Byambharr v Sarda*
 18 C 42

Contemporaneity of the Statement It is not necessary to show that
 the declarations were contemporaneous with the events to which they relate
 as *Lord Brougham* has well observed "a statement which would defeat the

1st Gen, 2 Russ & Myl, 157, 158, *Tay Ev* § 639

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excluded "In cases
 living nine years and

right of way, or of
 fact which would support

reputation must proceed on
 like, from the necessity of the
 particular facts is not excluded
 neighbourhood, and family transactions among the relations of
 Therefore, what is thus dropped in conversation upon such subjects may be

presumed to be true." *Per Lord Mansfield in Berkeley Peerage Case* 4 Camp. S. 3
401.

Cases under clause (5) Very liberal interpretation should be given to the words "when the statement relates to the existence of any relationship by blood family about certain majority of members of *ishna Lal v Raj Kumar*, 104 Ind Cas 299=1 Luck C 97=A. I R 1927 Oudh. 278 A statement as to the existence of a relationship is admissible even though it was made in a

clause *Chandreswar, v*

mark of the party,
appellant in his own

s 11, if not under s 32 (5) whether it is shown that the application was filed by a person who was admittedly the testator's nephew and claimed also to be his adopted son and therefore was in a position to know the date of his death and the age
Lachin
T. 891
relativ
532;

any

that his father was
'6 Before a pedigree
made by a person

relates to the existence of relationship by adoption *Danabati v Balsundara*, 36 M 19=18 Ind Cas 989 A pedigree filed in a Settlement Court for the preparation of *Kheuat* cannot be put in evidence as a family pedigree under a

S. 32 32 (6) It can be admitted only under s. 32 (5) for which purpose it must be proved that the document represents statement as to the existence of a certain relationship by blood or marriage made by a person who had special means of knowledge in respect of the matters thus stated and made before the question now in dispute was raised. *Mithu v Bhulan*, 15 O C 364, see also *Srinivas v Filok Chant*, 36 Ind Cis 66. A statement in a will made by the father describing his adopted son, aged 10 and so as the sole beneficiary is admitted to prove the age of the boy, under s. 32, cl. 5 and 6 of the Evidence Act. *Krishnamachariar v Veeravalli*, (1913) 11 W N 35, = 13 M L T 350. L J 517 = 19 Ind Cas 152. The question for decision was whether the plaintiff was the legitimate daughter of one K and R. The respondent contended that R was not the legally married wife of K, and in proof of it produced a compromise and a decree between R and another person by which R obtained only a small amount as maintenance. He also relied upon a statement made by R on a certain occasion admitting that she was the concubine and not married wife of K. It was held that the statement of R was admissible evidence under section 32 clauses (3) and (5). *Parbat v Maharaj Singh*, 19 Ind Cas 188. A statement made by a person before a public officer as to his age is admissible.

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199 Hearsay evidence is not admissible under section 32 clause Evidence Act, to prove the case of fosterage, in as much as, even if it be a statement of that connection by fosterage can amount to relationship in any sense of the term the relationship is not by blood, marriage or adoption. *Prinsep v Louab Qudus*, 21 Ind Cas 612. The term 'relationship' in clause (5) of section 32 of the Evidence Act.

relationship between

meaning of the

other child

meaning of clause (5) of section 32. *Achutananda v Jagannath*, 21 C L J 739 = 20 C W N 122. Statements contained in the plaintiff's statement within the meaning of section 32 of the Evidence Act.

statements contained in the plaintiff's statement within the meaning of section 32 of the Evidence Act.

A L J 349 = 39 A 426. Where the question is whether A born on a certain date is of age an entry in a book containing the record of births, deaths and marriages in the family kept by his father who is dead that he was born on a particular date, is admissible under this clause. *Mohamed Syedol v Garl*, 21 C W N 257 = (1913) 11 W N 35, = 13 M L T 350. L J 517 = 19 Ind Cas 152. A statement by a person to X, as the sole wife of a person having special means of knowledge. *Krishna Iyengar*, 1913 W N 35, = 13 M L T 350. L J 517 = 19 Ind Cas 152.

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statement = admissible

Ab Justice Mookerjee

that the section

should be excluded, first because it relates not to the existence but to the non existence of a relationship, and, secondly, because the relationship is not

■ Mohunt and his *chela* is not a relationship by adoption On behalf of the defen- S. 32

13 C 42, *Satish Chandra v. Mohendra Lal*, 17 C. 849 and *Ram Arishna v. Manindra Mohun*, 20 C L J 302. It is not necessary for our present purpose to determine whether the fluctuation of judicial opinion indicated in the two sets of decisions mentioned, is more apparent than real, and whether they may not be reconciled by a recognition of the principle that a statement as to the time of commencement of relationship is so indissolubly associated with the existence itself of the relationship, that it may be rightly regarded, without undue stretch of language, as a statement which relates to the existence of that relationship. *Oriental etc Co Ltd v Narashimha* 25 M 183, and *Patambar Kuru v Raman*, 2

that question, it
tion, viz, first, is it
by adoption, and, secondly, is a statement that A has one *chela* B, and has no other *chela*, a statement relating to the existence of a relationship? We are of opinion that both these questions should be answered in the affirmative. In the first place, there is no reason why the term 'adoption should be interpreted in a restricted sense, that the expression that A has adopted B as his *chela* is found in judicial decisions of the highest authority. In the second place, the expression 'relates to the existence' is obviously very comprehensive and need not be

The statement was treated as admissible in evidence but was held not to be conclusive evidence under ship by blood,

A document containing a statement of a deceased person as to the mode of succession obtaining in a particular family is also admissible in evidence *Patambar Kuru v Raman* 24 Ind Cas 519, see also *Sheo Lal v Gour Narain*, 7 Ind Cas 218

25 A. 236-5 Bom L R 410-30 I. A. 91 See also *Kedarnath v Muthumal*, 40 C 555 (P C) The legal presumption as to paternity raised by s. 112 of the Evidence Act is applicable only to the offspring of a married couple. A person claiming as an illegitimate son must establish his

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Ghurneeb Mossam v. C
the age of a person, the entry of
be statements of his deceased father
ection 35 *Munna Lal v. Kaneshan*

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Act, but, in the case of an entry in the register in question, there is no showing by whom the statement entered was made, much less that the person making the statement had any special means of knowledge. *Mr Collier v Mrs L Bawn, 2 N L R 31*. In an application for letters of administration the rights of the applicants to be considered the next heirs of the deceased depended on proof that the relationship between their great-grandfather and the deceased was that of full brother and sister.

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or deed of exchange, dated the 17th January, 1902, and Kurisnama as to the relationship were produced by the applicants. The Kurisnama was held admissible in evidence *Shazadi v Secretary of State for India* 100 C 1059 P C.

Cases under clause (6) Entries made by a parent or relation in Bible, prayer books, missals, almanacs, or indeed in any other books or in any document or paper, stating the fact and date of the birth, marriage, or death of a child, or other relations are also received as the written declarations of the deceased persons who respectively made them. *Tay Ev § 630* These adoptions may be made by the declarant's own writing, or by assenting to or adopting the true statement of another. *Id.* If a person is adopted, the adopter must be a competent witness. *Id.* An entry in a pedigree book is not good evidence. *Id.*

formal one—as, a deed or will—does not make the ^{an} *Murray v Mulner*, L R 12 Ch D 845; *Doe v. Pembroke*, 11 East 504. Such statements ^{inward}

them, or did anything that amounts to showing that they reposed

"A pedigree, whether in the shape of a genealogical tree or map, or contained in a book, or moral or monumental inscription, if recognised by a deceased member of the same family, is admissible, however early the period from which it purports to have been deduced. On what ground is this admitted? It may be that the simple act of recognition of the document, and consequent members of the family, is his information may

stated to be relations, or of information received by him from some deceased member of what the latter knew, or heard from other members who lived before his time. And if so, it may well be contended, that, if, the facts rebut that presumption, and show that no part of pedigree was derived from proper sources of information, then the whole of it ought to be rejected, and so also if there be some, but an uncertain and undefined part derived from improper sources. But when the

to that extent, the statements in the
, and are good evidence of the relation

adopted son that statement
the testator Chandressuar

book regarding the relationship of parties are admissible under this clause
Amrit Sarai v Prabli Dial, 89 Ind Cas 989.

wills or deeds are admis-
D 845, *Smith v Tebbit*, L
he principle that they are
the natural effusions of a party who must know the truth, and who speaks upon
, without any temptation
Deloch v Baker, 13 Ves
a Case 4 Camp 418. But
become admissible must

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has been set aside
10 M 362. So
7) does not render
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under section 32,
v *Mulim Chand*
does not prove
371. But when
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e, 11 East, 501
Dos v Ormerod
and signature

32. 16 So recitals of descent, and description of parties in deeds or other family instruments, will be received, provided the deeds come from proper custody and are proved or may from age be presumed, to have been executed by a member of the family to which the statements refer. *Marmayon Peerage* Pr Min 111; *Hastings Peerage* Pr Min 200; *Bonthicld Peerage* Pr Min 61; *Hengate v Gascoigne*, 2 Coop 117; *De Roos Peerage*, 2 Coop 541, 548; *Davies*, 1 Mason 269 cited in *Tay Et* § 651. But the execution of the deed by a relation is an inadmissible requisite. *Slaney v. Wale*, 1 Myl & Cr 200; *Port v Clarke*, 1 Russ 604; *Tay Et* § 651. Though a person cannot claim title under an unproved will he can rely upon a statement contained in it indicating the relationship of the parties. *Hutnarin v Rambarai*, 7 Pat 750; 1 Pat L 7484-A I R 1928 Pat 159. A statement, in a will left by a deceased person, to the effect that he and his brothers were living, earning and holding property separately, is not admissible in evidence under any clause of Act 32 nor under any other section of that Act. *Goluddas v Chandibai*, 4 S L J 225=10 Ind Cas 907.

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observed "Nor do we think that the first portion of the observation of Lordships is intended to lay down an exhaustive definition of 'family pedigree' as used in cl 6 s 32, Indian Evidence Act 1872. The two words simply indicate the highest and the best type of family pedigree. The decision does not show that a pedigree not conforming to that standard cannot be a family pedigree."

pseuinness *Inden v Yellaba* 100 I L J 600 '81 The mention of . . .

and the sons are found to be in joint possession of the property the presumption is that the common ancestors held the property *see* *Nur v Juan*, A I R 1928 Lah 964. A family pedigree may be a pedigree kept by a member of the family or by another person on its behalf and it can be admitted in evidence, if it is written by a family bard for the purpose of keeping a record of the family even for its use and the use of the family. Such a record can be admitted even though not signed by the person making it.

665=A I R 1921 All 575, see also S. 3
Ind Cus 235-24 Bom L R 289

of a *Harduar purolat* is valuable on a question of a family pedigree *Lauya Singh v Allah Ditta*, 133 Ind Cus 874=A I R 1931 Lah 722

It is valid to presume after the dea

v Rhetat, 21 Ind Cus 274 A pedigree was filed before the Settlement Court in

Gubaj, 16 Ind Cas 625 Although a
Evidence Act may be made with respect to :

32 (5) of the Evidence Act, though the entries in it were not of great value
Ram Din v Kanestha Patshala 25 Ind Cus 823

up were not
any of the
descriptions in section 32 of the Indian Evidence Act *Sorjon v Sardar Singh*,
23 A 72-2 Bom L R 492-5 C W N 49-27 I A 183 P C Where the
a family governed by the custom of
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members of the family made *anté litem motam* before there was anything to

THE INDIAN EVIDENCE ACT.

S. 32. throw doubt upon them, the evidence to prove pedigree. And such statements by deceased members of the family may be proved not only by showing that they acted upon them or ascribed to them, or did anything that amounted to showing that they recognized them. If any man . . . who presumably would . . . pedigree, that evidence . . . instances Abdul Ghaffur
J 583 P C . . . 13 A. 188=12 Lrb 336=60 M L

Horoscope—evidentiary value of. A horoscope may be tendered under clause 5 or clause 6 of section 32 or under s. 17 18 of the Evidence Act. Under clause (6) of section 32 . . .

the writer "is dead or . . . to come within this clause . . . had

Lat, 17 C

this clause

Then the

been admitted as coming within section 32 of the Evidence Act and within clause 6 of that section. That clause makes entries made by persons, evidence of questions of relationship by blood, marriage, or adoption, where the deceased person had some special means of knowledge. As to that it is enough to say that it is not shown that the person who had made this horoscope had any special means of knowledge, and that the question which we have to decide is not one either of relationship by blood or . . .

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questions of relationship, the interpretation is also not sound. *Id. supra*, also 11 C W Evidence Act p 336 I Note. A horoscope is receivable in evidence under section 32, clause (5) of the Evidence Act and not under clause (2) or of that section but the party making it must have had special means of knowledge. *Ravi Nathan v Murugappa* 33 Ind Cas 269=1916 M W N 41. see also *Gopal Chauh Hori* . . . *Rattan* 17 C

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Goudan, 1

In *Amardyal Singh v P* . . .
511=58 Ind Cas 72, a
one Ram Nandan Ram who
his son to be in his father's
scope could be admitted in evidence to
admitting the horoscope *Miller C J*
relationship between any of the parties . . .

ments as to age made by deceased persons in the circumstances contemplated in the section were admissible. The horoscope, however, is merely evidence and is not conclusive and in face of the other conflicting evidence in the case I should have been inclined to remand the case for further consideration on this point.

the life of the son
admissible in evidence
a relationship *Anna*

malai v Annamalai 10 L. W. 687=52 Ind. Cas. 456. Horoscopes deeds of adoption or of initiation as chet are admissible if the person writing them or hearing them read soon after their preparation is examined. *Shankergir v Chinnaji*, 71 Ind. Cas. 140=A. I. R. 1923 Nag. 1. Horoscopes containing date of birth and prepared by a person having special means of knowledge and who is dead is admissible to prove date of birth. A. I. R. 1927 Pat. 271=8 P. L. 1 730=103 Ind. Cas. 449.

Principle of authentication. The principle of authentication is applicable to proof of the execution or genuineness of a writing is in general applicable to a writing offered under the present exception. *Slater v Wade* 1 My. & Cr. 338. *Tracy Peerage* 10 C. & F. 154. No special considerations here need attention except as regards the necessity of proving the handwriting of entries in family Bibles or the like. The fundamental idea of authentication

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to the family, and therefore may be presumed to possess that authenticity which is derived from the tacit and common assent of those interested in the facts which they record. But such public exposure of the writing is not needed when it contains the signature of a specific member of the family and his signature is authenticated. So a signed chart of a family was admitted. *Montlon v*

inscription on a tomb in the mansion are all used in all those cases the existing—the want of a ring or the Bible with presumption—it would only did not more or less in case of family Bible,

there is no necessity of proving the handwriting of the entries. Proof of the handwriting or authorship of the entries is not required when the book is shown to have been the family Bible or Testament for then the entries as evidence derive their weight not more from the fact that they were made by any particular person than that being in that place a family registry they are to be taken as assented to by those in whose custody the book has been kept. *Alley J* in *Jones v Jones* 43 Md. 160, *Waggoner* § 1496. *Berkley Peerage Case* 4 Cump. 421 per Lords Ellenborough and Redesdale JJ. *Hubbard v Lees* 35 L. J. 1 x 169. *Goodright v Moss*, 2 Cowp. 521. *Slater v Wade*, 7 Sm. 595, *Shrewsbury Peerage*, 7 H. L. 1.

Value of statements under clauses (5) and (6). Statements of the kind referred to in section 32, clause (5) of the Evidence Act may be evidence, but

or rights may be given under clause (4) and not under this clause In England

to private titles? How is it possible concerns only these private titles? In rights as well as customs can be proved relate to any such transaction as is mentioned in section 13, clause (a). On principle there is nothing to object to the reception of such evidence Under this clause private boundaries, titles or possession can be proved "If such evidence may be offered to show customs and boundaries of a private manor, boundaries of a parish, tithes dues (*Stell v Pricett*, 2 Stark 466, per *Abolt* which a number of it is in substance So in *Weeks v*

a multitude of per

in England this tendency of extending to private rights was checked by 2 B 809 (1850) and an arbitrary d private property rights was laid down. In that case he said "Reputation is not admissible in the case of such separate rights, each that, because there We think this positive

is to cause number of v Bedford shire, 4 E & B 535, *Doe v Thomas*, 14 East, 323

But in America the result is otherwise The earliest English practice had clearly been to admit reputation as to private titles, and it is therefore natural regularly admitted *Cas Ex* 421 note, of the principle is be so evidenced is

conceded *Ibid*

Old maps and old surveys so far as they have been used and resorted to by the community in dealing with the land, may be taken as representing, after the test of use and criticism, the settled reputation of the community as to the correctness of the tenor of the map or the survey *R v Milton* 1 C & K. 62, *Hammond v Brad Street*, 10 Ex 390, *Pipe v Fulcher*, 23 L J Q B 12, *Daniel v Wilkin*, 7 Ex 429, *Bullen v Welch*, 4 Dow 297, *Smith v Earl Brownlow*, L R 2 Eq 252, *Ibuke v Berrington*, (1914) 2 Ch 303, *Freeman v Reed*, 4

32. *M & M 418; Curzon v. Lomax, 5 E-p 60; Doe v. Whitcomb, 1 H. L. C. 419, Carnation v. Vellebous, 13 M. & W. 313; Beaufort v. Smith, 1 Ex. 400, Wilford v. § 1592*

In *R v. Milton, 1 C. & K. 58*, upon the trial of an indictment against a parish for the non repair of a highway, where, in order to show that the road in question was not within the parish, a map was produced which had been made by a surveyor, from information derived from an old map, but to him the boundaries, *Edlin J.* held that the old map's death, the map would be admissible as evidence to come from the chest of the parish.

Nort. Ev. 190

Clause (7) of section 32 does not declare all reputation to be relevant, but only that which consists of statements contained in a deed, will or other document relating to any transactions.

modified, recognized, a sort of existence. The clause therefore evidence of reputation in it are admissible under this clause, judgment and decrees are not in the least important. *Field Ev. 6th Ed. 11*

703 But where the question is of a *Bhakti* system of rent, and it is in a *hebanama* executed by a tenant's deceased grandfather, *held* that the *hebanama* was inadmissible in evidence under s. 32 (7) read with section 13 (a) of the Evidence Act. *Bansi v. Mir Amir, 11 C. W. N. 703*

present plaintiffs and by the suit. *Held* that the deed though they could themselves admit it, the custom as against the defendants must be proved. *Hurronath v. Nittanand, 10 B. L. R. 263*

Ancient possession. In England the rule has always been that proof of

things and the finding them in such a place is a presumption they were honestly obtained, and reserved for use and are free from suspicion of

Doe v. Pulman, 3 Q. B. 622. In *Malcolmson v. O'Dea, 10 H. L. Cas.* laid down that the true ground for admitting a lease is that it shows an act of ownership. Thus, the production from proper custody of an ancient lease granted by A is evidence of an act of ownership over the land by A at that date, and is presumptive evidence that he was then owner in

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Rogers v.
rights

to which they refer *Heath v Dane*, (1905) 2 Ch 678. Entries in old parish books are admissible as evidence to prove who were the owners or occupiers of the property at a previous time *Smith v. Andrews*, (1891) 2 Ch 678; *Powell* p 287 So it is clear that the existence of a document of ownership of land (a deed, lease, or license) may be evidence that the maker of the document had occasionally said that the incorrect These documents thus explained by Lord m 641, 653, 688; "Old being evidence of facts of at a distant d a person reasonable

law permits ancient documents, either with or without evidence of ancient payment of rent, to be given as evidence from which the jury may properly draw an inference that there was such possession For in the ordinary course of things men do not make leases unless they act on them, and lessees do not payment of rent adds

laid down the reason
always attended with
acts of ownership

That rule is, that ancient documents coming out of proper custody, and purporting as a lease or a license, payment of rent under f of possession This it possession is proved

to have followed similar documents, or that there is some proof of actual enjoyment in accordance with the title to which the documents relate And certainly in the case of property allowing of continuous enjoyment, without proof of actual exercise of the right any number of mere pieces of paper or parchment purporting to be leases or licenses ought to be of no avail It may be a question whether the absence of proof of enjoyment consistent with such document goes to the admissibility or only to the weight of the evidence,

look at this document you find it contains a great deal It shows upon the face of it that *Jenkins* must have been in possession or else he would not have brought an action of trespass He speaks of trespass the word is used in the document itself. It is not an act of ownership, I agree, but it is a document

S. 32.

possession against
it is evidence of
This doctrine, how-
ever, does not
adversely affect
except the document
Lson v Wood

5 T. R. 112; *Rogers v. Allen*, 1 Camp 309; *Doe v. Asher*, 10 East 520, *Co. v. Coether*, M. & M. 393; *Doe v. Pulman*, 3 Q. B. 622 *Wigmore* § 157

Other cases. A deed of mortgage containing an assertion of title as

from in all the High Courts in
Fota, 25 Ind. Cas. 747 = (1914) M.
Ind. Cas. 149 = 14 C. L. J. 467

and with transactions affecting
of certain lands as *malik* or
brahm title in the will
case, which was not *inter partes*, was not admissible in evidence under section 32 (7) of the Evidence Act
will was not admissible in evidence under section 32 (7) of the Evidence Act
read with section 13 (a) and that the recital in the judgment not *inter partes* was
not evidence. *Satindra v. Krishna*, 36 Ind. Cas. 883; *Basi Nath v. Jagat Kishore*,
35 Ind. Cas. 298 = 23 C. L. J. 583 = 20 C. W. N. 613. Where the validity of the
testamentary will is in question, the recital in the judgment is not evidence.

this clause. *Nagammal v. Santharappa*, 54 M. 576 = A. I. R. 1931 Mad. 115. If a
settlement deed under which a promissory note is transferred to the plaintiff is
admissible as secondary evidence, may be employed to prove the promissory
note under s. 32 (7) read with section 13 (a) since a settlement deed constitutes
a transaction in which a right was asserted. *Subba Rayappa v. Vengama*, A. I. R.
1930 Mad. 742 = 123 Ind. Cas. 107

CLAUSE VIII.

of this clause is that when a number
of persons make a common statement, which is
one common statement, which is made in their minds at the time of
the statement, and is made by the witnesses and is evidence.
These statements are admissible on the
general principle that they appear to be natural and sincere. Illustration (a)
exemplifies this clause. This illustration is based on the case of *Du Puy v. Bessford*, 2 C.
impression produced on the defence, other spectators not being themselves put into the witness box
of the defendant's brother-in-law
and the latter very handsomely
received the
"Beauty and the Beast"
the story

impression produced by the picture on their own minds, viz., that it was intended

evidence that
Cool v Ward,
 M & P 99, *Phil Ev* 332 In *Chase v Houell*, 151 Mass 422 (Am) notice of
 the rottenness of a tree's root was in issue, and to show knowledge by the city

in M
 military
 calling
 statement
 different places and afterwards put in second hand before the Court cannot be
 received as evidence under the clause *Queen v Ram Dutt*, 23 W R 85 Cr
 "It has been held that if a statement is made by several persons and any of them
 is dead, each of the persons must be taken to have made the statement for
 himself or herself and therefore the statement of the deceased person will be
 admissible under this section *Chandra Nilmadhab*, 26 C 236 *Field Ev* 7th
 Ed 234

the by standers, on seeing a caricature called out 'there is X,' and evidence is
 given of their words, what is relied on is, not their statements, but the fact of
 recognition; the fact, that is, that the caricature at once recalls the person
 X to the minds of those who see it." *Mark Ev* p 34

S. 33.

could not be admitted under the section. If they were not known or could not be found, it is not easy to see how the fact that there were many of them is material. In the English cases, it does not seem to have been proved that the persons who made the observations could not be called. *Cum Et Illa* Ed p 85

33. Evidence given by a witness in a judicial proceeding

Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated

or before any person authorized by law to take it, is relevant for the purpose of proving in a subsequent judicial proceeding, or, in a later stage of the same judicial proceeding, the truth of the facts which it states, where the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:

Provided—

that the proceeding was between the same parties or their representatives in interest;

that the adverse party in the first proceeding had the means and opportunity to cross-examine;

that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation—A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section

Principle The securities which have been devised by municipal law

by Betnam as confrontation Betham's Rationale of Judicial Evidence III, Ch XIX This was established long ago "The other side ought not to be

a case for us and a certain

In other words, this secondary advantage is a result accidentally with the process of confrontation, whose original and fundamental object is

It is no essential part of the notion of confrontation; it stands on no better footing than other evidence to which especial value is attached; and just as the

party.
attained
People v
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remaining alive and actually examined in the cause" See also *R v Christopher*, 2 O & K 994, 1000 Its weight, however, is of course affected by the loss of the demeanour of the witness *Phip Ev 7th Ed 423*. Mr Taylor however considers it an exception to the rule excluding secondary evidence of documents, holding that the rule is wide enough to exclude secondary evidence of oral

48 (52), *Balgangadhar v. Shrinivas*, 39 B 441-19 C W N 729-42 I A 729 (P C)

The rule contained in this section is an administrative expedient for doing justice between litigants in a particular situation as a rational compromise between two well known canons of judicial administration. A presiding judge will require that a party within his power to do so be required to cause a witness admissible facts given on a

33. to the particular witness—It is not essential that the proponent also shows that he can prove the fact itself in no other way. The evidence being in its nature secondary, i.e., inferior in a probative point of view, less decisive and convincing than the face to face testimony of the witness himself, the party tendering the less probative proof must show to the reasonable satisfaction of the judge presiding at the trial that it is impossible for him to procure the attendance of the witness himself. This may be for one of several reasons. The witness may be dead, insane, sick, or absent from the jurisdiction.' *Chamberlayne's Ev* § 164

in interest, if criminal must retract
 person *McKelvey's Ev* § 164. The chief reasons for the exclusion of hearsay evidence are the want of opportunity to cross-examine the witness in the judicial proceedings, and the power to cross-examine being an ordinary test of truthfulness, of parties.
v Beal
 not dead
 insane,
 have been kept away by ill health.
 264, *R v Elliswell*, 3 T R 111.
 all the objections which are made in
Wright v Tatham, 1 Ad & El 313.
E of Winchelsea, 3 C & D 111.
 Court new powers, which require to be exercised with great caution. It is no doubt that it is still necessary to examine every witness at the trial, unless it is possible to produce him, or to be so difficult and unreasonable to insist on its production." *Per Macpherson J in v Moulton*, 20 W R 69 Cr., *R v Piyari*, 4 C L R 511, *R v Moulton* 1864. In England the law on the subject is thus stated: "Agreed in the case, where a person has been examined in chancery, that in a cause at law between the same parties his deposition may be used in evidence if it can be proved that the witness is not able to attend."

ers what the law requires and could not be read at law that the witness could not be read at law. *Reus v Palmer*, 1 Vea. & B. 272. It specifies what evidence is admissible.

receivable. This is, whatever is delivered in the proceedings or (b) before any person. Oral evidence therefore is as receivable as deposition. *Not Ev* 194.

The deposition of a witness is not admissible under section 30 of the Evidence Act. The mere admission of the prior deposition is not admissible. *Brayaballav v Akhoy*, 30 C W R 111, 1 I R 110-111. Cas. 115-A I R 1926 Cal 705, *Ghulam Haider v Emperor*, 1 I R 110-111.

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L. J. 205 Deposition in a civil suit is

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 Evidence Act,

right and opportunity to cross examine and the questions in issue were substan-
 tially the same in the first as in the second proceedings *Chakauri Singh v*
Suraj Kuar, 2 A L J 91. If that fact is a statement made by a person who is
 not called, or cannot be called, the statement cannot be admitted unless it

78 Ind Cas 178 The Sessions Judge before transferring the deposition of a

section a party's deposition in a previous suit can be used against him in a

THE INDIAN EVIDENCE ACT.

S. 33. subsequent suit as his admission. *Soojan v. Achmat*, 21 W. R. 414, *Asst Moharaj*, 36 C L J 186; *Exp Hall*, 19 Ch. D 583.

Relevancy. Even where primary proof is practically unavailable, the secondary actually offered is not necessarily admissible. It must, in addition, be relevant. It is essential that the fact tendered in evidence as secondary proof be relevant, both objectively and subjectively, to the existence of some *res gestae* or constituent fact. *Morgan v. Nicholl*, L R 2 C P 117. Objective relevancy, being in the matter of natural law, of the reality of things, is assumed and but little classified or, indeed, discussed. Subjective relevancy is however more carefully scrutinized, in its two essential requisites of adequate knowledge, and absence of controlling motive to misrepresent. When these administrative, and Relevancy are introduced, secondary evidence which was not relevant evidence in the second proceeding.

Small v. Narain, (1819) 13 Q. B 840.

Waiver

A competent

injection is that of a witness received at a trial, they cannot be excluded subsequent trial. In the same way, an observer, "expert" so called, on a fact it cannot be rejected as improper in its admissions, on a subsequent trial. *Chamberlayne*

presiding judge to be further invited in the

It will be remembered that it is frequently a loss to the cause of justice and the rights of the opponent should be made within reasonable time.

Objections

He acknowledges the fact upon his testimony might, and shall stand under oath, and shall be a false statement.

Small v. Narain, 13 Q. B 840; *Small v. Welsh*, 17 Mass 160 (1867). The opponent can take objection to leading questions (*Small v. Narain*, 13 Q. B 840); hearsay (*R v. Crook*, 71 J P Rep

152); or statements of the contents of unproduced documents (*Stein Keller v Newton*, 9 C & P. 313; 319; *Tuften v Whitmore*, 12 A & E 370), *Phy Ev*, 7th Ed. 425. S.

to judge its propriety. *Mol*
Cal 756=32 Cr L J. 233,
that under this section the

In order to enable
the ground for its
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I. R 1930
It is necessary
in admissible

and fast rule for the application of this section. Each case must depend upon its own facts and the matter is essentially one for the exercise of the discretion on the part of the presiding Judge. *Jati Mahi v Emperor*, 33 C W N 1215

Affidavit An affidavit of a person who died subsequently and who has not been subjected to cross-examination is not admissible under ss 32 and 33 of the Evidence Act. *Doraiswami v Balasundaram*, 38 M L T (H C) 275=102 Ind Cas 243=A I R 1927 Mad 507=52 M L J. 477, see also *Mir Abdul v Musst Bibi Sona*, 2 Ind Cas 897

jointly tried,
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I R 1929
117, *Ponnu*
am v Umar,
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ch witnesses

are alive *Lakshmi devamma v Krishnah*, 39 M L T 198=104 Ind Cas 518 Any irregularity in the admission of such evidence is cured by consent of the parties. *Radha Krishen v Kidar Nath*, 22 A L J 761=L R 5A 536=48 A 815=80 Ind Cas 874=A I R 1924 All 845, *Pannuswami v Shegaram*, 41 M. 610 The provisions, of this section are intended for the benefit of a party to a suit and he may waive their benefit at any rate in a civil is involved. *Jamab Bibi v Hyler* T 23=56 Ind Cas 957=1920 M *Gopal*, 24 B 591=2 Bom L R 924, J 1 But that is not the rule in criminal matters. *Kottammal In re*, 69 Ind Cas 636, see also *Reg v Bernard*, 4 Moo P C N S 460, *Queen v Bushnath* 12 W R Cr 8, *Deputy v Upendra*, 12 C W N 140; *Mokshed v Emperor*, A I R 1930 Cal 756; *Ghillum v Crocen*, A. I R 1929 Lah 542; *Annani v E*, 39 M 449

33. Case, the evidence was rejected, because the witness could give the effect only and not the words. But it may be doubted whether such minute particularity is requisite, for the very words could seldom be remembered after a lapse of time. Where a note has been made by a reporter or a short-hand writer he could of course use the note. . . . short-hand writer might . . . A & T 275. *Nort Ex* . . . prove what is deposed

put at the head of a deposition, form no part of it and are no evidence to prove the facts stated. *Magbula* . . . N 241-6 Bom L R 238, 1 . . . 357; *Chalor v Emperor, A.* . . . v *Abdul*, 50 Ind Cas 431. . . . sition, the identity of the person . . . *ballav v Akshay*, 30 C W N 254

of
 said
 of
 while a written record of what is said abides *Litera scripta manet*. Some forceful remarks on the superiority of written over oral testimony will be found in the case of *Bunwara Lal v Maharajah Hejnaram*, 7 M. L. A 156; *Nort Ex* 194.

Judicial Proceeding. The evidence taken in the proceeding . . . before the revenue authorities (Court to recover possession by person in the revenue Court. *Saru Khar* 1928 Lah 43. Where certain who had no jurisdiction to conduct a proceeding is inadmissible on a retrial before a competent Court. *Buta v Crown*, 27 P. L. R. 447-7 Lah 396-397. . . . Cas 752-27 Cr L J 1163-A . . . 3 M 48; see also *Empress v* 694. The evidence taken in the conditions and for the purpose of 33, previous evidence is . . . the person gave the

Nga Pu, 22 Ind Cas. 675-7.

completed. The moving party may have abandoned the proceedings. *Chamberlayne's Ed* § 1652.

Before any person authorised by law. It is not necessary that the evidence should have been given in a judicial proceeding. Any deposition taken by a Magistrate in his ministerial capacity could be receivable, if not excluded on any one of the grounds mentioned in the section. So a deposition taken before a Coroner (*R v Rig*, 4 F. & F 1985; *State v Campbell*, 1 Rich 124, R. v *Butt* 61 J P. 608; but see *R v Cowle*, 71 J P. 152), a British Consul of Zanzibar (*Empress v Dossay*, 3 H 334), a Special Registrar (*Jeheto v Jaifanessa*, 15 C W N 605. *Jeheto v Jaifanessa*, 20 Ind Cas 661; *Lanka v Lanka*, 42 M. L. C. 100), an arbitrator (*R v. Amanulla*, 12 B. L. R. App. 15), or a Commissioner

appointed under Civil Procedure Code to take down evidence (Civil Pro Code, Order XXVI), a revenue officer in a mutation proceeding (*Mamta v. Wazir*, 65 Ind Cas 308), is admissible in a subsequent case So noted by a Court which *Keraga*, 54 M. 561 In n by the Commissioner *Nundo*, 2 C W N. 239; C W N 794) but in

compel or not in practice employing cross examination as a part of its procedure
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er its
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Judge
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one of the constitution of Courts and their officers *Wigmore* § 1376 "It is sufficient if the point was investigated in a judicial proceeding of any kind, wherein the party to be affected by such testimony had the right of cross-examination" *Chamberlayne's Ev* § 1652

law
law.
and
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of Civil Procedure Code lay down the rules which must be observed in taking down depositions in civil cases When any deposition is taken in accordance with law, the Court shall presume that the document is genuine (*Vide* s 80 of the Evidence Act) See also *Dosghat v Emperor*, 52 C 490, *Emperor v Phaguna*, 89 Ind Cas 1043

When the witness is dead Evidence given by a witness in a previous action
proceeds
Steph
deceit
evident

Wigmore § 1103, *Gilbert's Li* 60, *Lord Morley's Case*, *Kelying* 55, *Fry v. Wood*

33. 1 Atk 441, *R v Castro* (Trichborne Case), charge of Chief Justice, II 40. Such depositions cannot be admitted in the subsequent suit when the witnesses are living and their evidence is procurable. *Hurish v Tara Chand* 2 B L R App 4; *Chakauri v Suraj*, 2 A L J 91. *Bhoobun Moyee v Ambica* 23 W R 343, *Mahomed v Iatan*, 1. The evidence of witnesses given before a Magistrate, if fresh charges have been added: *Empress v*

Li is well. *Chamberlayne* § 1634

Absence of a witness permanent, and such as to prevent the deposition upon him may be a sufficient justification

French, 2 C & K 1008. The deposition by a person where he denied on oath that he had presented a certain petition in Court which purported to be from him is held to be inadmissible as evidence when such person might have been brought into Court, but was not. *Bhoobun Moyee v Ambica*, 23 W R 343.

Illness. Illness, by causing inability to attend has the same effect as death. *Lord Morley's Case* *Kelvin v Wood*, 1 Atk 415. *R v Savage* 5 C & P 143, *Ro contra Doe v Evans*, 3 C & P 1. The phrase usually employed as the application of the principle should be left to the trial Court's discretion. *Thornton v Britton*, 144 Pa 130. *Gre v*

need only be in probability such that the trial cannot be postponed is a question for the determination of the Judge. *K. B 531, R v Stephenson*, L & C. 188. *R v* able to travel if the only

mined testimony or deposition, and would probably be much less. *Mathews J in Miller v Russel*, 7 Mart N S L 369. *Higmore* § 1408. *also Fry v Wood*, 1 Atk 445, *R v Savage*, 5 C & P 143; *R v Harris*, 4 C & P 440, *R v Harney*, 4 Cox C C 441, *R v Ullmer* 4 Cox Cr 441, *R v Stephenson* 9 Cox Cr 156, *R v Bull*, 12 Cox Cr 31, *R v Welton* 9 Cox Cr 206. *R v* 12 Cox Cr 206. *R v* 13 Cox Cr 187. *R v*

his previous deposition was not admitted. *R v Thompson* 15 Cox. *R v Farrell* 12 Cox Cr 606. A temporary illness will not excuse attendance and examination of a witness. *Empress v Pyarilal*, 4 C L R 501, *Empress v Ashgur*, 11 C 774=8 C L R 124, *Harrison v Blade*, 3 Camp 457. *R v* 5 C & P 143, *R v Tail* 2 F & F 533, *R v Wilson*, 12 Cox 622.

Cannot be found. Inability to find the witness is an equally sufficient reason for non production, by the better opinion (*Oate's Trial*, 10 How 4. *Tr* 1285, *Anon*, *Godbolt* 236; *Gilbert Evidence*, 60, *Buller N P* 239, *The* *from*

State, 33 Ark. precedents (Lord Scaife, 8 Q B is usually and If the witness or the purpose by the party's to recognizing ween party and been no collusion force Wigmore "e dead to him"

on Godbolt, 326 This principle has also been accepted by Jeffreys L. C. J. Oates Trial, 10 How. St Tr 1237, on the assurance of Oates to the effect, I cannot any cannot when

ent and unsuccessful search
1, Wiedemann v Walpole,
But in England the above
R v Scaife, 17 Q. B 238;
v Austen, 7 Cox 55, R v Hogan, 8 C & P 167; Phip Ev 7th Ed. 425.
it in India there is no difference between civil and criminal cases.

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also renders
Gallagher,
1 Pa 112, Cent R Co v Murray, 97 Ga 326, Eung v Duhl, 76 Pa 373;
rayton v Wells, 1 N
ve the same eff
Pa 378; contra,
6, Greenk. Ev
tified of the fact
order that this
no dispensation
se the deposition or report the testimony as a record of past recollecti
Wigmore § 1409; State v N O Water Works Co 107 La 1; Jack v. Woods, La
a 378; contra, Cool v Stout, 47 Ill 531; Stearns Lumber Co v Houllett, La
E 217.

Loss of faculties necessary for testimony The same result follows
a witness loses his voice (R v Cockburn, 7 Cox Cr C 265), hearing (R
ockburn, supra), eye sight, so far as necessary for the examination of documents
Ansman v Crooke, 1 Ld Raym 1166, Houston v Blythe, 60 Tex 46; or
culty essential to the giving of testimony Chamberlayne's Ec
Wigmore § 1108. Where evidence was given before a committing

S. 33. but in the Sessions Court the witness proves shy and speechless, this does not apply to the case and the evidence cannot ipso facto be treated as evidence at the Sessions *Moti Ram v. Emperor*, 75 Ind Cas 152-4 C L J 901.

Incapable of giving evidence The capacity to give evidence mentioned in section 33 of the Evidence Act need not be a permanent one; something of permanent incapacity might satisfy the words of the section "incapable of giving evidence" *In the matter of the petition of Asgur Hossein*, 6 C 774 C L R 124, but see *In the matter of Pyari Lal* 1 C L R 504, where it was held that the words "incapable of giving evidence" in section 32, Evidence Act, denotes an incapacity of a permanent kind. The Court has no doubt

if it is proved to be either actually impossible to produce him, or so difficult to do so, or if it is unreasonable to insist on his production. *In the matter of Pyari Lal*, supra

Kept out of the way by the adverse party If the witness has been

case where three prisoners were indicted for felony, and a witness, one of them, the Court held that the evidence of the witness against the other two was admissible. *R v Scarfe*, 2 Den 281-17 Q. B. 238-5 Cox 243 S C, *Ex parte Larlin*, 1 Arn M & O 403, see also *Lord Morley's Case*, 6 How St Tr 851; *R v Harrison*, 12 How St Tr 851; *Green v Gatewick*, B N P. *R v Gutteridge*, 9 C & P 473; *Taylor* § 478. The proposition that the witness be kept out of the way by the adversary, his former statement on oath will be admissible, rests partly, on the authority of several decisions both in civil and criminal Courts, partly on statutory analogy but chiefly on the broad principle of justice which will not allow a party to take advantage of his own wrong. *Taylor* § 478, *Green v Gatewick* § 163(g); *U S v Reynolds*, 1 Lush 322. Where it appeared that the witness who was related to the accused was as part of the evidence in the case, the Court held that the evidence of the witness was admissible. *3 Abbas Mandal v Emperor*

131 Ind Cas 855-35 C W N 143-A. I R 1931 Cal 473

Proof of unavailability If the witness is dead or the deposition is of course inadmissible in consequence of the former testimony is offered, *3 Abbas Mandal v Emperor*

J in Dunn v Dunn, 11 L. process of the Court, his previous deposition is inadmissible. *Blagrove v. Blagrove*, 1 Deg & Sim 252, 259 Under this section, the evidence of an absent witness taken in the Magistrate's Court cannot be received in the Sessions Court without proof of the circumstances which make it admissible. Such circumstances should be proved like any other fact by the evidence of witnesses and a mere report that a witness is dead or absent is not sufficient.

Queen Empress v. Nag Po, L B R (1872—1892), 134 *Khem Singh v Emperor*

S. 3

dia and an argument based on the
here *Alyan v King-Emperor*, 31 C
766—A I B. 1927 Cal 679, R v
oakes, (1917) 1 K 581, but see *R v Cohen*, 34 L J. 623 A previous
position can be admitted in evidence only under the provisions of
of the Evidence Act, but before it can be placed on record of a criminal
d been made on
at in spite of
or that he was

incapable of giving evidence,
his presence could not
high, under the circumstance

Thulam v Emperor, A I R 1929 Lah 542; *Annau v Emperor*, 39 M 449—
v *Emperor*, A I R 1929 Mad 32=46 M. 117;
437—A I R 1925 Lah 418, *Emperor v.*
Crs 161=15 Cr L J 713, *Falconer v Hanson*
pole, 1891 Times, June, 15, *Bishan Das v. Ram*

06 P R 1915.

Official duty etc Inability on the part of a witness to attend a trial
owing to requirements of official duty, will usually be deemed sufficient adminis-
ry evidence of his former testimony

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ing the attendance of the official wi
1407. But in India such evidence will not be admissible when he can be
examined on commission

Presence cannot be obtained without an amount of delay or expense
It is only in extreme cases of expense or delay that the personal attendance
of a wit
prisoner

, in the absence of special
able *Per Phear J* in *Queen*
ness is no ground allowed
4 What delay or expense is
stances of each case Of
the circumstances of the case, one of the chief which the Judge has and ought to

exists, or
for which
withesses are produced at the trial *Per White J* in *In the matter of Pyari Lal*
4 C L R 504 (509—510) But where the absence of the witness is due to
temporary causes, his previous deposition cannot be admitted *And* The more

actually impossible to produce him, or to be so difficult to do so, or if it is
unreasonable to insist on his production *In the matter of Pyari Lal*, 4 C. L. R.

3. 33. 534; see also *Asiatic Steam Navigation v. Bengal Coal Co* 35 C 751; *N. 2 B. v. Emperor*, 104 Ind. C. 637—A. I. R 1927 Rang 249; *R. v. Hogg* 6 C & P 176; *Beaufort v. Crawshaw*, L. R 1 C P. 639. *Empress v. Ramu Kadh*, 3 W. R. 509. So where a witness is procurable his subsequent deposition is not admissible. *Bhoobon v. Ambica*, 23 W. R. 343; *Emperor v. Nandu*, 2 A. L. J. 509. The whole notion of taking depositions is that they are a provision in advance for obtaining testimony from one who will not be available at the time of the trial, i. e., in the traditional phrase, they are taken *de bene esse*, conditional. If the witness is in fact available at the time of the trial, the principle of confrontation requires that he should be examined *in face* on the stand. This principle is constantly indicated. *Greenl. Ev* § 163(i) In certain States of the United States of America, such deposition is admissible where the personal attendance of witnesses would involve them in great pecuniary loss and involve a sacrifice of their personal interest without any person.

534.

A. I. R. Co v. Bussen, 30 C. A. 111. The notion that any witness has a duty to the community is not a part of the common law.

Proviso—Para (1) At common law testimony given by a witness in a civil or criminal proceeding is admissible in a subsequent, or in a later stage of the same trial, in proof of the facts stated, provided that the proceedings are against a person not a party to the first trial.

That cannot be done for this reason because such person has it not in his power to cross-examine. *Gooding v. Moss*, Cowper, 592. So "examinations upon oath, except in excepted cases, are of no avail unless they are made in a cause or proceeding depending between the parties to be affected by them and where each has an opportunity of cross-examining the witness." *Per Lord Kenyon L. C. J. in R. v. Eriswell*, 3 T. R. 707. The law on this subject is thus summarised by Chief Baron Gilbert: "When you give in evidence any matter sworn at a former trial, it must be between the same parties, because otherwise you dispossess your adversary of the liberty to cross examine." *Gilbert Ev* 68. So a deposition cannot be given in evidence against any person that was not a party to the suit; and the reason is because he had not liberty to cross examine the witness, and it is against public policy to allow a witness to be examined in a cause to which he was not a party.

would have been more accurate if it had been "cross-examination and estoppel interest." Here the effect is the same as that of *res judicata* and estoppel in interest. In fact they are the same. *Ev* 190. *L. T. 510—101 Ind. Cas. 11*. *Acholl*, 2 L. R. C. P. 11. Parties, is really meant personal parties, is really meant personal parties, having different rights and with whom the plaintiff had no privity, and he had no opportunity to examine or cross-examine the witness it would be contrary to the interests by the parties being the same in this case. *Per Hunman C. J. in Lord v. Brainerd*, 30 Cox 343. *Gilchrist J* laid down by *Gilchrist J* testimony be given under oath in a civil or criminal proceeding against the accused is admissible in evidence in a subsequent trial if the witness was not a party to the first trial and the parties to the second trial are different from the parties to the first trial.

igh the pros-cutor in the second case is the

Queen Empress v Bhabhutgar, Rat Un

To satisfy the requirements of this section the

unst the same parties or their representatives in

interest, at the time when the suits are proceeding and the evidence is given.

Sita Nath v. Mohesh Chunder, 12 C 627; *Queen v Ishri*, 8 A. 672=A W. N. 1886, 257.

Where the parties of the present suits were not parties or representatives of the parties of the previous suit, in such a case, a deposition made in the former

suit is not admissible in evidence in the present suit *Mrimoyee v. Bhooban*

Moyce, 15 B. L. R 1=23 W. R 42; *Queen Empress v. Ishri*, ■ A. 672 A W.

Bom L R 599 (601).

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The parties may be
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hrs. *Ibid*

The parties are deemed to be the same when those between whom the evidence is offered were on opposite sides in the former case, and a judgment or

may not have an opportunity to cross examine the witness, yet the person in

lity could not be used by the defendant therein, "as a man who cannot be prejudiced by a deposition or proceeding in a suit shall never receive any advantage from it." *Gubb Ft.* 55; *Brown v Johnson*, 13 Gratt. 641; *Burr Jones* § 683.

in both the proceedings *Morgan v. Nichol*, L R 3 C P 117, see also *Fool Assory v. Nobin*, 23 C 441, *Patinharkurn v Raman*, 24 Ind Cas 519 "The requirement of identity" says *Prof. Wigmore* of parties is after all only an accident or corollary of the requirement as to the identity of issue. It ought, then, to be sufficient to inquire whether the former testimony was given upon such

though a different person, had the same property interest that the present

former evidence *Mutatis Mutandis*, the rule is the same where a party whose omission from the record fails to alter the issue or the opposing party's right of cross-examination has been dropped in the second case *Chamberlayne's Ev* § 1671

been satisfied *Moore v Triplett*, Va, 23 S E 69 So the general principle is that in all cases where the party has without his own fault or concurrence

Greenl. Ev 163(f) The doctrine requiring a testing of testimonial statements by cross examination has always been

or be shaken by cross examination declining, he has had all the benefit of examination of that *Moule*, 1 Drew 472, law is that no examination of both examine and has if he had cross-examination opportunity of *Vaughan*, 1 M. & S. 6, *Empress v Jhuba*, 8 C. 739.

S. 33. "A deposition is considered a partial representation of fact, as to all parties who
Per
Dr

taken in former suit depends upon the fact that the adverse party, or those privy with him, had the opportunity, to cross-examine the witness, if it appears that the deposition was taken without authority, or without the sanction of the court or without such chance of cross-examination it should not be received.

proceeding provided that the adverse party in the first proceeding had the right and opportunity to cross-examine. That the accused had the opportunity of cross-examining this witness, is I think quite clear. He was asked to do so but he refused to do so. But I think it is also clear that at the stage at which the case had arrived he had no right to cross-examine. Now as far as I can see the accused in a warrant case has no right to cross-examine the prosecution witness until after the charge is framed... No doubt s. 256 (Cr. Pro. Code) does not prohibit cross-examination at a previous stage but that is not the same as saying that the accused has any right to cross-examine. I am of opinion that no such right is reached the accused has no right to cross-examine in the present case the accused had no right to cross-examine.

under s. 33" But in *Manjal*, was examined by prosecution the charge it was discovered unable to answer the charge.

must also be right to do so. *Das Bahadur v. Bijai Bahadur*, A. I. R. 1934 C. F. 9-21 C. W. N. 260. In this case the court held that the accused must also be right to do so. *Das Bahadur v. Bijai Bahadur*, A. I. R. 1934 C. F. 9-21 C. W. N. 260. In this case the court held that the accused must also be right to do so.

is dead and the opposite party had an opportunity of cross-examination though he did not avail himself of it. *Tafiz v. Emperor*, 50 C. L. J. 541 (Cal.) 1907 W. R. 117.

but was not cross-examined by the defence, his deposition is admissible under s. 30 in the Session's trial, even when the Sub-inspector does not cross-examine him. *Tafiz v. Emperor*, 50 C. L. J. 541 (Cal.) 1907 W. R. 117. A deposition taken in an *ex parte* proceeding cannot be used under this section in a subsequent contested proceeding between the same parties.

where other conditions of the section are satisfied *Raj Mungal v Mathura*, 13 S. A. L. J. 881.

, if not admitted, must be proved, before

3 The deposition of a witness obtained and forming part of the Evidence Act, provided *Empress v Ram Chandra*,

19 B 749, see also *Queen Empress v Basvanta*, 25 B 168=2 Bom L R 761

In an enquiry under Chapter XVIII of the Criminal Procedure Code, a witness was examined by the prosecution but he was not cross examined by the

accused had the opportunity to cross examine a witness examined by the prosecution, where the accused did not cross examine any of the prosecution witnesses, and was not asked by the enquiring Magistrate to exercise his right of cross-examination *Ibrahim v King Emperor*, 17 C W N 230=18 Ind Cas 406=14 Cr L J 70, see also 2 Weir 755 Deposition of a witness can be taken in the absence of an accused who has absconded When such a deposition is to be used in a subsequent case, it is necessary to establish that when that deposition was taken, the accused had absconded, and after due pursuit could not be arrested *Queen v Eluarce*, 21 W R Cr 12, *Queen Empress v Sahib Singh*, A W N 1896, 182, see also *Ghurbin v Q E*, 10 C 109

Failure of cross-examination There may have been an adequate opportunity of cross-examination, so far as depends upon the nature of the tribunal or

stances preventing adequate cross examination *Wigmore* § 1390

S. 33.

who
Per
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that

oath, or without such chance of cross-examination, it should not be received although if due notice was given, it is not necessary that any cross-examination should have been actually made. *Fitzgerald v. Fitzgerald*, 3 Swab & T 5 (1870) also *Lawrence v. Maule*, 4 Dr 170; *Macmillan v. Inton* 6 M & G 27 (1811)

33, Evidence Act, the statement of a witness, if relevant in a subsequent proceeding provided that the adverse party in the first proceeding had the opportunity to cross-examine. That the accused had the opportunity of cross-examining this witness, is I think quite clear. He was asked to do so, he refused to do so. But I think it is also clear that at the stage at which the case had arrived he had no right to cross-examine. Now as far as I can see, the accused has no right to cross-examine the prosecution witness at this stage but that is not the same as saying that the accused has any right to cross-examine. I am of opinion that under the stage of the case provided for in s 256 is reached the accused has no right to cross-examine. That being so in the present case the accused had no right to cross-examine. Mr. Value is not admissible in evidence.

dur v. Bazar Bahadur, A 1 R 1929 (where 510, 511)

adverse party had both the right and the opportunity to cross-examine. So a deposition of a witness is admissible under this section when the witness is dead and the opposite party had an opportunity of cross-examining him though he did not avail himself of it. *Ind Cas 743=A I R 1929* *Q E v Ram*, 19 B 749

524=A I R 1929 208 of the Cr P Code is not admissible under s 30 in the Session's trial, even when the Sub-Inspector died at the Session's trial. *Tafiz v Emperor*, 50 C L J 534=A I R 1904 228 A deposition taken in an *ex parte* proceeding cannot be used under this section in a subsequent contested proceeding between the same parties.

opponent is also entitled to cross examine the interpreter so as to test the correctness of the translation, and to call other witnesses to verify the interpretation. *Wigmore* § 1393

Whether the deposition of a witness who cannot be cross-examined on account of some organic defect, such as defects of speech, hearing or the like, should be admitted in evidence, it is for the trial Judge to decide. *Quinn v. Halbert*, 55 Vt 228. The same principle also applies when the accused is deaf or dumb or blind. *Bells v. Murphy*, 201 U. S. 123; *Wigmore* § 1393

Sundry insufficiencies of cross examination Where a party is absent from the Court at the time of the cross examination, but his counsel is present, he can . . . a witness Still in . . . Co. 429, 133 But such . . . a witness taken in his absence is read over to him and liberty is given to him to cross examine the witness *R. v. Smith*, R & R 374; *R v. Forbes*, Holt, 599 In *R v. Hoke*, 1 Cox. Cr 226, *Earle J.* said: 'The reading of it in the prisoner's presence is equivalent to the taking of it in his presence' The object is to afford to the

Id. Failure to take advantage of a known opportunity for cross examination wishes no ground for modifying the ion that the party in question had no assistance such an opportunity for ces, be a very barren privilege Nor is was embarrassed by the absence of his lawyer and was not afforded an extended time in which to exercise the option to cross examine personally The existence of such informative consideration is not deemed inconsistent with the reception of the evidence upon a subsequent trial Where the party to be affected by the secondary evidence has announced an intention to take no further part in pending proceedings, subsequent tender of opportunity to cross examine is regarded as having been expressly waived

cross examine Where a witness leaves the country after the charge and ho xpense, his deposit on before this section *Nga Da On v Bur L J 114-A I R 1927* Ring 248

Section 33 whether controlled by s. 350 The general provisions of section 33 of the Indian Evidence Act are not in any way affected by section 350 of the Code of Criminal Procedure *Lelal v Crown*, 101 Ind Cas 183-28 P. L R 199-28 Cr. L J. 451-A I R 1927 Lah 332-8 Lah 570

an opportunity of examining and cross-examining on the very point on which their evidence is adduced in the subsequent proceeding though separate proceedings may involve issues, of which some only are common both, the evidence of those common issues given in the former proceedings may, on the conditions mentioned in s 33 arising, be given in the subsequent proceedings. *Ram Reddi v. Seshu Reddi*, 3 M 43-2 Weir 756-2 Weir 451. Unless the issues were then the same as they are when the former deposition is offered, the

s. 33. cross-examination would not have been directed to the same material points of investigation, and therefore could not have been an adequate test for exposure of inaccuracies, and falsehoods *Wigmore* § 1386 It is absolutely necessary that the former statement was sufficiently tested by cross examination upon the points now in issue. It is sufficient if the issues were the same or substantially the

R v D-J-7 C 12-8 C L R 273, Wig
1 tl
2 f 1
4
in
Dos v Foster, 1 A & E 791; R v.
6 Cox Cr 52; R v Beeston, 6 Cox Cr 1
Castro, Trichborne Case; Brown v. Whit,
2 Cr App. 257, Wig
 thus a deposition on .

grievous bodily harm,
 facts *Phap Fv 7th Ed 124* citing, *R v Smith, Rus & W.*
4 F & F 63, R v. Beeston, 24 L J M C 5, R v. Dilmore, 6 Cox 52, R v
Williams, 12 Cox 101

In *R v Beeston, 6 Cox Cr 425*, deposition of a witness on a charge of
 intent to do bodily harm, was admitted on a trial for

he would not
 same case, and
 has had full opportunity
 said. "The question
 circumstances that the
 situation" says *Prof*
 in the application of the rule, and not a narrow and pedantic
 the whole the judicial
 already adequately
Wigmore § 1387
 the same, it is always a useful test to see whether the same evidence will prove
 the affirmative of the issue in both *Field Ev 6th Ed 149, Wordroffe Et*
Ed 356, R v Rochia Mohala, 7 C 42-8 C L R. 273, Dos v Foster, 1
A & E 791

Depositions of deceased persons are not admissible under s 33 of the
 Evidence Act unless the subject-matter of the dispute in the two suits is the
 same and also the subsequent suit is between the same parties or their repre-
 sentatives in interest
 suit under s 9, Act
 at a former case
 since dead, is admissible
 23 C 441

the purpose of excluding

Markby Ev p 33.
 and on behalf of F
 own behalf for assau
 these charges F
 of the same house under section
 institution of the civil suit

STATEMENTS MADE UNDER SPECIAL CIRCUMSTANCES.

34. Entries in books of account, regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability.

Illustrations.

A sues B for Rs. 1000, claiming that B is indebted to him for Rs. 1000, without other evidence.

Principle. "The reasons justifying the admission of this class of statements are not as clearly defined by the Judges as in other Hearsay exceptions § 1522. It has already been stated as an exception to the Hearsay rule, -

circumstantial guarantee of trust-

On the face of it, in this class of

In such a case the situation is

nowhere, even though a desire to state falsely may casually have subsisted,

related motives which
probable trustworthiness
habit and system of

real inaccuracies and to counteract

since the entries record a regular

course of business transactions, and error or misstatement is almost certain to be detected and the result disputed by those dealing with the entrant; misstatements cannot safely be made, if at all, except by a systematic and comprehensive plan of falsification. As a rule, this fact (if no motive of honesty obtained) would

8 Ind. Cas 81-13 C. L. J. 139.

"It is recognized that to use a system of regular accounts to sustain a

S. 34.

In case

... as a party's own kind of evidence ... witness for him ... evidence obtainable from others, certain past statements of his must be admitted by very necessity. Thus the principle of necessity and the principle of circumstantial guarantee were both recognized.

... rule was established before it ... therefore be understood only by keeping Courts in establishing it was precisely more § 150 admissible

in the affairs cases the book it being practi

... of a completed transaction. *Chu*

... motives for untruth and adding certain ... *Per Tindal C. J. in Peole v. Peole* 1 Bing N. C. 6

... were living or dead. But there was more abuse of this evidence in "leaving the books uncrossed and any way discreditable and still suing for the claim; moreover, the whole proceeding was paraded as involving the making of evidence for one's self, for 'the rule is a man cannot make evidence for himself.' In 1603, Stat. Jac. I. C. after reciting these considerations, forbade this use of shop books 'in action for any money due for wares hereafter to be delivered or for

hereafter to be done," except (1) within one year after the delivery of the wares or the doing of the work, (2) where a bill of debt existed (3) between merchant and merchant, merchant and man," for matters within the

1 C 4 § 22 and 16 Car I

that a man cannot make evidence complete, by refusing to recognize these books at all, after the expiration of the year. In the lower Courts, where the jurisdiction was limited to small used (*Vide Thayer, Cases on Evidence*, the historical material), and a recent (to an extent somewhat indefinite) in the upper Courts (Rule of Court, 1853, Ord 33, R 3; Ord 30, R 7 as amended by Rules of July, 1902) But before the end of the century of the above Statute,

where there was such evidence (entries) by a servant known in transacting the business, such entry, from time to time, re that servant, the servant or agent usually employed in such business, was intrusted to make such entries by his master, (and) that it was the course of trade,—on proof that he was dead and that it was his hand-writing, such entry has been read (which was *Sir Bby Lake's Case*) And that was going a great way, for there it might be objected that such entry was not by reason of the fact that it was gone so far," rty But already *Williams, Comb* jory, *Perke Add* and, 3 B & Ad 890, the matter was placed as of the exception was understood as since deceased, in the ordinary course of fully unconnected with the parties, or the clerk of a party, or a party himself *Greenl Ev § 120b*

S. 34.

the books of merchants and tradesmen regularly kept and written from day to day, without any blank, when the tradesman has the reputation of probity, constitutes a semi proof and with his supplementary oath are received as proof to establish his demand. *Green v. F. & 119 cited in Taylor § 712* The doctrine is familiar in the law of Scotland, others, kept with a certain reason, may be received in evidence, in supplement of such imperfect proof. It seems however that such books or other

accounts,

probatio,

273—277,

evidence of a debt being due to him by entries, whether by himself or in his own books, provided the books have been regularly kept in the course of business. *Cum. Pr. 10th Ed. 175*

therein" So, even by that Act a man was not allowed to make himself by what he chooses to write in his own books behind the back of the parties. But where there was other independent evidence of the truth of a transaction to which the accounts referred they were admissible as corroborative evidence, provided the books were first shown to the satisfaction of the Court to have been regularly kept in the course of business. *Nort. Ev. 193*, see also *Duarka Doss v. Janktee Doss*, 6 M. L. A. 88. But such books could not be used as independent evidence. *Ras Sri Krishen v. Ras Hurry Krishen*, 5 M. L. A. 4. *Duarka Doss v. Darika Doss*, 2 Agr. 303; *Ramkrishna v. Hurrydo*, Mar. b. 1919; *Jagan Koor v. Raghoonundun*, 10 W. R. C. R. 148; *Allyat v. Jugul Chund*, 13 W. R. C. R. 242, *Seth v. Seth*, 13 W. R. (P. C.) 36; *Sorabjee v. Annamayi*, 13 W. R. 29 P. C., *Gopal Mundal v. Nabho Krishen*, 5 W. R. Act. X Rule 30. Account books are legal evidence to corroborate oral testimony. *Rajnarain v. Olivia*, 5 W. R. Act. X Rule 30, *Ram v. Hurry*, Marsh. 219—1 Hay. 21. *Ind. Jur. N. E. 11.*

fraud, it must be considered binding upon him. *Gopce v. Anwar*, N. S. 358.

Books of accounts as evidence—American rule. "The 'shop book' rule is that by which shop books and tradesmen's books of account, regularly and fairly kept as books of prima facie evidence, are received in evidence. The rule is regarded to the admission of evidence by the courts. The rule is very old and is in force in many countries."

going into the history of the admission of the shop-book. It is noted that the origin of the shop-book administered in this country was it seems, but from the law of Holland. It has long been the settled law.

that entries made in the regular course of business in shop-books by the clerk or agent of a person are, with proper restrictions, admissible in evidence after the ruling... It has long been the

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their
In many of the states statutes have
been entered
account in
parties to
entries to
may be in
them, since

states that books of accounts regularly

selves to charge any
rated they are still
missible They are
books of accounts are
reason with liability
It would be more correct to say that though admissible they do not establish the
facts required to be proved, i.e., that a person owned a certain sum of money,

present section
instances with no previous ruling
an entry relevant under section 34 and one relevant under section 32, cl (2) is
that in the former case the person who made the entry may be available as a
witness while in the latter case he is not. I find it very difficult to appreciate on

Sridhar, 28 B 294 and has been accepted as correct in *Daji Bhai Kharis v Govil*,
Narayan, 10 Bom L R 811, *Dukha Mandal v W N Grant*, 16 C L J 21 and
Allooli v Tarak Nath Ghosh, 17 C W N 774-16 C L J 329, and it is
perhaps too late to contest it. If this other view is adopted it should be held

34. *Sen v. Bijoy Chand, supra*, see also *Jainab Biswas v. Sita Kumari Devi*, 46 C L J 253=101 Ind Cas 733=A I R 1927 Cal 855, *Manichand v. Parakaji*, 9 Mys L J 337. It is essential in every case where reliance is placed upon books of account in the course of business; the entries themselves removed by the admission of the opposite party. *Bibi Inambandi v. Hira Motasuldi*, 15 C L J 621=13 Ind Cas 678. Under the Indian Evidence Act entries in books of account regularly kept in the course of business are admissible in evidence, not only for refreshing the memory of the witness, but also as corroborative evidence of the story which he tells. Books of account which profess to record facts relating only to the particular transaction in question are less reliable than a book where in the same is recorded in common with other transactions in the ordinary course of business. *nathan*, 29 C 331 P C=6. It is not necessary in a written and that they were kept in regular course of business. If a *goma* and a member of a firm were examined and depose that the accounts were regularly kept, the accounts may be held to have been proved in the absence of evidence to the contrary. *Biccha Lal v. Jas Pershad*, 45 P R 1899. A party who calls for an account book is bound by all the entries contained therein. *Shib Pershad v. Promotho*, 10 W R 193; *Rameswari v. Bal Kishun*, 9 A 713 P C.

Account books. the Privy Council in *Jaswant v. Sheo Nara* are instructive as to the variety in account-book al value, but merely a man's private record, p and convenience. "Other accounts may be so kept, and may so tally with external circumstances, as to carry conviction that they are true." And, the Lordships continue, "the Evidence Act, section 34, therefore, enacts that entries in books of evidence, The admis to the general rule laid down in section 34, is that the words "the words paper bound by tearing a p in the sense of portfolio, or clip, or strung together on a piece of twine which is intended at will, would not in the ordinary English, be called a book. But so narrow a signification would not do in India, where accounts are often kept on sheets of paper laced or threaded together in a manner which allows removal of any sheet at any time by the nature of a book. Of this class are the books of practically every Ma in the English Copyright every volume, part or div of music, map chart, or for the convey Act, and w enacting sect even the Ma not made in intended not to be taken apart at any time for any purpose." *Idem*, *supra*.

however to say what is not a book for the purpose of section 34, the hesitation in holding that unbound sheets of paper, in whatever quantity, filled up with one continuous account, are not a book of account within the purview of section 34.

account of reli.

ing substantive evidence on which reliance may be placed. A private diary may be most regularly kept and contain made, of the utmost value. It may be used as a witness or refreshing his memory and others of the Evidence Act; for such user does not make the document itself evidence. (*Cf. Ramji v. Rangayya*, 1 M. H. C. R. 168). It may also come in under section 32 (2) if the requirements of that section are satisfied. But no entry in such a diary can be filed as documentary evidence of the facts stated in it in favour of the person making the entry if he is a party to the suit. It would be excluded by section 21 of the Act, and section 34 provides no exception in favour of it. The reason for such differentiation between a private diary and a private account is manifest. An account, regularly kept necessarily results in a continuity which makes fraudulent addition extremely difficult and dangerous, it is a chain of forged links into which the subsequent interpolation of a link of forgery without discovery is almost impracticable. The man who wishes to defraud his neighbour accounts, or, having kept them, suppresses them. A book of account, on the other hand, with truth in regularly kept account popular, because of the mathematical connection running through them. But these safe-guards of truth are entirely absent in the most regularly kept of private diaries, and subsequent interpolations, to meet an unexpected demand and facilitate fraud, are generally possible without difficulty and danger of discovery. It is clear that the Legislature, which guides itself by human experience, had such considerations before it when it enacted, by section 34, an exception to section 21, in favour of books of account. I am therefore of

discovery are not admissible under sec 34." *Per Stanyon & J. C. in Mukund Ram v. Dayaram*, 23 Ind. Cas. 893 (891, 895) = 10 N. L. R. 44.

... of business
... been kept
... and not as in-
... 'regularly
... kept,' and in-
... and not "proves." It is
... 34 of Act I of 1872 = not
... Act II of 1855, and this seems
... section 31, indicate that the
... regularly kept in the course of
business—in the first place, making them relevant whenever they refer to a matter into which the Court has to enquire, and next, providing that when such entries are sought to be used as statements for a particular purpose—namely, to charge any person with liability, they shall not alone be sufficient evidence for the purpose. Section 32, clause (2) makes relevant a statement consisting of an entry made by a person who is not a witness before this Court, in books not necessarily books of account but—kept in the ordinary course of business. A

S. 34.

Per Mookejee J
the old Act I
regularly kept

"proved to have been" have been dropped. In the later Act I of 1872 the w
in the law. The legislature has dispened with. This amounts to material altera
that the book

and as appears on its face to create liability in an account with
the party against whom it is offered, and not be a memorandum for other purposes
Burr Jones § 570. The entries in the books of account should relate to the
business or occupation of the person whose books they are and not to transac-
tions of such person having no relation to his regular business or occupation.
But the admissibility of the book in respect to proper items will not be lost
because of the fact that the book contains some entries not connected with the
regular business of the party. The character of the entries is not
particular, and should itemize the
frequently

most elementary stru-
ture. Finally, when *Ganesh, 95 Ind Cas 100* evidence, but would of course

balance and general accuracy of an account-book is not admitted, it must be
formally proved. *Mukundam v Dayaram, 10 N. L. R. 41-23 Ind Cas 300*
They may be kept in the form of a ledger, if this is general mode in which the party
keeps his books, provided the entries are original entries. The entries may be
made in pencil, or in the form of a time-book, and not only of
the labour of the plaintiff.

Cash books in which the entries are not admitted, the issuance of the checks are not admissi-
evidenced by them are admissible in evidence. The statutes do not generally
prescribe the form in which books are to be kept, nor the degree of definiteness
to be observed in making entries. They have been so framed as to have a very
general application. The account-books of an illiterate labourer, as well as
those of a tradesman or a banker are admissible in evidence if within the necessary
condition, the purposes of which are to secure authenticity and credibility in
respect to the evidence, rather than to prescribe the form of it. Whatever may

be its form, it is only evidence *prima facie* of what is shown by it. Supplement- S.
ary proof may often be required to make such evidence relevant to particular
case. *Burr Jones* § 570

plaintiff that there were dealings between him and defendant, held, that the
dealings were not proved under s. 34, Evidence Act, in the absence of evidence
of specific sums having been paid. *Bulla v Trilok*, 100 Ind. Cas. 862 = A. I. R.
1927 Lah. 903; *Narayan v Fithoba*, 100 Ind. Cas. 863 = A. I. R. 1927 Nag. 177.
T. not prove anything.
H. account kept in the
n with liability. The

Firm of Jodha v Ditta, 81 Ind. Cas. 909 = 6 Lah. L. J. 501 = A. I. R. 1925 Lah.
242. This section does not limit in any way at all the nature of the material

tements in a book of account.
vouchers, receipts or other

Kallu Mal v Bhairavi, L. R.
6 A. 375 = 83 Ind. Cas. 383 = A. I. R. 1925 All. 742; see also *Tesunadiyan v*
Subba, 52 Ind. Cas. 704; *Abdul v Puran*, 82 P. R. 1914 = 277 P. L. R. 1914;
Ramaswami v Ramanathan, (1914) M. W. N. 240 = 22 Ind. Cas. 627. Where
a claim based on entries in account books is entirely denied, plaintiff must
prove the various items of his account by independent evidence, as the entries
cannot in themselves charge any person with liability. *Ganesht v. The Firm of*
Mangal Ram Atma Ram, 76 Ind. Cas. 157. In a suit for recovery of water cess,
bills entries showing that in previous years the defendant has been paying cess
at the rate demanded, are admissible in evidence. *Prabhu Dyal v Ram Chander*,

in slips of paper
the books cannot
be rejected on the ground that the entries were not made in them regularly from
day to day. *Mangal Prasad v Manjir Das*, 11 Ind. Cas. 95. Where the
plaintiffs can easily produce independent and trustworthy evidence in support of
entries in their account books, it would be unfair to defendants and wrong in
principle to accept as sufficient proof the entries, uncorroborated by any evidence

one of the plaintiffs to the effect
Ganga Rari v Kala Ram, 53

try in the pamphlet alone is not
entry which is denied. *Keshavan v*
book, not otherwise suspicious, is
supported by *prima facie* reliable
R. 1909. Entries to be admitted
for testimony must be made in the
to prove that the entries were

taken from books which were regularly and correctly kept. *Queen Empress v*
Sayed Sarjatan, Rat. Un. Cr. C. 314 = Cr. Rg. 37 of 1887. Though certain
account books are proved not to have been regularly kept in the course of
business, yet if they are proved to have been kept on behalf of a firm of contract-
ors by its servant or agent appointed for that purpose, they are relevant as
admissions against the firm. *Rey v. Harwant*, 1 B. 6, 10. If books are kept in
pursuance of some continuous and uniform practice in the current routine of the
business of the particular person to whom they belong, they are 'books of

S. 34.

that the books were kept up in the regular course of business. It is a matter of intrinsic evidence as to whether the books in question were books of account regularly kept in the regular course of business. *Emperor v. Narbada*, A. I. R. 1930 All 38. The book should be such a regular and usual account book as explains itself and as appears on its face to create liability in an account with the party against whom it is offered, and not be a memorandum for other purposes. *Burr. Jones* § 570. The entries in the books of account should relate to the business or occupation of the person whose books they are and not to transactions of such person having no relation to his regular business or occupation. But the admissibility of the book in respect to proper items will not be lost because of the fact that the book contains some entries not connected with the regular business of the party. The charges in the book must be specific and particular, and should itemize the transactions recorded. Such entries have frequently been rejected when they consisted of charges in gross for contracted services. *R. v. Jones* 8 F. 71.

have no weight. *Kesho Ram v. Ganesh* 45 Ind. C. 178-A. I. R. 1910, must 407. "FIR see that the supposed, usually called the *mahajani* system. Their evidential value must depend upon their formality and the checks against fraud secured by method of recording with admissibility. A check will be admissible. As regards of a large bank, and the day-book of a house-keeper. The difference lies in the weight to be given to the entries therein. But where the fact of regular maintenance must be

stubs of checks, several days after the issuance of the checks, are not. Cash-books in which the entries were made at the time of the transactions evidenced by them are admissible in evidence. The statutes do not generally

respect to the evidence, rather than to prescribe the form of it.

absence of recital in ■

who is not a party

the case of *Ram Persh*

restricted in the sam

621=13 Ind Cas 678; *Ah Nasw Khan v Mamk Chand*, 25 A 90=22 A W N 207; *Pragdas v Dauallaram*, 11 II 257; *Debendra v. Arun*, 1925 Cal 65; *Tarakumar v Arun*, 74 Ind Cas 383; *Kasam v Hay*, 76 Ind Cas 327; *Ganga Ram v Lachmi ram*, 19 C. W. N. 611=28 Ind Cas 705; *Imambandi v. Day* *Mulsaddi*, 28 C L J 409=45 C. 878

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causes they have a suspicious and fraudulent appearance, and are not explained they should be rejected The book may be admitted as to entries which are proved to be original, although other entries in the same book are not original, unless the two classes of entries cannot be distinguished Irregularities in account-books sufficient to justify their exclusion must be gross and palpable Books of account must, however appear to embrace all of the items of account between the parties which are proper subjects of entry The account book must

the power of
of the book
and veracity

give evidence of facts or circum-
ok is not fairly and honestly kept as a
r routine of business, subject, it is

said, to the limitation that the investigation should be confined to a time at or near the period covered by the account in suit *Chamberlayne's Ev* § 3148

Jama wasil baki papers Where certain entries are admissible under section 32, the position is that there is no statutory obligation to look for anything else in order to found the liability It does not follow that such entries should necessarily, in any event, be regarded as conclusive of the truth of the statements therein made When such entries in the landlord's papers are sought to be used against the tenant, their evidentiary value has got to be carefully

evidence to show when and by whom these entries in collection papers were

34. made Held that the collection papers were inadmissible in evidence *Attors v Tarak Nath*, 16 C L J 378. *Jama rasul bai* papers have no weight as corroborative evidence *Sunomoy v Johur Mahomed*, 10 C L R 340. *Belaet Khan v Rashbehary*, 22 W R 519. *Gopal Mandal v Nabokristo* 2 W R (Act X) 83. *Kherromonee v Beyoy*, 7 W R 533; *Umed Ali v Habibullah* 47 C 266; *Yeshuradnyan v Subba Dasler*, 52 Ind Cas 704; *Dicarka Das v Bahsh* 18 A 92. *Mahomed Mahmud v Safar Ali* 11 C 407. (409), *Fanidin Agnikumar*, 71 Ind Cas 300, *Jonah v Siva Kumar* 16 C 733 = A I R 1927 Cal 85; *Tr...*

Evidence

if the col

Taira Aas

accounts

specifically states that of itself it shall not be considered to be sufficient evidence to charge any person with liability *Bhagwat v Prasad* 15 R D 401

Account books, entries how to be proved. Where certain accounts were produced in the original Court by the plaintiff, and all that was proved was that they were in the handwriting of his father, and the books were not examined in detail in the original Court, and the particular entries upon which the plaintiff relied were not selected and exhibited it was held that the entries ought to have been pointed out and proved and evidence should also have been given in detail as to the character of the books themselves. *Hingmaji v Heramba Chandra*, 8 Ind Cas 81 = 13 C L J 139. In that case the Court in delivering the judgment said "It is essential, in every case where reliance is placed upon books of account, to establish that they have been regularly kept in the course of business. It is perfectly true that as laid down by their Lordships of the Judicial Committee in the case of *Deputy Commissioner v Parsad* 27 C 118 = 26 I A 251 = 4 C W N 417, they need not be written up from moment to moment or from day to day. But it is obvious that if they have been written up casually once a week or a fortnight, though they may be admitted in evidence, obviously they do not possess the same claim to confidence that attaches to books entered from day to day or from hour to hour. Transactions take place (*Uncher Shaw v New Dhurumsay*, 4 B 570). The proper procedure to follow therefore, is, as laid down by the Judicial Committee in *Duarka Dass v ...*

has kept the accounts or prove that the books have been regularly kept. But this is not all that is necessary, section 34 makes the entries relevant if they are entries in a book of account regularly kept. It is therefore not sufficient merely that the entries themselves have to be proved. It is moved by the admission of the original books were produced in the original Court. The plaintiff selected and exhibited at all. Obviously there is considerable laxity to have been pointed out in detail as to the character of the books closely has been applied to use ...

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were disallowed

by him soon after the *furd*, embodying the expenses, and *maskabar*, monthly accounts, were prepared. It was found that these latter accounts were kept regularly in the ordinary course of business. The *maskabars* and *rolat* books, *furd* under Mohan, it gave a decree for the plaintiff on the evidence of his account books and of his book-

going into the witnessbox was not entitled to succeed. *Hira Bhagat v. Gobind Ram*, 63 P. R. 1897

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ertain disputed items interpered in the account should not be disallowed
no specific evidence
by such fictitious items
Hanumanta v. Akbar,
O P. R. 1910-147 P. L. R. 1910-117 P. W. R. 1910. It is not a condition
precedent to accepting entries in account books as relevant under section 31,
Indian Evidence Act that it should be proved how the accounts came to be
written, and
necessary to
to be establish
who were examined as witness for the defence, was considered sufficient
corroborative evidence of the accounts to charge the defendants with liability.
Bichha Lal v. Jas Pershad, P. L. R. 1900, 5. It is unnecessary to prove, by
independent evidence, the correctness of every single item of an account extend-

for the decision of the
witness likewise observed
all account books, but
each book contained that amount of difference which was appropriate to its
character. The committee also used the better test of genuineness than the
correspondence
other evidence,
firmly the deci
I A G P C

Plaintiffs sued to recover money due as balance of a running account and

The various items entered
plaintiff, the High Court
or this section, sufficient
be evidence, however, one
of the plaintiffs having given evidence with reference to the account books,
stating the amounts advanced to and repaid by the defendant, and no question
speaking from his own
lence of a witness for the
was sufficient to uphold
Larka Das v. Sant Baksh,

Kalu v. Bhairani, 33 Ind Cas 353-A I R. 1925 All. 742, *Abdul v. Firm Ditta*, 81 Ind Cas 909, *Gopeswar v. Bhoj*, 23 B 291, *Dhuka v. Grant*, 16 C L J. P C, *Ganashi v. Firm*, 76 Ind Cas. 157; *Khumi Mal v. Duarka Das*, 1930 A L J. Corroborative proof must be given by evidence, it seems to have been deemed necessary that this corroborative evidence should be furnished if the rule itself is to apply. Confirmation of a particular item may be sufficient. In other words it was necessary for the proponent to call third persons such as those who had dealt with the plaintiffs and found their books to be correct. Where evidence of this produces the best good faith with In this connection. The book to be verified by the testimony of the witness must be the same in which the account in question is entered. *Chamberlayne's Lr* § 3096. But such entries are evidence against the person making them. *Angama v. Bharmajpa*, 23 B. 63; *Mathilda v. Gaebels*, 96 Ind Cas. 429-A I R. 1926 Mad. 955; *Jodha Mal v. Ditta*, 81 Ind Cas 909-A I R. 1925 Lah 212.

accident. *Seth Maganmal v. Darbarilal*, 24 N L R. 10-30 Bom. L R. 296-107 Ind Cas. 118-47 C. L J 222-A I R. 1928 P. C 39.

35. An entry in any public or other official book, register or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself a relevant fact.

General Principle An exception which in practice is by far the commonest in its employment is the exception admitting statements made by officials in pursuance of official duty. The principle of Necessity, which in one form or another, the death, insanity, or absent, but

attendance of the officer is corporally impossible to obtain, there is a high degree of expediency that the public business be not deranged by insisting on the strict enforcement of the Hearsay rule. *Wigmore* § 162 (m).

S. 35. The second essential for an exception to the Hearsay rule is that some circumstantial guarantee of trustworthiness be found, to take the place of a confrontation and cross-examination so far as may be. Two reasons are given by the Courts as not sufficient in this respect. The first is that public officers do not satisfy the exception.

§ 163 (a) In P.

"The law requires that the law reporter should be a public officer that it presumes they will discharge their duty with accuracy and fidelity."

charge of their public duty may be true, under such a degree of case may appear to require." Sir

"It depends upon the public duty of the person who keeps the register to make such entries in it, after Kennedy, 5 App Cas 623, F 468, Parke B said

by the register
the document
duty exists
will be used
ably the duty

Possibly the officer may not be one from whom in advance an express warranty of office is required. No stress seems to be laid judicially on either of these considerations, nor need they be emphasized. It is the influence of the official duty, broadly considered, which is taken as the sufficient guarantee of trustworthiness, justifying the acceptance of the hearsay statement. Wigram § 1632

making of this particular official statement is hardly amenable to the correction of errors by public inspection—its efficacy must be of the moment, for it is not supposed that the public, or specifically interested members of it, do in fact (whatever their rights may be) ever demand inspection of the vast majority of official records that are made, and there can be hardly any chance of checking or revision from that source. It would seem that the second reason, put forward so definitely by Lord Blackburn, is to be regarded as merely a casual advantage, and not an essential limitation, of the class of documents to be included within the exception." Wigram § 1632.

case at the present, statements in public documents are receivable to prove the facts stated on the general grounds that they were made by the authorized agents of the public in the course of official duty, and that they were made in the public interest or required to be made by the public. *Taylor Ev 10th Ed § 1591* "In many cases a lapse of years, it would be impossible to require that the facts contained in such documents were made by the official in the presence of an exception is made to the rule that statements in public documents are receivable to prove the facts stated on the general grounds that they were made by the authorized agents of the public in the course of official duty, and that they were made in the public interest or required to be made by the public. *Ghulam Rasul v Secretary of State, 30 C W N 101 (101)-86 Ind Cas 651-52 I. A. 201-23 A. L. J 639* For further discussion vide next topic.

v. Malapat Singh 5 C 714 751, 753-L R 7 I A 63; see also *Malibaryna v. Secretary of State, 35 M 31* So the register is admissible irrespective of whether the official who actually wrote the entries had any personal knowledge or whether the register was a copy of a previous register which had become untidy. *William Graham v Phanindra Nath Mitra, 19 C W. N 1038*; contra *Ambalariya v Sree Unakshy, 29 M I. J 217-26 Ind Cas 841-(1915) M. W. N. 76* Now let us examine whether the principle is violated on the ground of want of personal knowledge on the part of the entrant. The argument for excluding the use of entries except for facts necessarily within the entrant's personal knowledge is thus stated by *Denman L C J* in *Doe v Wallaston, 1 Moo & R 389*. "The clergy man must be present at the time of the marriage (of baptism, the time of

the part of the entrant. "Must we not take it to be the act of the incumbent, who, however he got his information, had satisfied himself of the fact before he sanctioned the entry?" *Doe v France, 15 Q B 758* In the same case *Wightman J* having taken English Comm

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ray, 8
389;
(1933);
Wignore

§ 1636
"It is

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that the same principle is applied to persons whose hearsay statements are receivable under the exceptions to the Hearsay rule; and the application of the

here as elsewhere, but the principle itself need not be and is not judicially employed to the extent of unpractical strictness; and it has its qualifications and exceptions, based on good sense and practical convenience." *Wignore § 1635*. So it is at first sight unsatisfactory to accept an entry as evidence of a fact not occurring within the personal knowledge of the entrant. At the same time there

city be not confirmed by the usual tests of truth, namely the swearing and the title to this by law to out at se en be difficult to prove them by means of sworn witnesses" *Per Bayne J in Games v Pelf* 12 How 172, 570, *Wigmore* § 1631. So "official registers, or books kept by persons in public office, in which they are required to write down particular transactions, or to enrol or record particular contracts or instruments, are generally admissible in evidence, notwithstanding their authenticity is not confirmed by those usual and ordinary tests of truth—the obligation of an oath and the power of cross-examining the persons on whose authority their truth and authenticity may depend. This has been said to be because they are required by law to be kept, because the entries in them are of public interest and notoriety, and because they are made under the sanction of an oath of office or in the discharge of an official duty." *Per Fowler J in Ferguson v Clifford*, 37 N H, 11 books, etc, 7 books, and keep *Nort*, E

guarantee of reliability to render them admissible if offered in evidence. *Vo sufficient Uchler's Ev* § 206. The exceptional privilege given to public records by this section cannot be extended to entries which a public officer is not expected to, and is not permitted to make. *Ali Nasar v Manikchand*, 25 A. 90 (F. B.)—1903 A W N 207; *Vadhabrao v Deonah*, 21 B 695. There must be

might not be admissible. *Bhanya Dnyaj v Beni Mahto*, 22 C W N 139—23 M L T 382—20 Bom L R 712—28 C L J 1—47 Ind Crs 1 (P. C.) But registers kept under private authority private individuals are inadmissible (1913) 1 Ch 392, *Whittunck*, v R 303, *Doe v Gasacre*, 8 C & P 5 it is not the duty of the officer to 14 App Crs 137, *Farrell v Maquire*, 3 Ir L R 187. A register can be received to prove incidental particulars concerning the main transaction where they (1920) 1 Ch 284 town to be prepared any other person be country, nor has the act or record in absence of proper I II 1930 All.

English Law. Another exception to the hearsay rule consists of statements contained in public or official documents which are admissible as evidence of 291 Statements Royal proclama-

United Ins Co 7 Johns 38; mentary Journal (upon all matters properly before either House, *Jones v*.

- S. 35. *Randall*, 1 Cowp 17; *Root v*
matters, *Oates Case*, 10 How, St 71
 not conclusive evidence of the f
Frachin, *supra*, 111-112
 Official records
 is required by
 entry has been
 England, a ch
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 identity of the ch
 or reference, and (2) the
 cr. *Ibid* p 293. So in
 in of the E table had
 by the evidence of the
 baptism; but not the time of it
 to make enquiry about the in e d
Draycot v Talbot, 3 Bro P C
May, 2 Stra 1073; *Whitham v Law*, 3 Star, R 63, D
Larnes, 1 M & Rob 389; *Stark*, L
 Eq 373, *R v Weaver* L R 2 C
 the church of England, from the t

Hubbuck on Succession, 470; 474
 in 1644 and 1653 provided for the registration of births, deaths and marriages
Scobell's Ordinances, 76 236. *Dudley's Case*, 2 Sid 71 But these Ordinances
 were annulled upon the restoration of Charles II And registers kept and
 ecclesiastical authority continued to be admitted in evidence by the Courts
 although not required to be kept, nor declared to be evidence by any Statute
 This is probably the meaning of *Lord Holt's dictum* that such registers are
 evidence from "the nature of the thing", and of the additional words attributed
 to him by one reporter of least au
Burgesses of Droitwich, 1 Salk 28
 the time of the decision of that ca
 which were repeated

Will IV
 Statutes

register, 13 L J N S Ch 399
 of the baptism of the ambassadors and
 entries in

of their own or of England. *Evans v. Ball*, 38 L. T. 111; *Faylor* § 1593; *Phip* S. Fe 7th Ed. p. 329.

entry must have been contemporaneous. The fact of being under oath, but the official character of the transaction appears to afford a *prima facie* guarantee for its truthfulness—stronger, perhaps, than that which obtains in respect of books kept in the ordinary course of business. *Nort Fx* 200 But the entries should be made promptly, or at least without such long delay as to impair their credibility. — *Phip Ex 7th Ed* 330, *Doe v Bray* 8 B & C 813

vidence Act, the following documents are public documents—(1) documents forming the acts or resolutions of the Government, (2) documents of the official bodies and departments, (3) documents of the courts of law, (4) documents of the executive, whether of the Government or of the local authorities, (5) documents of the dominions, or of a private documents.

5 App.
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in a corporation book concerning a corporate matter, or something in which all
 1d be public within that sense. But it must be
 made by a public officer. I understand a
 a document that is made for the purpose of the
 able to refer to it. It is meant to be where

there is a much better way of doing it. It is meant to be where
be the
ay be
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have access to it afterwards

any cases entries in the entries of that kind,

"public" then, because the common law of England making it an express duty to keep the secret - kept by a public

I think as far
o its accuracy, and

at, in every case
, it has been made

... as a register to be on public" says Prof.

being known or otherwise, and may be equally open to all, capable of persons in general.

persons in 1960: 1

Ind	Cas	125	A	I	R	1926
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THE INDIAN EVIDENCE ACT.

S. 35.

Other official book, register or record. It is important to observe that whenever it is the duty of a public official, either at common law, or by Statute, to record certain facts in any book which is referred to ever after, it is not only the duty of the official to do so, but it is also the duty of the official to record the facts in the manner in which they are referred to ever after.

kept by any law. The statement of the station writer, the register not being one directed by any law. *Mohammad v. Feroze*, 23 C. 313-5 C. W.

Cr Pro and the provisions of that section. The certificate of guardianship is no evidence of the age of the person under this section, for it is neither a book nor a register, not a record kept by any officer in accordance with law. *Queen Empress, 28 C. 313-5 C. W.*

Teishhana papers prepared by the de. *Samar Dasadh v. Jaggu*, 23 M 492-3. The register (so called from the number of columns in the statement of the station writer) prepared by a person who is called a patwari and submitted to the collector, in accordance with the rules framed by the Board of Revenue under Reg. XII of 1817, is not an official register. *Mahhan, 18 C. 321.*

consequence that part may not be admissible in evidence under this section. *Raj L. 101*

Durga v. Deo Bahadur, 22 C W N 439-23 M L T 382-23 C L J 101

Ind Cas 1 (P C)

in this section must be taken

28 Bom L R 1225-50 B 716-A L ..

servant, has not been defined in this Act.

21 of the Indian Penal Code and s 2 (17) of the Indian Evidence Act, 1908. As regards who are public servants, see s 2 (17) of the Indian Evidence Act, 1908. *7 B L R 448-16 W N*

Gan, v. Sahargouda, 51 C L J 592

Register or record

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inaction as a separate ex-cause of circumstances that precincts and the

are not fitted for entry in a single office volume
 Sufficient in that it is preserved in official custody

The return differs from the
 A further distinction, within
 s that the former deals with
 r, while the latter records
 it has occurred out of his

s 1637. It must always be a
 correspondence which do, and those which do not, fall within the scope of s 35
 But where there is a statutory duty laid upon public officers to investigate and
 report facts, a report of the facts elicited by their investigation is an official
 record within the meaning of this section *Ramakrishna v Tirunarayana*,
 A. I. R 1932 Mad. 198.

It is essential that a register should be
 7th Feb p 330, see also *Graham v*
Winsfield, 18 Vce 143; *May v May*,
 P 552

Nature of the Duty—General Principles Whether a given statement was
 made under an official duty will depend chiefly upon the nature of the office, the
 subject of the statement, and the form of its making (1) It is clear that no

they did not occur (7) A statement otherwise admissible is not generally to be
 excluded where there existed for the declarant a special interest or motive to
 misrepresent (8) The person having the duty and the person making
 the statement must on principle be identical *Wigmore* § 1633

S. 35. birth of a person The entry was admittedly not made by the Chaudhlar & there was no evidence that it was made by any other public servant or that it was the duty of any public servant to make it. *Held*, that the register was not admissible under s. 35 of the Evidence Act. *Ganpat v. Gauri Sanjar*, 190 C 68.

Errors of interest

affect the weight of

App Cas 437, *Falcon*

They do not also affect

(1907) 2 Ch 592. So also, the fact that the entry is in the interest of the owner or body keeping the register, affects weight only, not admissibility. *Irish Exch. v. Derry*, 12 Cl. & F. 611; *Phip. Ev 7th Ed.* 330, *Sturla v. Neccia*, L. R. 5 App Cas 623, 628.

Wajib-ul-arz. An entry in the *wajib-ul-arz* is admissible in proof of the custom under s. 35 and its validity does not depend upon the question whether the *wajib-ul-arz*

Hasan v. Abdul

village administrator

the statements

rights and customs

of such rights

and purport to give the history of the devolution in certain families: when the narrators stand in no better position than any other tradition. When the incidents are not with a

safe to accept

4 O W N

have been

is shown by the party alleging it. *Manya v. Sitaram*, 23 N. L. J. 407-408, App Cas 438-A. I. R. 1927 Nag 147, *Wasiq Ali v. Mihar Ali*, 110 Ind. Cas. 4-5, I. R. 1928 Oudh 409, *Sartaz Koer v. Mahadeo Bux*, 29 O. C. 153-92 Ind. Cas. 657-A. I. R. 1928 Oudh 320. *S. H. Singh v. Rustam, Singh* 3 O. W. N. 121.

or *Rinaj Ram* should be supported by instances. *Bayy Nath v.* An entry in a *wajib-ul-arz*

Singh v. Babu Lal, 21 A. L. J. 822-L. R. 4 A. 557, *Sher Anwar v.* 78 Ind. Cas. 112.

existed or that

had been made

207 *Wajib-ul*

of 1863 when much more reliable than oral evidence given after the event. 30-53

Ashgar Ali, 57 L. A. 29-52 C. L. J. 183-A. I. R. 1930 P. C. 30-53 in the village records

was laid down for his
216 = 13 C. W. N.
Musammal Lali v
= 10 C. W. N. 730;
63; Isri v Gujra,
Moharaja, 2 A. L.
arurudhucaya, 15 A
, 16 A 10, Garura-

W. N 33 = 23 A 37; Ali Nasir v. Mamul Chand,

25 A. 90.

Riwaj i am. An entry in a
facie proof of the custom Lali
924 = A I R 1927 Lali 241, Ghu
Ruwaj i am being a public reco
of his duties, is admissible in evidence to prove the facts therein entered and the

Lali. 99 = 1923 Lali 401

fact
rana
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a judgment,
therefore, an
to a relevant
the judgment
In support
Purno Chunder
15 M 378 and

it is contended that the relevancy of judgments is governed by sections 40 to 43
of the Evidence Act and that a judgment not *inter partes* is not evidence

issue or relevant fact, even though the judgment may be between persons who

ds" Then after dissenting from the
Parbutty Dassi v Purno Chunder Singh
Mahpal Singh, 5 C 744 = 6 C L R 593,
correctness of this decision (i.e. Parbutty
submitted in Sundar Das v Fatimul ul nissa

Apparu, 12 M 9
a judgment not *inter*
a fact in issue or

I, L. A.—83

5. 35.

tion between the parties.
Ind. Cas 298 = O C W N
Ind. Cas 593 = 43 C 707 =

20 C W N 802 = 11 A L J 121 = 18 Bom L R 490 = 21 C L J 116, see also
Asa Singh v Uansa Ram, 621 Ind C, 509 = A I R 1930 Lah 237. On a
consideration of the authorities and the provisions of the Evidence Act it is clear
that such an entry is admissible.

L. R. 763

relevant under s 35, Indian Evidence Act. *Gelumul v. Kurummal*, 10 D L J
28 = 35 Ind Cas 551

accepted as conclusive of the dates of the death recorded in the
Ranga Swami, A I R 1925 M W N 233 = 88 Ind. Cas 249 = A I R 1925
Mad 1005. The register of deaths maintained under para 807 of the Police
Regulations is admissible as evidence of death.

Reddi v. Kotayya, 33 M L J 100 = 111 of 1899, the Registers of Births and
Deaths of the Board of Revenue since the year 1865 do
not come under this section. *Ibid* Entry in death register may be rejected when used
to prove or disprove death on a particular day, if register is prepared in casual
way. *Kali v. Sashi*, A I R 1930 C P 100. Death Registers are evidence of death.

tribunal *Phup v. Phup* 7th Ed. 332.

of a partition which affected the public revenue is admissible in evidence for
all purposes only. *Abdul Haq v. Abdul Khasra* is not a record within
the meaning of s 35 of the Evidence Act, but is admissible as evidence
of the plot in question before the court. *Abul Khasra*, A I R 1923 P. 163. See also

weight cannot be attached to a partition paper in the absence of detailed information. S.

35 of the Evidence Act. *Sothi Bhoosan v Girish Chunder*, 20 C. 340; see also *Ramsarup v. Ramnaram*, A. I. R. 1929 Pat. 32. A *batuara chitta* is not admissible in evidence under s. 35 of the Evidence Act. *Isuar Chandra v. Turanath*, 1 Ind. Cas. 607. Entries in *batuara khasia* papers are admissible in evidence, but it is for the Court to decide in each particular case whether the

made in a proceeding under Reg. XIX of 1831 between predecessors of the parties to a suit are good and admissible evidence, quite apart from anything contained in section 35 of the Evidence Act. *Khetra Nath v. Mahomed*, 23 C. W. N. 48-45 Ind. Cas. 921.

Entry in a certified copy. Under this section an entry made on a certified copy indicating the date on which it was completed is certainly relevant. But when an enquiry as to correctness of such an entry has been started or its

report *Nizam Din v Mahomed Iqbal*, 168 Ind. Cas. 619-A. I. R. 1928 Lah. 643.

Ghosi v. Ajudhia, 14 R. D. 444

Satish Chandra Mukho-
ficate of guardianship was
be a record kept by a

S. 35.

erem So in the province of
strict Judge to a guardian
made by a public servant in
in such record is therefor
meer Hasan v Fiaz Hussain
Luck. 602

A I R 1929 Oudh 135; see *Mehdi Ali v. Walayat Hussain*, Luck. 602
O W N 25=121 Ind Cas 277=A I R 1930 Oudh 97

duty
to till
ship
of his official duty and the same was recorded It was held that the statement
was admissible in evidence on the question of relation-him under this section
Lal Harihar Pratap v Bishesu
Ind Cas 422=A I R 1928 C
by the surveyor who recorded
Its Illce 5 Rnt L I 116=99 Ind Cas 166=A I R 1926 Rang 404; Ali

entries in a prescription register maintained by a Government compounder or c
in a Government witness. *D Cruz*
Oudh 310 All
final or sole test

Bidya Prasad v Surkhur, 134 Ind Cas 638=A I R 1931 Pat 263 L
of Chari Assistant Collector is admi-
sible Gany A report in police diary
is admissib witness. *Abheraj v Gaj*
Singh, A I R 1932 Oudh 137

Where the subdivisional officer directed an enquiry by a Kamnjo of the
circle into the matter of the complaint by virtue of s 202 (1) of Cr Pro Code
report was admissible

the actual state
for that purpose
being an officer
comes under section 35 of the Evidence Act, and is admissible
without formal proof *Mohan Singh v Emperor*, L R C A 49 Cr =55 Ind. 617=26 Cr L J 551=A I R 1925 All 413 The contents of the report may
be used as a corroborative piece of evidence to show that the implication of the
accused in the offence is not an after thought. It cannot certainly be used as a
substantive piece of evidence *Mohan Singh v Emperor*, supra

An *Inam Register* embodies the conclusions of the *Inam Commissioner* on S. 35

3 Ind Cas 616 = 48 M L J

Protap Chandra Deo v Jayadish Chandra, A. I R 1925 Cal 116. Entries in the *Siyohs* are made by the *Pattars* in the ordinary course of business and are

4 M L J 112 = 72 Ind Cas 211. Extracts from Revenue Registers Nos 1 and

Surendra Nath, (1919) Pat 465 = 53 Ind Cas 20

A recital in a public record as to a statement made by a public servant with reference to a particular statement of the grant by the Government may be admitted, under section 35 of the Evidence Act as proving that the public servant made the statement that he is to have made, if the fact that he made such a statement is a relevant fact. *Sanharacharya v Manali Saravana Mudaliar*, 31 Ind C 876

Revenue Records are not evidence of title for they are kept for fiscal purposes and it is not part of the duty of the Revenue Officer to record title. But

under the Land Acquisition Act *Secretary v Satish*, 58 C 828 = 35 C W Bh 173 P C

Though survey entries in survey records may not be sufficient evidence to prove that certain land is *poramboke* they are good evidence where the only question is as to the extent of *poramboke* land *Kalayal v Secretary of State*, 2 L W 413 = 29 Ind Cas 154

Officer that the name of this or that person was entered as the occupant of certain lands could be admissible if relevant, but it would not be admissible

THE INDIAN EVIDENCE ACT.

S. 36.

36.

Relevancy of statements in maps, charts and plans.

maps, charts or plans, are themselves relevant facts

Principle This section offers charts generally offered for authority of Government

published maps or charts generally offered for public sale, or in maps or plans under the authority of Government, matters usually represented or stated in

are in favour of any inaccuracy being challenged and exposed" Field Et 10 (7th Ed) The person or persons who prepared the map in question, being unavailable, both the principle of Necessity and the principle of the Guarantee of Trustworthiness are satisfied. Hence

ment surveyor
rized to do; an

admissible Wigmore § 1665

Scope of the section

charts offered for public sale and entry, etc., and as regards the section refers not

helds White's Stat, also boundaries of villages and (in Khassas)

B D 406, 14 Cox C C 436, 6 App Cas 229, 14 Cox C C 546 Lnd rule excluding declarations admissible in Engla Car & P 481, Bridge L R 5 Ch D 709

map is prepared, must be an authority given by statute Gahyo Jagat Pal, 11 C W N 230=9 C L J. 415 But there must be judicial quasi-judicial duty to enquire by a public officer Sturla v Freca, 5 App 623, Irish Society v Derry, 12 C & F 64.

Survey

but as if
-Tet
10 x 12

Evans v Taylor, 7 A & A 617; Wigmore § 1665 These maps were also because they were findings by a

36. expressly consented to the delineation or admitted the correctness of such map; they have no binding effect. *Kristomon v Secretary of State*, 3 C W N 33. That map is inadmissible as evidence.

18. 110 But a
 sufficient to prove
 v. Gobind, 9 C.
 Watson & Co, 27
 sought to be set
 an Amin's report.
 v. Gusseshur, 5 W. R. 34 If there has been
 a Government survey, the survey map must be taken as evidence. R. 12
 Choudhazim v. Gadharee, 20 W. R. 11
 25 W. R. 153; Guddadhur v. Tar

7. *Falrassa*, 15 Ind Cas. 159.

Thakbust man " sketches, in magnetic he made from ■ Dhusan Bane thak author to title or pos v. Secretary of State of C " legitimately be drawn from thak man Ticeन्द्र La

and is in possession
the remainder pays
value of such a map is

undiscoverable from a mere inspection
nor their agents have by their signatures, admitted the correctness of the
Joylara v. Mohomed

in the *thakbust* map, prepared the revenue map by accurate observations made by expert surveyors with scientific instruments. *Keshabjee v Sanku Khoson* 20 Ind Crs. 1027 = A I R. 1926 P 385. As the object of a *thakbust* survey and map is to ascertain and delineate the boundaries of the estates borne on the Revenue roll of the District, the entry in a *thak* map that certain lands formed part of an estate become a relevant fact under this section and such entries are evidence on which a Court may act. *Abdul Hamid v Airon Chaudhary*, 71 W N 849.

Entries in a : Court of fact to
hold that disputed at the time of the
Permanent Settlement at the boundary
Ramnandan v.
that the state
survey maps existed at the time of the
State v. Ward, 31-C L J. 111 A
time in connection with the measurement
is a rough register, statements entered in
affected thereby had notice

23 C. 552.

In case of dispute between Thak and
revenue survey map which was carefully and
officers and the *thakbust* map do not agree,

pillars, put down on the ground
existence; and they correspond with
the field book and the materials
ish sufficient data The revenue
signature of the revenue surveyor
on the thak map does not mean that if the thak map is reduced to the same
scale as the revenue survey map, then the two boundaries will necessarily agree
but merely that the surveyor has satisfied himself that the boundary accepted
and intended by the demarcation staff has been correctly picked up on the
ground.
3 Pat 85
A I R
Ranjan, 4
an v Ranjas,
Case 1027-
jah Mahendra
rule that a

the *thak* and the survey
clearly agrees with the
There is no general or
allow either the one or
the other, the Court may, if it considers the *thak* map more reliable,
follow that in preference to the survey map *Abad Hossen v Doucurry Pal*, 11
C. W. N 629

held that a topographical survey map of 1869 in which the boundary line
between the two *perqannahs* was given, was admissible in evidence under section
36 of the Evidence Act When *perqannah* boundaries are found entered in such

36 valuable evidence conclusive and contrary, they made. In cases of to possession is boundary line on absence of better evidence, the lower Appellate Court erred in law in not accepting a Topographical survey map as evidence of possession at the time the map was made. *Gajhoo Damor v. Kotwar Jagatpal*, 11 C. W. N. 239-9 C. L. J. 415.

45 M. L. J. 444-50 C. 446-50 I. A. 121-(1923) M. W. N. 511 The map is not the settlement map and the entry is in a different notation and therefore the map, nor is it an independent piece of evidence. *Laharam v. Gurnukh Rao*, 99 Ind. Cas. 628-A I R 1927 204 Maps prepared under the Calcutta Survey Act have great evidentiary value as regards question of title. *Debendra v. Surendra*, 31 C. W. N. 419-102 Ind. Cas. 370-45 C. L. J. 474-A I R 1927 Cal 345 A site plan prepared for

Warden of the Cinque Part was excluded and this decision was reversed on appeal in *Mercer v. Denn*, (1905) 2 Ch. 538, 555 A map prepared by a Commissioner entrusted with local inspection is only evidence in the case in which he was entrusted with such inspection. *Dinabandhu v. Anisatara*, 12 C. L. R. 50

Under sections 36 and 83 a map prepared by a Deputy Collector particularly for the settlement of land forming the settled bed of a river is not admissible. *Kanto Prosad v. Jagat Chandra*, 23 C. 335 A map prepared for one purpose is not relevant for another. *Leonath Mozumdar v. Durga Tarai*, 14 C. 3 maps and plans were prepared by the Government for a private purpose, such maps and plans are relevant facts under section 36 of the Evidence Act. *Rahimmatulla v. Secretary of State*, 112 P. W. N. 1012 112 P. W. N. 1919-18 Ind. Cas. 1012

Though a Rennell Survey is valuable evidence on not conclusive of its non-
N. 1113; see also *Secretary of State v. Haradas Acharya v. The Secretary of State*, 26 C. L. J. 590 A map prepared by a kamungo, is not relevant under this section. *Tarai Sarfar v. Fakrani*, 132 Ind. Cas. 150

maps and *chittas* are given. Maps and plans prepared under this section. *Rahim* Cas 799.

37. When the Court has to form an opinion as to the existence of any fact of a public nature, any statement of it, made in a recital contained in any Act of Parliament, or in any Act of the Governor General of India in Council, or of "any other legislative authority in British India constituted for the time being under the Indian Councils Act, 1861, the Indian Councils Acts, 1861 and 1892, or the Indian Councils Acts, 1861 to 1909,"* or in a notification of the Government appearing in the Gazette of India, or in the Gazette of any Local Government, or in any printed paper purporting to be the London Gazette or the Government Gazette of any colony or possession of the Queen, is a relevant fact.†

Relevancy of statement as to fact of publication contained in certain Acts or notifications.

tence of any fact of a public nature, any statement of it, made in a recital contained in any Act of Parliament, or in any Act of the Governor General of India in Council, or of "any other legislative authority in British

India constituted for the time being under the Indian Councils Act, 1861, the Indian Councils Acts, 1861 and 1892, or the Indian Councils Acts, 1861 to 1909,"* or in a notification of the Government appearing in the Gazette of India, or in the Gazette of any Local Government, or in any printed paper purporting to be the London Gazette or the Government Gazette of any colony or possession of the Queen, is a relevant fact.†

Legislative recitals—Principle The general grounds of reception are (1)

sometimes advanced (*vide R v. Sutton*, 1 M & S 532, 549)—cannot otherwise suffice to give it any weight as evidence in controversy) But, next, it is clear the authority to inform itself

was in fact the distinction

of a statement in the recit

* Substituted by Act X of 1914, Sch 1

† The last paragraph added by s 2 of the Indian Evidence Act, 1899 (5 of 1899), was repealed by the Schedule II of Act X of 1914

follows: "Any
 idia in Council,
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 l such Courts an
 cited" This has been incorporated in this section.

though
 nclusive
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 ot as determinations of controverted
 be made evidentially conclusive
 1352; see also *Harrat v. Wise*, 9 II
 C. 712; *R v Greene*, II A. & E 518; *R v Franklin*, 17 How St Tr 636;
th. Gen v. Bradlaugh, 14 Q B D 667 So a legislative declaration of fact
 at are material only as the ground for enacting a rule of law—for instance,
 int the use in public one may not be held conclusive by the Courts; but a
 -claration by a Legislature concerning public conditions that by necessity and
ock v Heigh, 256 U
 se, the recital may
 W ignore § 1352

principle admissible The executive cannot be supposed to need express authority

Canada).

Government Gazette The Government Gazette is admissible and suffi
 ent evidence of such acts of the executive or of the Government, as are usually
 unations and the
 8 Price 89 For
 the publisher to

nature proof of the publication under due authority *Goodere* Lx 307 The
 Government Gazette is also evidence of various Acts of state at common law
R. v. Holt, 5 T R 436, *A G v Thealstone*, 8 Price, 89, *Faylor* § 1662; *Php*.

- S. 38 *Ev. 4th Ed. 711.* The appointment of an officer may be proved by the government Gazette. *R. v. Gardner*, 2 Mod. & R. 363, where the division of a parish. The Gov of sale, and a printed paper in the Gazette, and issued from t were admitted in evidence to *Jatindra v Brajo*, W. R. (8864) 5 conclusive even where such knowledge is presumed from the publication of fact in the Government Gazette *Harriet v. Wise*, 9 B. & C. 712.
- Gazette of India Previous to 1863, the Government of India had an exclusive organ of its own; its notifications, orders, etc., being published in the of the Local Gazettes of the Local Governments as was necessary. In 1863, as the Gazette of the Government of India was passed to give to publications its publication in any other Gazette in the publication was prescribed by the law then in force. Vide s. 1 of Act XXXI of 1863; *Field's Ev 7th Ed 159*

document constantly used and referred to, are to be assumed genuine. principles, however, are in fact usually involved, first, the admissibility of a document proved to be printed by official authority, as hearsay evidence of the contents of the original and secondly the presumption of genuineness of a particular document.

proof of its being bought of the Gazette printer, or where it came from. *Ev. 4th Ed. 711.* § 2151 *Ev. 4th Ed. 711.* The Evidence Act enacts: "The Court shall presume

known or observed by all and in which persons in general have well as which is done by an officer of the Government, executive, legislative or judicial.

38. When the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain any such law, and any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings, is relevant.

Principle. There is no reason why an officer may not be authorized to give printed copies as well as to give written copies; nor has there been any doubt that such authorized copies are admissible. Yet it cannot be said that such an

had their source, not so much in a doubt of any of these principles, as in the

be copy rather than the authority to furnish it that the difficulties have arisen, *Wigmore* § 1631. "Not that the printed Statutes are perfect and authentic copies of records themselves, but every person is supposed to know the law, and therefore the printed Statutes are allowed to be evidence because they are the prints of what is supposed to be lodged in every man's mind already. *Butler J. Trials at Nisi Prius*, 225. The reason of their reception is thus stated by *Duncan J.* publication of mistake authentic danger Statute King's for by

t affords to all parties, and en the States. The rule, too, nger of abuse, and error or rry, 28 N H provides that be printed

law authorized reports of foreign countries would be admissible to show the reports of the domestic Government as well ld not be admissible. Taking every thing seems, to extend the meaning of the section of India, Great Britain and other foreign countries.

Mich 196

38.

by an expert witness (Fildes v.
 copy? It is usually said that
 that the state of
 Statute, but a

1 rarely prevailed, except that
 Statute already proven by copy
 Corp 161, 174; *Pictou's Trial*
 178, *Alvan v. Furnival*, 1 C. M. & R. 291; *Millore v. Heinrich*, 4 Camp 1;
 Baron de Bode's Case, 8 Q. B. 250; *Cocks v. Parlay*, 2 C. & K. 270; *Nelson*
 Bridfort, 8 Beav. 539; *Sussex Peerage Case*, 11 Cl. & F. 115; *Bremer v. Freeman*
 10 Moore P. C. 362, *Green's Ev* § 488. The particular question is whether
 evidence of a foreign "written law" should be presented in the shape of a
 or merely by recollection testimony of one qualified to know it. *Wigmore* § 12
 In *Baron de Bode's Case*, 8 Q. B. 250, *Patterson J.* said: "I quite agree that
 witness conversant with the law of a foreign country may be asked what in
 opinion the law of that country is. But I cannot help thinking that as
 as it appears that

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 I may we rule should not be the same in the case of a foreign writ
 law. I think the rule would be just the same if the question related to
 French Code as existing at this moment. If a witness were asked what the
 now is with respect to a bill of exchange in France, and were immediately
 examined as to whether that law was not in writing, and answered that it
 I think a copy of the law must be produced." So also *Justice Story*
 "Generally speaking authenticated copies of the written laws, or other
 instruments of a foreign Government
 not to be presumed th
 authenticated, which
 justice in foreign coun
 foreign Government
 on *Conflict of Laws* § 640.

According to this section evidence of foreign statute law can be given
 the authorised copy of the Statute of the foreign government. But section
 of the Act says that it can be proved as well by the opinions of persons
 skilled in such law. Now the
 proving a foreign statute, or
 different circumstances. The
 "But the answer to this is clear
 purely and simply directed to the contents of a specific Statute, the proof
 be by copy of its terms. But in the usual case this is not the que
 inquiry is as to the state of law at the present time or at a given time past
 inquiry

ter accuracy, would
 so other material elements
 If in *Baron de Bode's Case*
 270, note notes under s 35. But in some cases a copy was required.
 Harford v. Morris, 2 Hagg Cons 430; *Boendlin v. Schuetler*, 3 Esq
 v *Levy*, 3 Camp. 168; *Miller v. Heinrich*, 1 Camp 135; *Alves v. Johnson*, 1 T. L.

The books are produced, but the witness, describes them as authoritative Proof. of the law itself, in a case of foreign law, could not be taken from the book of the law, but from witness who described the law. If the witness says, 'I know the law and this book truly states the law,' then you have the authority of the witness

Majesty's Dominions to ascertain the law of that part. *Phip Ev 4th Ed. 359; Lord v Colman*, 1 D & S 21; *Logan v Princess of Coorg*, 30 Beav, 632=1 Jour. O. S 109. So also by Stat 21 & 25 Vict Ch 11, a similar case may be stated for the opinion of a Court in any foreign state with which His Majesty may have entered into a convention for ascertainment of such law. *Phip Ev. 4th Ed 359* An unauthorized translation of the Code Napoleon is not a work to which reference can be made under this section. *Christian v. Delanney*, 26 C 931=3 C W. N. 611 Under this section the Ceylon Insolvency Ordinances might be looked at to decide the question of the defendant's liability. *Denanayagam v. Muthu Kumar Suamy*, 14 Ind Cas 560

admits authorized as well as unauthorized Law Reports when the latter is recognized or shall be reported by

always been done and ought to be done. A judgment is none the less an authority because it has not been reported, otherwise the question of whether or not a judgment could or could not be regarded, would depend upon the mere whim of the Reporter. I therefore respectfully dissent from the view on this point expressed in the case reported in 4 C W N 732. *Brett and Banerjee JJ.* concurred with him; see also *Trustees, P. D. v. Venkata Chalam*, 92 Ind. Cas.

S. 39. 710 An unauthorised report of a High Court case is entitled to respect. L J 153-A I. R 1925 Nag 414 Unauthorized reports are on the footing as an unreported case 24 O. C. 319.

HOW MUCH OF A STATEMENT IS TO BE PROVED

39. When any statement of which evidence is given forms

What evidence is to be given when statement, forms part of a conversation, document book or series of letters or papers part of a longer statement, or of a conversation or part of an isolated document, or contained in a document which forms part of a book, or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, book or series of letters or papers as the Court considers necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made

Principle

ing of an utterance word in another part of a statement is modified by a prior or subsequent clause; one sentence qualifies another; and one paragraph may form only a part of the whole exposition. We must compare the whole, not because we desire the remainder for its own sake, but because without it we cannot be sure that we have the true sense and effect of the statement. If parts of a statement are taken out of context, they may be misunderstood.

ent or subsequent words or the thing produced, and give

person making the statement; for thus alone can the whole of what the

How St Tr 257 In *Algernon Sidney's* arguing passages piecemeal said "My lord, you will make all the penmen of Scotland say David of saying, there is no God." L C J the sen.

angelists of saying, "that they were drunk." It is part of it that explains a trifled with a little. It is a trifled with a little. It is a trifled with a little.

in heart, There is no God. Now here you can say there is any part that is in the admission of an opponent and to inconsistent statements of a witness used in impeachment. Where a series of letters in a correspondence, or of entries in an account-book are involved, it is sometimes difficult to draw the line between

those which are in effect part of the same statement and those which are not (*Call v. Howard*, 3 Stark. 6; *Sturge v. Buchanan*, 10 A & E 59; *Roe v. Day*, 7 C & P. 705). But it seems that so far as the letter or oral statement put in as an admission was written or made in reply, or contains within it a reference to a

under section 33 *Prince v. Samo*, 7 A & E 627

Abbot C J in *the Queen's Case*, 3 B & H 297, observed. "The conversations of a party to the suit, relative to the subject matter of the suit, are in themselves evidence against him in the suit, and if a counsel chooses to ask a witness as to anything which might have been said by an adverse party, the counsel for that party has a right to lay before the Court the whole which was said by his client in the same conversation—not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the part introduced upon the previous examination, provided only that it relates to the subject-matter of the suit because it would not be just to take part of a conversation as evidence against a party without giving to the party what he said on the same subject, or the whole of it."
Denman L C J E 627

"We cannot assent to it. We will merely observe that it was not introduced as an answer to any question proposed by the House of Lords, and may therefore be strictly regarded as extra judicial, that it was not necessary as a reason for the answer to the question that was proposed, that it was not in terms adopted by *Lord Eldon* or any of the other Judges who concurred, that it was expressly denied by *Lords Redesdale* and *Wynford*, and that it does not rest on any previous authority." The Indian Legislature has wisely left to the discretion

is concerned, they are still governed by the provisions of section 27 which must be construed as favourably to the accused as possible for it is a section which makes an exception, namely sections 25, 26 and 27. *Sakhan v. Emperor* A I R 1929 Lah 344. Because a document is admissible.

first, whether the party

other parts, of the conversation, document, whose statement it is, may afterwards, by remainder, or other parts, or other statements

THE INDIAN EVIDENCE ACT.

S. 40.

in Bankruptcy Such judgments
her parties or strangers Such

Judgments in personam are all

bind only persons not so affected

Co Lit 271

donor or do

ancestor and

executor, intestate or administrator, tenant and (3) In law (or representation) as testator and

successive incumbents The

parties, viz, that a party of

manner as the original party

of their legal effect, as distin,

(Cockle Cas 14)

The distinction between judgments in rem and judgments in personam was

thus laid down by Blackburn J in *Casrique v. Imrie*, L R 4 H L pp 47-120

Some points are clear Where a tribunal, no matter whether in En

or a foreign country has to

judgment

country

rights of ti

exercise of that jurisdiction direct that the thing, and not merely the interest

of any particular party in it, be sold or transferred, the case is very

different Whatever it settles as to the right or title, or whatever disposition it

makes of the property by sale

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publicity attending such judgments; secondly, on account of the solemn

Interest reipublicæ ut sit finis litium (It concerns the state that there should be an end to all law suits) Hence the maxim, *transet in rem judicatum* The

gment and also

principle is that

solemn character, must be presumed to be faithfully recorded), but that it
between the
Ev 10th
up Ev.
Allyn,
1st 361;

relevancy of
74) F B But
the judgment

partes, except where the judgment is clearly *resjudicata*. A judgment other than a judgment referred to in ss 40 to 42 may be admissible to prove that a right was asserted or denied under s 13 of the Evidence Act or to explain or introduce facts in issues or to explain the history of the case *Purnima v Nand*, 12 Pat L. T. 582—A I R 1932 Pat 105 The law of evidence does not make a

one suit
t *Tulsi*
applies
should

not do so because that matter has been decided before (*Lakshman v. Ramdas*, A I R 1929 Cal 374 (F B))

Judgment, meaning of The word judgment in sections 40—44 means any final judgment, order or decree of any Court *Step. Dig Et art 32*

Scope of the section This section deals with judgment *in personam* and
is v Bapu Ashor, 10 B 439,
anj v Dipa, 3 B p 3). it is plain

40. 2 of Act VIII of 1859 was to be construed as including a material issue, and we think that, similarly, the terms 'taking cognizance of a suit' may be construed as including a material issue in the suit between the same parties; in other words, that section 40 was intended to include cases in which the general law relating to *res judicata inter partes* as then understood applied. This section provides that the existence of a judgment, decree, or order is a relevant fact, if by law it has the effect of preventing any Court from taking cognizance of a suit or of holding a trial. *Per Mitter J in Gugu Lal v. Fateh Lal*, 6 C 171 (176). In the same case (*Garrh C I at p 170*) said "It is true that s 40, might

Khoti Act, conclusive and final evidence of the liability thereby, and the Civil Court cannot look behind the entry. And, under the circumstances mentioned above, the evidence of a decision otherwise relevant under s 40 of the Act, is not relevant on a date of the survey entry that the

have been shown to the suit

the record is the entry *Ram*

Balbin, 21 B 235, *Gopal v. Dasarathi*, 21 B 244; *Gopal v. Mogeswar*, *Antay v. Madhab*, 21 B 480. Where a subsisting judgment, order or decree relevant under this section is set in by one party as a bar to the claim of the Court

judicata or otherwise under some other rule. It is a question of fact whether the plea of *res judicata* is not a plea as against the plea of *res judicata* is not a plea as

to a point in issue. *Udamauthal v. Parameswara*, 85 Ind Cas 460 = A I R 1925 Mad 1019

Principle The doctrine of estoppel is a fundamental doctrine of all Courts that there must be an end of litigation. *Re May*, (1885) 23 Ch D 516 (C 4). Judgments being public transaction of a solemn nature are presumed to be faithfully recorded. Every judgment is therefore, conclusive evidence for or against all persons of its own existence, date and legal effect as distinguished from the accuracy of the decision rendered. *Philp Ev* 7th Ed. 392.

Foreign Judgment A party who has submitted to the jurisdiction of a foreign Court is bound by its judgment, when such judgment is within jurisdiction and does not offend the principles of natural justice. Irregularity which do not affect the jurisdiction of the Court do not vitiate such judgment

... of the foreign Court, render the ...
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 ... shall be conclusive as to any matter ...
 ... es
 under whom they or any of them :
 (a) where it has not been pronounced : b)
 where it has not been given on the merits of the case; (c) where it appears on
 incorrect view of international
 India in cases in which such law
 which the judgment was obtained
 are opposed to natural justice, (e) where it has been obtained by fraud; (f)
 where it sustains a claim founded on a breach of any law in force in British
 India."

So a foreign judgment operates as *res judicata* except in the six cases specified in section 13 of the Civil Procedure Code of 1908 *Bababhai v Narharbhai*, 13 B 224 "Where a Court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial Courts are supported and enforced." *Per Parke B in Williams v Jones*, 13 M & W. 633, *Russel v Smith*, 9 M & W 819, *Goddard v Gray*, L R 6 Q B 139

So where the subject matter is a *res* so situated as to be within the lawful control of the state under the authority of which a Court sits and that authority has conferred on the Court jurisdiction to decide as to the disposition of the thing and the Court has acted within that jurisdiction, that decision is conclusive,

they are final and unalterable by the Court pronouncing them *Duchess of Kingston's Case*, 2 Sm L C 731, *Ricardo v Garcias*, 12 Cl. & F 308; *Nonvion v. Freeman*, 15 App Cas 1

Previous Judgment to bar a second suit A judgment which is not a judgment *in rem*, is not admissible in evidence against those who are neither parties to it nor derive title through such parties, as proof of the facts determined therein. *Kesho Prasad v Kistanath*, A I R 1926 Pat 577-97 Ind Cas 282 Under section 40, the existence of a decree is a relevant fact when the question is whether in or to hold the

would also conclude the trial of the question as to what the rate of rent at the date of that suit was if the decree showed that that question was heard and finally decided in that suit *Ibid* "It is not competent for the Court, in the case of the same question arising between the same parties, to review a previous decision. If the decision was wrong it ought to have been appealed against." *Per Lord Macnaghten in Badar Bee v Habin American*, (1909) A C at p 623, see also *Huntley v Gaskell*, (1905) 2 Ch 656; *Mangma v Wright*, (1909) 1 K B, 958, *Humphries v Humphries*, (1910) 1 K B 796

Res judicata by general principles of law Where a matter has been

S. 40. 2 of Act VIII of 1859 was to be construed as including a material issue, and we think that, similarly, the terms 'taking cognizance of a suit' may be construed as including a material issue in the suit between the same parties; in other words, that section 40 was intended to include cases in which the general law relating to *res judicata inter partes* as then understood applied. This section provides that the existence of a judgment, decree, or order is a relevant fact, if by law it has the effect of preventing any Court from taking cognizance of a suit or of holding a trial. *Per Mitter J in Guppi Lal v. Panch Lal*, 6 C 11 (176). In the same case *Garrh (J)* at p 170 said "It is true that s 40, m. 1 have been VIII of Dayee v. was in

whether civil or criminal, from taking cognizance of a suit or trying any particular issue. The words 'holding a trial' are amply large enough to admit of this construction, and it is not because in some other Act the words 'holding a trial' may have been construed to refer to criminal trials only, and we ought to confine their meaning in the same way in s 40 of the Evidence Act." See also the judgment of *Mitter J* in page 176. A party is precluded from contending the contrary of any precise point which, having been once distinctly put in issue, *Ex parte Official Receiver*, (1896) 1 Q. B. 100. It and second actions are different, the directly (not collaterally or incidentally) in a second action between the same parties. *Prietman v Thomas*, 9 P. D 210 C A; *Halsbury Vol XIII* p 83. An entry in a record prepared under s 108 of the Bombay Revenue Code, by the Survey

shots have never received the conclusive effect of the entry have been shown to the record is the entry *Ram*

Balbir, 21 B 235, *Gopal v. Laxman*, 21 B 480. Where a subsisting judgment, order or relevant under this section is set up by one party as a bar to the claim of the other, the latter can show that the judgment, order etc., was delivered by a Court without jurisdiction or was obtained by fraud or collusion, and it is not necessary

Bansi Lal v. Dey, admissible judgments own as plea of res section has nothing to judgments because

a plea of *res judicata* is not a plea as a matter of evidence, but only a plea of law, barring the action on a plea of *res judicata* is distinguished from the rules of evidence.

also *Sita* contain to a pair

460 = A I R 1925 Mad 1019

Principle The doctrine of estoppel is a fundamental doctrine of all Courts that there must be an end of litigation. *Re May*, (1885) 28 Ch D 516 (C.A.). Judgments being public transaction of a solemn nature are presumed to be therefore, conclusive evidence for or against, date and legal effect as distinguished

Philp Ev 7th Ed 392.

Foreign Judgment A party who has submitted to the jurisdiction of a foreign Court is bound by its judgment, when such judgment is within jurisdiction and does not offend the principles of natural justice. Irregularities which do not affect the jurisdiction of the Court do not vitiate such judgment.

only when it is so pleaded, or there is an opportunity of so pleading it. Otherwise it is only a relevant fact from which the Court may draw a conclusion in favour of the person who tenders it as evidence. *Vooght v. Wmch*, 11 B & Ald 662.

But "the plea of *res judicata* as a bar to an action belongs to the province of adjective law, *ad litem* *ordinatio* *em*; but difference of opinion prevails among jurists as to whether the rule belongs to the domain of procedure or constitutes a rule of the law of evidence as furnishing a ground of estoppel. In England, and I may say also in America, the rule is usually dealt with as belonging to the law of . . .

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suit between the same parties, or between the parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court

Explanation I The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto

Explanation II For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court

Explanation III The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other

have been made
med to have been

granted by the decree, shall, for the purposes of this section, be deemed to have been refused

Explanation VI Where persons litigate *bonafide* in respect of a public

cause . . . a suit in respect of such

cause

A judgment *in per*
record and their privies

S. 40. cannot answer the same question again in another action, although, perhaps,

there must be an end of litigation, otherwise there would be no security for any person."

Stay of

the matter

instituted su

or any of

in the same

relief claim

continued by the Governor-General in Council and having like jurisdiction, as before

a suit in a foreign Court does not preclude a suit founded on the same cause of action. Vide section 10 of the Civil Procedure Code of 1908; see also *Micoy v Kasouji*, 1 C L R 282, *Balkissen v Krishan Lal*, 11 A 148, *Ramaswami v Raghunath*, 20 M 418, *Venkappa v Manjuralath*, 16 M L J 526; *Bissessar v*

Din Shau v Galstoun 29 Bom L R 382-102 Ind Cas 229-A 1 A J 201 Bom 245; see also *Kuberan v Korman Nair*, 98 Ind Cas 421-48 M L J 201-A

must shall include the

whole

of act

bring the suit in

sue in respect of,

not afterwards sue in respect of the portion so omitted or reserving of action

person entitled

may sue for

the Court, i

so omitted

for its performance and successive claims arising under the same Order II, rule 2, Civil Procedure Code shall be deemed respectively to constitute but one cause of action

Previous Acquittals or Convictions Section 403 of the Criminal Procedure Code 1908 follows -- A person who

against him might have been made under section 236, or for which he has been convicted under section 237

A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed, if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged

Explanation The dismissal of a complaint, the stopping of proceedings under section 249, the discharge of the accused, or any entry made upon a charge under section 273, is not an acquittal for the purposes of this section

Judgments how proved If a party offering a record does so in support of a plea of *res judicata*, or to show that he has acquired or his adversary has lost some title or right either by the judgment alone or by it and proceedings taken for its enforcement, the whole record so far as it concerns the formal stages, must be either produced or exemplified, and if exemplified, the exemplification must show on its face that the record is complete and is regular nor can the record be pitched with parol. *Harrison on Evidence* § 824 Before any document, whether an original or a copy, can be received in evidence of a judicial proceeding, it must, in general appear that the record or entry of such proceeding has been finally completed. *Taylor* 10th Ed § 157C

Judgments not relevant under ss 40 to 43 R was charged with the offence of defamation and convicted. The complainant then sued R in damages

41 A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant

Relevancy of certain judgments in probate, etc., jurisdiction

Such judgment, order or decree is conclusive proof—
that any legal character which it confers accrued at the time when such judgment, order or decree came into operation,
that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, * [order or decree] declares it to have accrued to that person,

that any legal character which it takes away from any such person ceased at the time from which such judgment, * [order or decree] declared that it had ceased or should cease,

and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, * [order or decree] declares that it had been or should be his property.

* These words in s 41 wherever they occur were inserted by the Indian Evidence Act Amendment Act (18 of 1892) s 3

THE INDIAN EVIDENCE ACT.

...every one who can be affected by the decision may protect his interests by becoming a party to the proceedings. In addition to which it is to be remembered that a decision *in rem* not merely declares the status of the person or thing, but *ipso facto* renders it such as it is declared, thus a decree of divorce not only annuls the marriage, but renders the wife *feme sole*, and adjudication in bankruptcy not only declares, but constitutes, the debtor a bankrupt, a sentence in prize Court not merely declares the vessel prize, but vests in the captor *Phipson Ex 7th Ed 397*; cited with approval in *Venkataramananayya, A I. R 1931 V 7*.

tion pronou

the status So a judgment *in rem* may be defined as the judgment of a Court of competent jurisdiction determining the status of a person or thing, or the disposition of a thing (as distinct from the particular interest in it of a party to the litigation) (*Castrique v Inrit, L R 4 H L 414, 423*) Apart from the application of the term to persons it must affect the *res* in the way of condemnation, forfeiture, declaration of status or title, or order for sale or transfer *Halsbury, Vol XIII, p 327*.

Scope of the section Th...

the purposes for which the judgment of a competent Court operates as conclusive against the world, and so far as such purpose relates to the status or what is referred to as legal character of a person, it specifies three purposes only: it

is conclusive against all the world as to that status, whereas in a judgment in

B. 455—65 L. J. Q. B. 616—75 L. T. 95.

is thus supposed to be a party. *Nort. Ev.* 214; *Cunningham Ev.* 184. The four
J. C. A.—87

S. 41. classes of judgments, etc. which alone are to be conclusive, affect it will be observed, the status of a person.

when the judgment declares it did or should where the vesting is in futuro. *See* Ev. 215. *Radhakessun v. Mt. Gangabai*, 22 S. L. R. 105-1923 Sind. L. J. Judgments declaratory of title.

therefore a judgment is conclusive. *See* 1923 A. 393.

54 M. 727-A. I. R. 1931 Mad. 474.

Probate Jurisdiction. The Courts in India exercise the Probate jurisdiction under Act XXXIX of 1925.

in probate is granted to persons as such may be. I think that the section has been frequently applied to cases of persons after the Hindu Wills Act came into force shows this. The only legal character when the Probate Court declares a person to be entitled to is that of executor. It confers the character of administrator. It does not declare it. So the section would be meaningless unless "legal character" included the office of an executor. I do not think that the circumstance that in the particular case the powers of the executor may be limited, makes any difference in the construction of the section."

is only granted after satisfactory evidence as to the testator's capacity on the part of the testator. *See* *Jones v. Jones*, 1923 A. 393.

in any Co
v. Duke of
v. Conche
Griffiths v.
Harris, 11

to probate must be taken to have been conclusively determined and therefore probate is conclusive proof of the due execution of the Will which is the foundation of the title of the executor. *Chandreshwar v. Bisheshwar*, A. I. R. 1927

R. v. also *Ratabundya v. Yanamandya*,
79 1 C 360; *Mayho v. Williams*, 2
N. : *Anjanabai v. Ram Das*, 4 C. W.
N. clxxvi; *Chuna Sami v. Hariharabarda*, 16 M 380; *Jagan Nath v. Rangit*, 25
C. 354; *Mt. Phekn v. Mt. Alanki*, 9 Pat. 693-128 Ind. Cas. 128-A I. R. 1930
Pat. 618.

Court in such matters is conclusive. See also *Field Ev* 335

in a Common-law Court, either
he executed the Will (*Mario*
not then in England (*Whitaker*
L. R. 29 Ch. D. 657), prove
the title of the executor, in which
1433. But where the points were directly in issue and actually decided by the

S. 41. Court between the same parties, or persons claiming under them, the judgment in rem will be conclusive evidence of the matters decided in it. *Spencer v Williams*, 2 L. R. P. & D 230=40 L. J. P. & M. 45. For instance, if, in a suit for administration, the sole question be, which of the two parties is next of kin, the Probate Division, declaring that as fact, has proved himself next of kin, and as such, will be conclusive evidence of the relationship of the parties in a subsequent action between them for distribution, instituted in another Court. *Barrs v Jackson*, 1 Phill 582; *Boulton v Taylor*, 4 Bro P C 708, *Dochon v Crispin*, 35 L. J. P. & M 129, *Thomas v Kettle*, 1 Ves Sen.

execution of the Will, *Harmus v Bar Dahn*, *Ganesh v Ramchandra*, question was considered in *Raman Deb v Kumud Bandhu*, 14 C. 1. "The Judgement in a probate has been repeatedly held as subject to the law of limitation (in a special case) *Ishan Chandra Roa*, 6 C 707) A probate proceeding, therefore, while it enjoys the advantage that a decision it is clear from *nandan v Sheo*

by their very cause of action 21 B 563 In conclusively as testator, and does not, in other words, the judgment of a Court by which a refusal, does not necessarily operate as a judgment in rem in the same way as a judgment by declares that testator with

No doubt, such a judgment if it has not been duly executed by the testator, it has not been duly attested may character of a Will, but even if it is propounded to the court, it is not the genuine Will of the testator. The decision may be based upon entirely different grounds, which do not touch the question of the genuineness of the Will. Such a judgment cannot operate conclusively unless it embodies a final decision against the genuineness of the Will. The learned Judges of the Bombay High Court while they lay down the proposition carefully guard themselves, however, against any expression of opinion upon the question whether, if an issue had been raised upon the question of forgery of the Will and had been decided, the decision might not be conclusive. "The true rule thus formulated in the case of *Schultz v Schultz*, 10 Gratt, 358. When a Will has been propounded by a party interested and fairly rejected on the merits, it would defeat the policy of the law and be productive of many mischiefs, if it could be again propounded by the same party or by others who might be interested and the contest thus renewed from time to time. The sentence, therefore, against the Will must be regarded as a sentence against all claiming under it, it stands upon a footing analogous to the subject of a decision upon the facts necessary to support the decision. *Freeman on Judgments*, Vol I, section 312 (1). O.

ment of the matter in the same or in any other Court by in privacy with them, in other words, a refusal to admit a Will to probate is conclusive of the facts necessary to support the decision. *Freeman on Judgments*, Vol I, section 312 (1). O.

for probate by another person, for example, a legatee who claims an interest under the Will; if so, it would be futile to hold that an executor who has made default, cannot propound the Will again. *Raman v Kumud*, 11 C. W. N 924. The finding as to the execution of the Will of the Probate Court binds at any

as is contemplated in section 41 of the Evidence Act in as much as such judg

Ramoye, 5 Mys L J 107, see also *Monmohun v Banga*, 31 C 357=8 C W N 197.

The expression 'legal character' in section 41, Evidence Act, when it has

Matrimonial jurisdiction This section enacts that a final decree of a competent Court in the exercise of matrimonial jurisdiction which confers upon or takes away from any person any legal character not as against any specified

S. 41. (IV of 1869), does not make the proviso in section 17 applicable to the confirmation by the High Court of a decree of nullity of marriage made by a District Judge, and such a decree may therefore be set aside within six months from the pronouncing thereof :
to be applicable to a decree of nullity, the same before the six months' period has expired, cannot on that ground be treated as made by a District Judge within the meaning of section 11 and 14 of the :
sections 11 and 14 of the :
S. 41, conclusive proof
L H Caston, 22 A 270 (F B) In a case decided before the passing of the

be no evidence against
that the two ladies were a
Charan, 7 W R 38-I
whether the decision can
judgment by a Court h

L R 4 H L 428) or maritime lien (*Minna Craig v Charbreed, etc*, 1 Q B 460). A decree for enforcement of maritime lien by a Court of Admiralty is a judgment in condemnation of property as forfeited, and also is a judgment in rem. *Geyer v Aguilar*, 7 T R 696, *Mainway v Gakan*, Ridge, L & S 1, 78.

is barred by the previous decision which is a judgment *in rem* in section Narayan v Hardutta Rai, 16 N L R 201. The decision of the Insolvency Court amounts to conclusive proof as to the title in respect of the specific things claimed by the applicant, not merely as against him, but absolutely, within the meaning of this section. Pitaram v Jhujhar 33 Ind Cas 798, see also Mussamat v Mathura, 40 Ind Cas 102, Bhavro v P. C. Das 17 A. L. J. 202.

even if it could be held that the decision was not a judgment *inter partes* and binds the creditor *Ram Narain v. Durga Das*
Ind. Cas. 568-55 P. R. 1912-242 P. W. R. 1912

An order of an Insolvency Court refusing to adjudicate a person insolvent on the ground that he was not a member of a firm which had been declared insolvent is not a final order which conferred upon or took away from him any legal character within the meaning of this section and hence it is not a *res judicata* in rem. Being a partner in a firm is not a legal character. *O. J. Sanyal v. O. J. Sanyal*

Madras v. Off. Assignee of Rangoon, 46 M. L. J. 580=1924 Mad. 662=31 M. L. S. T. (H. C.) 90=83 Ind. Cas. 171, see also *Radha Kishen v. Mt. Gangabai*, A. I. R. 1928 Sind 121=22 S. L. R. 105. An order adjudicating a person an insolvent and vesting his property in the Official Receiver no doubt operates as a judgment *in rem* but the grounds on which the order is based has no such effect. *Radha Kishen v. Mt. Gangabai*, A. I. R. 1928 Sind 121=22 S. L. R. 105.

Legal Character.

The legal character and legal status of the person

"We :
"legal
to him
it were with which the law clothes him apart from the attributes which may be said to belong to normal humanity in general. *Rama Krishna v. Narayana*, 39 M. 80=26 Ind. Cas. 883.

ing must have been declared not as
A decree declaring that A is entitled
t only made against a specified person,
so it is not conclusive proof of title to a debt. *Venkataramanayya Pautulu*,
54 M. 601=A. I. R. 1931 Mad. 441=61 M. L. J. 229 (S. B.) Similarly a right
to recover a debt or a chose in action cannot be deemed to be a "specific thing".
Ibid.

f an issue as to the age of a
of the guardian for person,
proceeding, is not one of
conclusive
R 1910
administration
her father,
sly been made under the Guardians
idow for a declaration that she was the
infant son of the alleged testator,
by the present petitioners who claimed
to be testamentary guardians of the property appointed by the Will now
propounded, and that the
question of genuineness of t
proceedings under the Pro
haraborda, 16 M. 380. A ju
adoption is not admissible
matters decided therein. *Guru Mahadev v. Jagatray*, 71 Ind. Cas. 929, *Kanhya*
Lall v. Radha Churn, 7 W. M. 338, *Yarakalamma v. Ana Kala Naramma*, 2 M.
H. C. R. 276

to be testamentary guardians of the property appointed by the Will now
propounded, and that the
question of genuineness of t
proceedings under the Pro
haraborda, 16 M. 380. A ju
adoption is not admissible
matters decided therein. *Guru Mahadev v. Jagatray*, 71 Ind. Cas. 929, *Kanhya*
Lall v. Radha Churn, 7 W. M. 338, *Yarakalamma v. Ana Kala Naramma*, 2 M.
H. C. R. 276

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S. 42.

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a sentence of
evidence on a questio

marriage . . . But in these cases the parties
whom the

Judges, when taken apart from the reasons on which it is founded, is not
entitled to much weight, it being merely a
decision of a

Administration - was not in issue in the proceeding relating to Lath
1926 Rang 202; see also *Oates v. King Emperer*, 38 C. L. J. 163.

42. Judgments, orders or decrees other than those mentioned in section 41, are relevant if they relate to matters of a public nature relevant to the inquiry; but such judgments, orders or decrees are not conclusive proof of the truth of the facts which they state.

Illustration.

exists, but it is not conclusive proof that the right

not as res
parties, provided
for the C

s section judgments
whether between the
see also *Collector v.*

S.

such as the existence of custom in succession in particular communities. Such

regarded as a species of reputation,—will also be received and this too, whether the parties in the second suit be those who litigated the first or be utter strangers.

when admitted, will so far vary, that they will be bound by the previous suit be strangers to the parties in the inclusive. *Reed v. Jackson*.

Even before the enactment this country. *Doorga v.*

Narendra, 6 W. R. 232; *Madhab v. Thomas*, 7 W. R. 210, *Totaram v. Mohan*, 2 Agra 120; *Venkata v. Subba*, 2 M. H. C. 1.

Origin of the Rule It has often been said that verdicts of juries, and judgments, decrees, and orders of Courts of competent jurisdiction, are evidence of reputation, and possibly when juries were summoned *de vicinato*, and were consequently assumed to be acquainted with the subject in controversy this may

as were admitted, said "Reputation is case; a fortiori lays there is no

exception to the

Hearsay Rule *Wigmore § 1593* Because "that was when the jury was summoned *de vic*
Per Alderson B
early part of the
verdict was a c
Pre Treat Ev 90
nor a Judge's c

S. 42. pronounced in a cause litigated
is also admissible, not as tending to

to be forced into evidence to the Hearsay Rule. Case 147, which was decided under the Reputation Exception, explained in notes and "Such evidence, admitted, is not in itself in any proper sense evidence of reputation." It really rests upon a higher and larger principle, specially in cases, like the present, of prescription; it comes within the category of *res gestae* and of declarations accompanying acts. The effect of this evidence is extremely strong to establish the same case as evidence and being of reference to the actions, the pair of decrees stronger Court has

observed "Here the persons acting as Judges had no knowledge or view except what they derived in the course of that proceeding" But see *Duke of Newcastle v Brantowe*, 4 II & Ad 279, where *Parker J* said, "Though they (Justices) are not proved to be residents in the country or hundred they must from the nature and character of their offices alone, be presumed to have sufficient acquaintance with the subject to which their declarations relate". Similarly in *Evans v Rees*, 10 A & E 155, *Denman LCJ* said "The opinion of an arbitrator as to a boundary is formed not upon his own

933), and it seems to receive some support from a recent case in which it was held that old depositions are not admissible under this head of evidence if they contain testimony only as to particular facts. *Mercer v. Deane*, (1904) 2 Ch. 534; (1905) 2 Ch. 538, 1 *Wills Ev.* 234.

Cases in which judgments were held admissible where they relate to public matters. In the ^{not a} ^{verdict in an} ^{action}

A judgment in favour of a Lord of a manor on a *quo warranto* issue
a franchise is evidence of the right even against copy holders of impropriate land.
Carnarvon, Earl of v Villiers, 10 C.B. 678. See also *Attorney-General v Lord*
on custom, evidence which it was alleged The most satisfactory based on the custom
Albar Khan, 1 A 44.

Mundul, 27 C 379 (391), *Kahan Das v. Bhagirathi* 6 A 361, *Judicial dec.* *Sheonarayan*, 1 A. 373; *Sheoboran v. Bhaxor*, 7 A 890. Judicial decisions recognising the existence of a disputed custom amongst the Jains of one place are very relevant evidence of the existence of the same custom amongst the Jains of another place, unless it is shown that the customs are different and oral evidence of the same kind is equally admissible. There is nothing to be

S. 4
 setting up
 of a High
 go of the
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 trustees of a
 es money
 gments in
 have been

decreed in favour of the trustees of the temple were relevant under s 42 of the Act as relating to matters of a public nature *Ramasami v Appavu*, 12 M. 9

to show that shrine *Sri Ganesht v.*
Keshavrao, 15 *ecretary of State*, 16 C 173
 (183) Where daughter's son in sanc-
 tioned by custom amongst *Dehasitha Smarth* Brahmins, decisions in suits in which

who made it. *Lanuarial v Shoochand*, 85 Ind Cas 795=A I R 1923 Lah
 884 When a question of status is in issue, judgment and orders between the
 a case, rent suits, suits for
 are of high evidentiary value
Jumtal v Mt Hulki, A I R
 ough a judgment not *inter partes*
 as a fact in issue, or as a
 recitals in the judgment cannot
Kashinath v Jagat Hishore,
 20 C W. N. 643=23 C L J 583=35 Ind Cas 298; see also *Ram Ranjan v*
Ram Narain, 23 C 533 (P C); *Bhutto v Kesho Prosad*, 1 C W N 265=24

of a 'public nature' within the meaning of section 42, and the judgment of the

5. 43. Faridkot Court is not therefore relevant as relating to a matter of public nature *Ibid.*

43. Judgments, orders or decrees, other than those mentioned in sections, 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree is a fact in issue, or is relevant under some other provision of this Act

Illustrations.

A obtains a decree against C for damages on the ground that C made out his justification. The fact is irrelevant as between B and C

A wife
tion As b
(d) A
murders A in consequence

The existence of the judgment is relevant, as showing motive for a crime
* (e) A is charged with theft and with having been previously convicted of theft. The previous conviction is relevant as a fact in issue
* (f) A is tried for the murder of B. The fact that B prosecuted A for libel and that A was convicted and sentenced is relevant under section 8 as showing the motive for the fact in issue

Principle It is well settled that a judgment in personam is not admissible in a suit between strangers or a party and a stranger except in a case where it is settled, the judgment is tendered against (R v Foulkes, 1859, 11 Q B D 1028), sometimes as hearsay (Step Art 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 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978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

could not make defence
legitimate ground for a
satisfactory reason for
that the objection of *res iudicata*
solemn acts of strangers if relevant to the issue *Phil Ex 101*
where the instance of judgments, orders or decrees is a fact in issue or a relevant fact under some other provisions of the Act, the judgments, orders or decrees

however, there is a highly important limitation. A judgment

*This Illustration was added to s 43 by the Indian Evidence Act Amendment Act, 1891 (3 of 1891) s. 5

able for proving the truth of what it asserts may be valuable as evidence for some other purpose. Its very existence may be a fact in issue, and then of course, evidence of it may be given; or it may be a fact relevant within some
ence
So
imis-
0, 41

or 42. So the cases referred to in this section are such, as the section itself

taking this view I am doing any violence to the language of s. 43 of the Evidence Act, which, if I understood it aright, declares that judgments, orders and decrees other than those mentioned in ss. 40, 41 and 42 are of themselves irrelevant, that is in the sense that they can have any such effect or operation as

which the partition of the estate was asserted and recognised : The reason upon
and cannot be so
than the transaction
*Jodinda v Shanulal*
C W N 521 P C
but if they are not

inter partes unless there existence of such judgment is a fact in issue or is relevant under some other provisions of the Act. The existence of the judgment may be relevant but not the decision of the Judge or the opinion expressed by him. It is immaterial if the defendant on both cases is the same and the decision of the Privy Council in 22 C 533 is no authority for the general proposition that a judgment against a party can always be used against him in a subsequent suit by another person. *Benodelal v Secretary of State*, 34 C W 1113—A I R 1931 Cal 239. So recitals of judgments not *inter partes* of relevant fact are not admissible in evidence. *Asa Ram v Mausha*, A I R 1930 Lab 237

Existence of judgment etc is a fact in issue. If the object of the judg,

even though his name appear on the back of the bill, or of his malice, or of

S. 43.

l v. Marumara, 9 East 361; *Inclusion v Barr*
hika, 11 W. R. 339; *Keramat v Gholam* 9
 notwithstanding the verdict is still at liberty to
 r § 1667 - but see *l v. v. Shewer* 11 4

will apply to other cases, wh
 or the like *Pouell v M*, 4
 158, *Griffin v Brown*, 2 Pick 504. In
 defence was that the plaintiff had received
 satisfaction of his damages, it was to
 that the plaintiff, on traversing this plea, might put in evidence a judgment
 recovered from him by the assignee of the principal for the amount so received
 as conclusive proof that the money had

29 L J Ex 270

Watson v Little, 5 H L J 1

Irrelevant under some other provisions of this Act. Ordinarily a
 judgment not inter partes is
 in *Lal*, A I R 1929 Lah 137
 regards the value of the estate
Nageshar v Hanuman 2 A, 4

A. L. R. 10 (Kev)

In a suit

binding on

by the same

part of the land in suit was not binding on the ground of the issue
 ancestral, can only be treated as admissible for the purpose of showing that
 on former occasion the right of the alienor to alienate part of the property
 suit was called in question on the ground that the property was ancestral
 The finding of the Court in the previous suit that the property was ancestral
 is not relevant *Partap v Mothu*, 11 Lah L J. 492=96 Ind Cas 293=27 F
 L A 544

the fact

Harih

Where

not relevant

with

trans

previous decisions in Land Acquisition cases are relevant in a suit
 where the market value of the land in the same neighbourhood is
Madan Mohan v Secretary of State, 78 Ind Cas 557.

5 Pat. L. W. 97 = 43 Ind. Cas. 393.

One N, who was a usufructuary her right to recover profits in that sh defendant for a number of years. R dant's name continued to be recorded as the defendant and R

present suit for a declaration that the , the lease in his favour having come to The defendant pleaded an arrangement

the unex
mortgage
pleaded b
admissible
Mahomed

Reca
Satindra v.

possession was claimed or disputed, and also as evidence to show that there was such a j determine w trial should c

n an action for
his land by the
was accidental

of a bond on which a suit had been brought, directed the prosecution of the of the executants plaintiffs in for the offence Raja Kumari Sarma v. Kash

Kalpada, 28 C. W. N. 587. But p. 618, Ghosh J said "I am not prepared to say that the decision in the civil suit would not be admissible in

, and what the land in
Nath v. Mahomed Wafiz
P. C) = 6 C. W. N. 387.

- S. 44. Judgments, etc are admissible, meaning of The general principle is that the mere existence of a judgment, its date and legal consequences, are conclusively proved, as against all the world, by the production of the record, but that even though, as between the parties, the judgment must have been proved. The

sively -
the pr
used in
W N 402 Judgments and decrees recognizing rights between parties to a suit or between persons whom they represent are not conclusive but are admissible in evidence under s 13.
different from those in the former suit
Neamut Ali v Gooroo Das, 23 W R
Gopi v Kherod, A I R 1925 Cal 194.
in evidence in order to prove that there was a certain way, does not make all the recitals in the subsequent action *Abdul Latif v*
Cas 667, see also *Tripurana v Rokham*, 43 W L J 324 (F B) = 45 W L J 583; *Sarod v*
Arishnanath v Jagat Rish - 1905
Kant
... contains a recital of the
... refers to a point in the
... A. I R 1925 Mad. 996 = 85 Ind Cas 996 = 27 L
parties put the respective claims which in
979 (381) *Chhadeh v. Syd Ali*, 85 Ind Cas
pleading is narrated in the judgments, the judgments furnish evidence of the
allegations made by the parties on that occasion *Kailash v Byoy*, 72 Ind Cas
680, see also *Purbatty v Purno*, 9 C 586; *Bhaya v Pande*, 3 C L J 1
Byathamma v Arallu, 15 M 19, *Thama v Kondar* 15 M 378, *Krishna v*
v Rajagopala, 18 M 73, *Malcomson v O'Dae*, 10 H L C 593, *Loyell v Ken*
(1889) 14 A C. 437 *Neil v Devonshire*, 8 A C 135

44 Any party to a suit or other proceeding may show that fraud or collusion in any judgment, order or decree which is relevant under section 40, 41 or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.

Principle

between parties who were really not in contest with each other." This rule has been embodied in the Indian Evidence Act. *Barkumssa v. Fazl Huz*, 26 A. 262 (283). So under this section the defendant is entitled to show that the decree is obtained by fraud. *Ibid*, see also *Hara Krishna v. Ramchsh*, 62 Ind. Cas. 962=6 P. L. J. 373.

ties to a suit tenders or has
n 40, 41 or 42, it is open to the

lays down that any party to a suit or judgment, order or decree which is relevant under s. 40, 41 or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion. *Pranag Kumar v. Siva Prasad*, 93 Ind. Cas. 385=A. I. II. 1926 Cal. 1=42 C. L. J. 280. This section was construed by *Maclean C. J.* and *Banerjee J.* in the case of *Rajib Pondey v. Lakhari Sindh*, 27 C. 11=3 C. W. N. 660 and it was held that a party to a suit can show that a decree

Boss, 30 C.
id is sought

a judgment, order or decree as barring a second suit or trial; section 41

- S. 44. case of fraud or collusion will have to be specifically alleged and substantiated by the party setting it up. *Baukantha v. Mohendra*, 1 C. L. J. 65. To set aside a decree on the ground of fraud, it is not sufficient to prove constructive fraud, but an actual positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance by that contrivance. *Bisher*, R. 1926 Lah. 177. Where a fraud or collusion, such fraud or collusion as is contemplated by the Evidence Act, must be raised in the defence. *Ambika v. Kala Chandra*, 10 C. W. N. 422 (424). Where a party seeks, under section 44 of the Evidence Act, to avoid a judgment on the ground that it was delivered by a Court not

111 Ind. Cas 762 = A. I. R. 1928 Pat. 675.

Not competent. The words "not competent" in this section refer to a Court acting without jurisdiction. *Kellamma v. Kelappan*, 12 M. 229 (230). "Jurisdiction may be defined to be the power of a Court to hear and determine

in "jurisdiction" which has been stated to be "the power to hear and determine issues of law and fact,"

v. Dhanraj, 193. This jurisdiction is to place, value, and has exercised within

pronounced by a Court without jurisdiction is void. *Mohan v. Mahesh*, 193. void and a nullity it is not only the duty of the Court which passed it to

Lal, 17 A. 478; *Haji Musa v. Purman*, *Vaithinathan*, 38 M. 682; *Roop Naram v. Narendra v. Gopal*, 17 C. L. J. 634. One must be fundamental

pronounced, for the power to decide necessarily carries

decide wrongly as well as rightly. *It*
 723=31 C. L. J. 482. In *Mallharjun*,
 5 C. W. N. 10, Lord Hobhouse said:

W. N. S.
 (347)=
 wrong

Moomraj, 45 C. L. J. 24.

The plea of *res judicata* can be satisfactorily met by showing that the judgment, in which the issues pleaded were decided, was delivered by a Court

To sustain an objection that the Madras Insolvent Court's order is a nullity conferring no title to the debtor's estate on the Official Assignee, it is obviously not sufficient to prove that the order was wrong. To hold otherwise would virtually erect into a Court of appeal from the Insolvent Court, not only this Court, but every Court in which the (and would be inconsistent with section 41 Act. What, then, is the test of whether

S. 44. Mere delay in raising it cannot itself be fatal objection when a fresh execution sought. *Sheo Tahal v Binack Shulul*, 1931 A L J 613-1 I R 1931 418 689, see also *Panchhari v Girdharimel*, 89 Ind Cas 317, *Veerav Muga* 33 M 271 (F B)

thereof
nullity, a

made by a Court
41 and 44 of the Ind
proof that the marriage
271 (F B)

un quam co habitavit (Fraud & 1
It vitiates the most solemn proceeding, O J in the *Duchess of Argyll*

Case, 20 How St Tr 355 It avoids all judicial acts, ecclesiastical or temporal. *Ibid*, see also *Shedden v Patrick*, 1 Macq 535 But the difficulty is that no definition is given in the Act of the word "fraud" This section provides that any party to a suit may show that any judgment was obtained by fraud. "It is clear" says *Martin C J* in *Bhulaji v Balwant*, A I R. 1927 Bom 610 "Bom L R 1046, 'that some limitation must be put upon that section. For instance if party A, and his witnesses in a particular suit came into the box and committed deliberate perjury on material points, that is clearly fraud. On the other hand if a decree is eventually passed in favour of that party, even on the perjured evidence, it cannot be a ground to the opponent to start a new action exactly the same evidence wrongfully believed by doctrine of *res judicata* party might alternately

Consequently the authorities show, I think, that if the case merely in effect, a re-hearing of the previous suit on substantially the same issue then the Court will not hear the second suit. On the other hand it is clear that in a proper case the Court has jurisdiction to set aside a decree which has been obtained by fraud practised on the Court. If, for instance, the existence of certain evidence has been stoutly denied by one party and the Court has been induced to pass a decree on the basis that that evidence existed

circumstances are looked at, that in that case the Court would set aside the original decree

In *Nanda Kumar v. Ram Jiban*, 41 C 99-100 C L J 457-23 Ind Cas 27-18 C W N 991 The jurisdiction to set aside a decree is not limited by

the decree being the principal point in issue, it is necessary to show it by proof before the propriety of the prior decree can be investigated. Decrees may be (1) by consent, (2) *ex parte* or (3) after contest, apparent or real. And though each is liable to be attacked for fraud, the character of the fraud would vary with the circumstances of each case. One who seeks to impeach a decree passed after contest takes on himself a very heavy burden and it is not to be upset on a mere allegation of fraud. The conclusion that the decree is void in the former suit will not be upset on a mere allegation of fraud where, and in what way, it was obtained. The

L. R. 751=37 A

motion and acting in order for the purpose of actually a fraud, must be fraud which and that mere irregularity, investigation of these rights is not the kind of fraud which will authorise the Court to set aside a solemn decision which has assumed the form of a decree signed and enrolled " Per Lord Cairns L. J. in *Patch v. Ward*, L. R. 3 Ch 203, see also *Cheo v. Johnston*, 2 Sch & Lef 308

In *Fowler v. Lloyd*, L. R. 10 Ch. 1 *Baggallay and Thesiger L. JJ.*, the suit was d

to have been sub
not question would
in the affirmative
action brought out
could be set aside
in to interrogatories,
of a process had
which the evidence
other wilfully and

corruptly perjured In this case, if the plaintiffs had sustained on this appeal the judgment in their favour the present defendants, in their turn, might bring a fresh action to set that judgment aside on the ground of perjury of the principal witness and subornation of perjury. as if the parties might go on after

proved that a
which judgment
These observations
Mohamed Go
"The principle
obtained by a fraud
from placing his case before the tribunal which was called upon to adjudicate

S. 44.

Both the defendants contended that the Will was void, and that the probate was induced by fraud. *Held* that the second defendant was barred by the decision of the District Court in the revocation matter from raising the question in the Court of the Subordinate Judge. Further *held* that as regards

he does not raise these questions by his pleading, although he does so in the common cause with the second defendant in his defence. . . . As regards the second defendant, although he had a *locus standi* to make an application, his right is now at an end by reason of the unsuccessful result of his application for revocation. That being so, it appears to us that the first defendant has no defence to this suit.

The fact that the defendants have been in possession of the land in the village implies a decision in respect of any of the lands included in that village by a decree of Court under section 11 of Regulation III of 1872. It is open to the plaintiff to avoid the effect of such a decree. 2 A. or sub-section (1) of section 24 of the Evidence Act, 1872, is interested to bring forward in the Settlement Court, and to make to any part of such record.

the record. 19 C. L. J. 29; see also

Art. XIV of 1883 can only be used against whom an order

the fraudulent nature of the proceedings, the order passed upon it in any proceeding, the strength of that order. *Chumma v. Ram Das*.

16 Bom. L. R. 648.

Judgment vitiated by fraud, whether the same should be set aside. Whenever a party seeks to avail himself of a former judgment, fraudulently entered, the opposite-party may show the fraud, and thus avoid the judgment. *Whart. Ev.* § 797. Now the question is whether fraud can be collaterally set aside, or whether it can be directly set aside.

and cannot resort to a writ of *habeas corpus*. *Whart. Ev.* §§ 797, 799. So according to *Burr Jones* also "domestic law"

our attention to so

other words (confining

from a provision such as the plaintiffs contend it is intended to be merely

et on makes the same provision for
and that it does for avoiding a
Now there can be no question

Sib Saran v Rameshwar, 60 Ind Cas 640=1920 Pat 363=2 P L T 40,
Kunaram v Banomali, 29 Ind Cas 838 The case of *Ransilal v Ram Lal*

collateral proceeding." "In applying this rule it matters not whether the
impeached judge
Highest Court
every Court,

tes had fraudulently taken place under
in Ireland obtained by collusion between
person in whose favour a charge had

S. 44. been created, and the purchaser, and where the interests of the tenant in remainder had not been probated, the Court of Chancery in Ireland on the 1st of May 1811 filed a bill filed to

estate of mortgagor. *Nistarini v. Nundo Lal*, *ubi supra*, see also *ibid* 11. It is competent for every Court, whether superior or inferior to treat as null and void judgment which can be clearly shown to have been obtained by manifest fraud. *Maung Kyaw v. Annul*, 62 Ind. Cas 53=13 Bur. L. T. 198, *Manchhar v. Kalidas*, 19 B. 621; *Krishnabhupati v. Ramamurti*, 16 M. 198; *Andamery v. Annunissa*, 12 C 156

Compromise decree—Fraud Where a decree is alleged to have been obtained by fraud and misrepresentation it is competent to a party to bring an action under section 44 of the Evidence Act that this amount was obtained by fraud and misrepresentation, and a separate suit is not necessary to set aside the

v. Panchi Dasi, 32 Ind Cas 849.

Pat 375=9 P. L. T. 375. Foreign judgments *in personam* of a party to the suit in foreign Court cannot be enforced by him in an action brought in an English Court. *Nistarini v. Nundo Lal*, 28 C 891 (91) see also *Abonloff v. Oppenheimer*, L. R. 10 Q. B. D. 295, *Valda v. Laufer*, L. R. 25 Q. B. D. 310, *Codd v. Dela*, 92 L. T. 510; *Ilip Foong v. Anewa*, (10) A. C. 888; but see *Robinson v. Fenner*, (1913) 3 K. B. 835

In *Abo*

even though

gated in it

committed,

an action claiming

whereby the defendants

were ordered to return

to the plaintiff the goods

at the goods

the plaintiff

ord Court,

it must be

in Court and

that the allegations

of fraud were brought

before the

foreign Court

came to a conclusion

against the

defendants, and

whether the

conclusion was

right or wrong

on the matters

of fact the

question of the

fraud alleged

could not be

tried in the

Courts of

England, says

that the

arguments for

the plaintiff

also in some

what different

words, namely

that although

the Russian

Courts at

Tiflis were

led to decide

as to the

defendants through believing a false :
the plaintiff, nevertheless the defendan :

l to a foreign judgment
it obtained in an English
ught. There may be a

difference where it is sought to enforce by the process of a Court a judgment of
that very Court, because if that judgment has been obtained by improper means
the objection does not arise in a new action brought on that judgment, but it
arises with regard to the process of the Court to enforce a judgment of its own
In a case of that kind it was perhaps formerly necessary to proceed in a Court
of Equity in order to get rid of the judgment, but I doubt whether it was
necessary, because, at least in my opinion, a Court of Common Law would have
in the exercise of its own jurisdiction set aside a judgment procured from
it by deception."

In the case of *Vadala v Laurs*, L R 25 Q B D 310, in which an action
was brought by the plaintiff in the English Courts upon a judgment obtained
Bills of
Bills were
t without

in equally general language, is perfectly well settled, is that when you bring

Foreign judgment—how impeached under Indian law In India a foreign
judgment shall be conclusive as to any matter thereby directly adjudicated

law in force in
1908)

Collusion No definition of the word "collusion" is given in the Act.

may be of two kinds—(1) when the facts put forward as the foundation of
the judgment of the Court do not exist, (2) when they exist, but have been
corruptly preconcerted for the express purpose of obtaining the judgment."
Wharton Law Lexicon cited in Field Ev 7th Ed p 170 No doubt a decree
can be avoided on the ground of fraud or collusion under this section. But

- S. 44.** there is a great : : : :
made the victim of : : : :
discovered the fr : : : :
a point of defence : : : :
collusion is a m : : : :
is a point which could and might have been raised before the decree was p-
on the last occasion. A third party can undoubtedly void a decree or
ground that it has been obtained collusively, but it is clear that a party to
collusive decree can not avoid it on that ground. *Sahib Rai v. Balan Lal*,
I R. (1927) All 494=101 Ind. Cas 765, *Chenier Appa v. Puttappa*, 11 B
Varadarajula v. Srinivasulu, 20 M. 333; *Kandetti v. Nukamma*, 31 M. 4,
M. L. J. 576; *Venkataramanna v. Viramma*, 10 M. 17. That such a decree
by the case of *Rangammal v. Tello*, 27
h, A. I. R. 1927 All 523=101 Ind. Cas
rigage decree was made more than the
absolute. After the decree absolute was
judgment debtor transferred his equity to
judgment-debtors, though served with
the annulment

questions and adduce evidence to prove the facts stated *Kama* :
18 C. L. J. 261

Who can plead fraud or collusion. The language of this section is
enough to allow a party to the suit in which the judgment was obtained, to
that it was obtained by the fraud of his antagonist, though the judgment was
by to set up his own fra-
Indian Code Vol II
h under the English law
such judgment is void
the suit in which it is
non the Court

Aswani v. Banamali, 21 C. W. N. 591; *Taylor* § 1719; *Phip* Et Tit Ed.
In England a party to a suit would not be allowed to defeat a judgment
showing that it has procured an
Anglo Ind Code Vol II p 829 In :

, 27 C. 11 (21-22) = 27 C. 11
st a judgment. *West v. Ash*
Ves Sen 244, *Ahmedbhoj v. Vullubhoj*, 6 B 763; *Prudham v. Phillips*, 2 All
763 The rule that fraud can only be proved by an innocent party does not
apply, however to probate [*Birch v. B.* (1902) p 130], or divorce [*Doniphan*
B. (1892) p 402] cases.

Party cannot plead his own collusion or fraud. Section 44 of the Indian
Evidence Act, no doubt allows a judgment or decree, otherwise relevant, to be
shown to have been obtained by fraud or collusion. But the whole
doctrine that a party cannot plead his own collusion to avoid a decree
supported by numero : : : :
1179; *Bhaicabal v.* : : : :
Nundo Lal, 26 C. 891
Srinivasulu, 20 M. 333 (338), *Kandetti v. Nukamma*, 31 M. 455 (457)=4 V L
T. 331. A party cannot ask for relief against a fraudulent conveyance
by him and which has been successfully used by him to defraud a creditor.
Banku Behary v. Rajkumar, 4 C. W. N. 289=27 C. 231, *Gobari* : : : :
Ritu Roy, 23 C. 962; *Kali Charan v. Rasik Lal* 23 C. 963 N. "The maxim
pari delicto potior est conditio possidentis is as thoroughly settled as any F. C.
tion of law can be. It is a maxim of law established, not for the first

it is made the antipony of his executor (ancestor ?) and *cessante ratione legis*

decree had been obtained by fraud
 fraud was their predecessor in title
 The principle that a party to

1151-22 C L J 197-29 Ind Cas 690

Suit to set aside judgment obtained
 section where a judgment has been obtained

decree, an *ex parte* decree or a decree passed after contest, is liable to be vacated on account of fraud *M A Maistry v Abdul Aziz*, 5 Rang 46-101 Ind Cas. 431-A. I R 1927 Rang 130, *Raman Menon v Madhava*, 93 Ind Cas 176-A I R 1927 Mad 96 To set aside a decree on the ground of fraud, it is not sufficient to prove constructive fraud, but an actual positive fraud, a mediated and intentional contrivance to keep the parties and the Court in ignorance of the real facts and obtaining a decree by that contrivance *Bishun Singh v*

S. 44.

decree whether there was fraud practised in relation to the proceedings

sufficient ground for setting aside a decree *Kasimur v Aminuddin*, 34 N 133=47 Ind Cas 84; *Barkuntha v. Prahlad* 31 C W. N 560, 34 Ind Cas 84; *Hari Mandal*, 24 C W. N 133=51; *T 735=60 Ind Cas 124*, *Kripa v Nan*
But a decree can be set aside which

88 L R 81

To sustain an action to set aside a decree on the ground that it was obtained by fraud, the fraud must be extrinsic to the proceedings before the Judge must be in the conduct of the suit by keeping the plaintiff out of Court

by him *Madan Dadda v Kama* 37 Ind Cas 199=91 L R 81

Suit to set aside an ex parte decree A suit to set aside an ex parte decree on the ground that the claim was a false one and the decree was obtained by perjured evidence will not lie, where the prior suit is a contested one or an ex parte decree was passed after service of summons *Nalin v Hari* 29 C W N 325=86 Ind. Cas 779=41 C L J 281=A I II 1925 Cal 663, *Barkuntha v. Prahlad*, 30 C. W. N. 560 The mere fact that an ex parte decree has been passed does not show that there was no service of summons on the defendant

P. L. T. 239 = (1920) Pat. 209 = 56 Ind. Cir. 615; *Nagendra v. Parbatty*, 20 C. W. N. 819, *Gendu v. Saddi*, 44 Ind. Cir. 983.

OPINIONS OF THIRD PERSON WHEN RELEVANT.

might be more accurate and sound than
implation of law, a matter of no consequence.
in the most unequivocal manner, that the

It was for the jury to form opinions, and draw inferences and conclusions, and
y, or the Judge, the
the witness spoke
whether to believe
then the jury were
to judge of their import and their tendency The witness was not to say that he

centuries, and it was but slight before the present century In a sense, all
testimony to matter of fa
from phenomena and
Courts or in common lif

is not really to be called opinion evidence in the sense of the rule It has been
said, judiciously, that there is, in truth, no general rule requiring the rejection of
opinions as evidence' (*Hardy v Merrill*, 66 N. H. 227, 241). Without acceding

S. 45.

the case

Matters of opinion—meaning of. I phrase "matter of opinion" fails to represent a definite conception. As used in the law of evidence

shows
logical

it applies to the use of the reason

— of opinion there relating to facts, is applied

whole or in large part, of an act of reasoning, but propositions of belief, not capable of verification religious views, political principles and the like, as to which certainty is practically impossible. These are the matters of endless debate of argument pure and simple. In cases of these debatable questions, the facts of the trial, *res gestae* or probative, are in no way involved. *Chamberlain v. E.* 1791, 1792

Why opinion evidence was a matter of testimony. In *Wright v. Tatham*

concede, though, it is not, opinion of a witness even on oath is, as such, admissible evidence without question of competency. When you can bring the decision of that question sometimes may, to depend upon deductions from scientific principles.

at the same time that this principle is becoming recognized, or as

there occurs a general recognition of what seemed at the time as an exception to it—the use of skilled witness *Wigmore* § 1917 ‘Though the witnesses can in general speak only as to facts, yet in questions of science persons versed in the subject may deliver their opinion upon oath on the case proved by other

on the subject in dispute” *Peake’s Evidence*, 143 Like other exclusionary rules in the law of evidence, that which undertakes to reject ‘opinion’ may be a
 rectly
 nent of
 is not
 The
 equate
 knowledge on the subject His declaration, therefore, is said to be rejected as
 opinion *Chamberlayne’s Ev* § 1793

person who had to be received by way of exception to that notion Thus, when an ordinary lay witness took the stand, equipped with personal acquaintance
 ge, the circum
 and expressed
 per It would
 not occur to any Judge that this witness was doing a wrong thing In short, it was only ‘opinion’ as a mere guess and a belief without observation which they
 3 Burr 1905, 1918 *Lord Mansfield* said “Mere
 opinion as an inference or conclusion from
 did not think of disparaging That this was the
 ver will appear from the following passages
 hich witnesses speak from judgment and opinion,

ich he witness may form *Mr Espinasse*
 he “*See it*” 5-7 (Am)
 when the early
 had in mind
 ncluded in his
 the case of the lay
 testimony an opinion or inference based on these data—as in the leading
 instances (used by those writers and Judges) of handwriting character, and

now and
 witness
 propose
 made at
 this opi
 before the jury and they were as competent as he to draw an inference It must
 ory,
 It
 r to
 be no English rulings which indicate that the opinion rule has there been
 I E. A.—91

S. 45.

bar Wigmore § 1917.

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nature It simply endeavours to save time
telling the witness: "The tribunal is on -
materials of information as yourself, thus, as you can add nothing
materials for judgment you if what testimony is unnecessary, and
encumbers the pro
applied in each
the principle" II
Mansfield in *Carier v Boehm*, 5 Burr. 1303, 1310. "The
rightly formed, could only be drawn from the same premises from which
Court and the jury were to determine the cause, and therefore it is improper
irrelevant in the mouth of a witness"

Opinion and fact, how to distinguish. Accurately to distinguish "matter
of fact" from "matter of opinion" is not less difficult than to distinguish
from "matter of law" In all supposed statements of fact the witness really
testifies to the opinion formed by the tribunal upon the presentation of the
senses Statement of opinion is the
fact 1 *What Ev* § 15 An
"opinion" is found in cases where
inadvisable to permit a correct or effective impression to be
permitted to state simply the impression, such phenomena produced in the
minds This apparently is simply another method of stating facts *Test. E.*
8th Ed p 473, *Corn v Sturtevant*, 117 Mass 122, 133 So also if we look at
the "opinion" of the witness in a proceeding of the nature of the

sense this may be said to be a statement of opinion—that is, it is
the witness's mind upon a state of facts presented to his senses—and in the case
in question there was sufficient doubt as to the nature of the statement to cause
the objection to be raised, yet the Court held, and quite properly, that it was
speaking the
Cl Ry. Co
cases which
the witness
in several ways, and sometimes the use of one word will make a

could not even have been raised, had the witness used, instead of the word 'acknowledged' the word 'said'. *Haunster v Davis*, 128 Iowa 216=103 N W 573. A witness may not be asked whether there was any room in a car for other men, but may state whether there was any vacant or unoccupied space in the car. *Chicago Terminal Transfer Co v R. Co.*, 114 Ill. 407.

knowledge on the part of the witness testifying. What he thinks in respect to the existence or non existence of a fact in issue is matter of opinion, and he cannot state it. It is for him to put before the jury the facts as he has perceived them by his senses.

of the robbery they recognized him by his

The testimony was objected to as opinion.

The Court treats the question as follows. The statement by the witnesses for the prosecution of a fact which they ascertained through the sense of hearing was not the statement of mere matter of opinion, but the statement of a conclusion reached directly at

A witness can learn and

faculties—his five sense

Prof Wigmore no such

principle", says the lear

out of the question and considering only principle) that there is no virtue in any test based on the mere verbal or logical distinction between 'opinion' and 'fact'.

Further more, an examination of the so called opinion rule, as applied in its various instances shows that the opinion element is in the very law itself, a merely superficial and casual mark and not the essential feature".

Wigmore § 1919

Entire Elimination of Inference Impossible The impression which first arises to the mind upon hearing the ideal position of the witness thus stated is a conviction of the impossibility for any one to satisfy such requirements

of the simplest fact

ative recognition of

ning Observation

by the aid of the

that of inference or

reasoning viz, intuition so instantly and intuitively that the mind is seldom conscious of the process. These sense-impressions are seized by the reasoning powers and the mind becomes aware of the concept rather than a mere percep-

when those original sense perceptions have become so overlaid by inference, experiment that the reaction of each upon the other can no longer be distinguished from the practically

Involution of Reasoning, (1) Inference While the entire elimination of inference is impossible, something may fairly be said as to the relation which observation and inference bear to each other in certain classes of mental result. However distinct the classes may be in broad outline they present the ordinary difficulties inherent where one class shades into another by almost imperceptible distinct line is frequently difficult to draw nor can it be

Credibility of intuition The administrative reason for rejecting the S.

trustworth

operation

statements

ience shows that instinctively acting the normal human mind tends to observe correctly and report neous statement is reasoning is not

almost as a matter of course, one more reasoned in its nature can be admitted only upon the exhibition of some satisfactory administrative necessity for so doing For the reception of a conclusion a still more imperative necessity is required Inability to offer other evidence or to prove a case without using this species of proof culminates when a judgment is offered *Chamberlayne's Ev § 1806*

omenon observed by the witness
d to the tribunal wherever possible,

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essential, in the second place, that the substituted evidence should be both objectively and subjectively relevant to the existence of some fact in the *res gestae*. *Chamberlayne's Ev § 1808*

Scope of the rule rejecting the opinion of witness "The opinions of any person, other than the Judge by whom the fact is to be decided, as to the exis-

"The opinion of a competent person is

case of 'hearsay', there is an
may be stated as follows (1

in the

the rule

express

ive an

doubt

45-50

person

is not allowed to express an opinion that a fact which is being enquired into exists (save and except in cases mentioned in 45-50), he is right in his statement of law But if his lordship meant that a fact-witness is debarred from stating his opinion in any case, when on the stand, his statement of law is evidently erroneous Observation and reason being practically inseparable, the real administrative problem is not as to whether reasoning shall be excluded in to to but rather in determining whether a particular involution of a given quantum of reasoning is necessary under the facts of a particular situation As facts become more complex, more compound, the proportion of reasoning almost of necessity, grows greater So intimate, in many cases, is the blending, that the

S. 45

Court is compelled to accept or reject the whole, despoiling of such separation *Chamberlaynes Ex* § 1837 In this connection the observation of Foster, C J in *Hardy v. Merrill*, 56 N. H. 241, should be borne in mind "All evidence is opinion merely unless you choose to call it fact and knowledge as discovered by and manifested to the observation of it to me quite unnecessary admission of such evidence, or isolated and arbitrary) to of some books and the cl rule requiring the rejection of he and to exist, which is lost to sight in an enveloping mass of arbitrary ex- tions" Wigmore § 1919 The Hearsay rule rule are the product of in

while the Opinion rule will always

Proper scope of opinion
his opinion

no good ground for excluding such evidence inevitably connected with the main issue that its consideration is (b) So also, if certain evidential material, having a probative value, tends nevertheless to produce also, over and above its legitimate effect, an unfair prejudice to the opponent, or by virtue of the personality of the witness tends to receive an effect there is good ground

the witness's opinion is excluded, not because of its nature such are objectionable—for a witness's knowledge and all knowledge is made up of inference,—but because the inference under the circumstances

of in this
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ation
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ts from which n

be able to separate the facts and indications from which he has formed a conclusion from the conclusion itself *Yahn v Ottumwa*, 60 Iowa 429=15 N W 257 From the many illustrations given below it will appear that, from the often be received uses in that, from the described in such language as will enable persons not eye-witnesses to form one accurate judgment in regard to it *Burr Jones* § 360 The opinions of non experts are admissible, therefore, provided they state, so far as the opinions are based on questions of animals, or hand writing; and of the size, time and distances; of the mental state of and

or seemed hostile, intoxicated They can state as to who deduced or that a person appeared rational If person looked excit

matters more within the common observation and experience of men, non-experts may, in cases where it is not practicable to place before the jury all the primary facts upon which they are founded, state their opinion from such facts, where such opinions involve conclusions material to the subject of inquiry In eu fu be re fr

Inference—condition of Admissibility—Necessity The necessity for a use of reasoning, more or less great, is practically insuperable. The simplest

3. 45. Statement of a fact embodies an element of inference. In the original sense-impressions received from observations are brought to consciousness by faculty of intuition. The mind, however, seizes upon the material, with such instant avidity as to make the transition to the inference practically unrecognizable. The statement therefore of a observed phenomenon, classed as one of fact, is, in reality, a declaration of what the observer inferred the fact to be. To this use of inference no alternative objection can be taken. Facts can be proved in no other way. They therefore continue thus to be stated. The necessity, however, for a larger element of inference, in a mental process somewhat more complex, is at once discernible. Not only may the witness be powerless to state the simplest fact without stating his inference as to it. He may be unable to state compound facts in the same way. True, it may be quite possible to declare certain of the component or constituent facts which go to make up a compound fact in such a manner that

it without the slightest difficulty

Under such circumstances, judicial administration, *ex necessitate rei*, pre-

the result to which they have led his reasoning faculties.

in which t'
of a pen
evidence,
Er § 1867

or mental states may serve, as the inference of the witness is a matter of opinion or belief.

■ stranger, and then
Expert and Opinion
the voice alone, and
the tones of voice

such a manner that from the description of the crime is

on as to the nature of
not admissible to the
143 Cal. App. 3d 100
receiving in the

707. In many instances the act of reasoning is numerous and minute to

numerous and limited to
 Chamberlayne's Ex § 186. ^{as previous may be}
 v. Frith, (1896) P. 74. ^{Brooke v Brooke, 60 Md. 529, 533, 187}
 Nebr. ^{The camera}
 well l ^{Guillard, 33-}
 742 ^{to give}
 for the ^{§ 1-12}

it competent in itself as primary evidence. It is the experience which he acquires in the ordinary conduct of affairs, and from means of information such as that of that
cher, 117
 an expert
 f a thing,
 still there

is no rule of law, and there can be non
 know of property before he can be
 He must have some acquaintance with
 estimate of its value, and then it is for the jury to determine how much weight
 to attach to such estimate *Bedell v. Long Island R. Co*, 49 N. Y. 367; *Lawson*

be presumed to have a sufficient knowledge of the market value of property
 from the location and character of the land in question *Pennsylvania, etc.*
R. Co. v Bunnell, 81 Pa St 426 The best and only legitimate evidence of the
 value of the land at the time of the sale would be the opinion of witnesses who had

founded *Illinois etc. Ry Co v Von Horn*, 18 Ill 257; *Durr Jones* § 363 So
 it is clear that the valuation of land must be arrived at by the tribunal by taking

As regards
 urt. *Stucell*
ates, 2 Story,
 421 (Am); *Lawson's Exp & Op. Ev* pp 463 501, *Wigmore* §§ 1910 1911,
Narain Chandra v Cohen, 13 C 56; but see *Durarka v Lular*, 4 O C, 217
 As to how valuation is to be made under the Municipal and Land Acqui-
 sition Act *vide Manindra v Secretary of State*, 41 C 967; *Harish v Secre-*
tary of State, 11 C W N 875; *Wenrick v Secretary of State*, 13 C W
 N. 1059; *Secretary of State v Shanmugaraya*, 16 M 369; *Government of*
Bombay v. Meruany, 10 Bom L R 920, *Heyham v Bholanath*, 11 B L
 R 236; *Secretary of State v Belchambers* 33 C 103; *Tulsi v Secretary*
of State, 14 C W N. lxxx, *Jani Sahoy Sha v Secretary of State*, 8 C
 W N 671, *In Fsafah Salebhar*, 10 Bom L R 997, *kailash v Secretary*, 17
 C L J. 31

S. 44. **Sanity.** The reason for admission of non expert opinion evidence regards sanity
N. H 144: "by witnesses a
The opinion
no description
ordinarily he cannot give an adequate description of them' The Act

80 (Am); Wigmore § 1934 "To ask
appeared peculiarly or strangely was s
opinion she was insane" Per Doe J
opinion of non-professional witness
such opinions are based upon their
person's appearance Burr Jones § 36

disease in any one of the v Mc Daniel 4 Fred 4 455 (Am.)
expert witness
person is sick
upon the nature
system of a p
days, however.

upon for their opinion as to sanity or insanity of the testator.
Caughman, 26 S E R 16 (S C); Wheeler v. Alderson, 3 Hogs Eccl 374 6
606, Dew v. Clerk, 3 Add Eccl 79; Eagleton v Kingston, 3 Ves J 43
Hadfield's Case, 27 How St Tr 1281; Loue v Jolliffe, 1 W Bl 365, Tatham
Wigmore § 1934

might have as to the bearing of the opinion rule Wigmore § 1935
as to sanity and opinion as to general testamentary or criminal capacity ar
entirely distinct The latter sort of opinion is inadmissible (when it is) beca
a question of law may be involved, and witnesses' conclusions, are not neede
on such points. Wigmore § 1937

Opinion from necessity The opinions of ordinary witnesses derived from
observation are amissible in evidence when, from the nature of the subject
the facts can be

This rule, however, has its exceptions, some of which are as
settled as the rule itself When all the pertinent facts can be
detailed and described, and when the triers are supposed to be able to

correct conclusions without the aid of exception to the rule is allowed. But case

: .S.

to deceive purchasers *Macdonald v Holland*, 10 S L R 175-41 Ind Cas. 539;
Suadishi Mills v. Juggi Lal, 24 A L J 975.

45. When the Court has to form an opinion upon a point

of foreign law, or of science, or art, or as to
 Opinions of experts identity of handwriting *[or finger impres-
 sions], the opinions upon that point of persons specially skilled in
 such foreign law, science or art, [or in questions as to identity of
 handwriting] *[or finger impressions] are relevant facts

Such persons are called experts.

Illustrations

(a) The question is, whether the death of A was caused by poison

The opinion of experts as to the symptoms produced by the poison by
 which A is supposed to have died, are relevant

by
 the
 relevant

(c) The question is, whether a certain document was written by A. Another
 document is produced which is proved or admitted to have been written by A

The opinions of experts on the question whether the two documents were
 written by the same person or by different persons, are relevant

knowledge of the facts, and, in the final outcome, withdrew from their considera-
 tion any facts of which they had original knowledge, confining them to such facts
 only as should be presented to them at the trial. This left to the jury simply
 the duty of drawing conclusions from facts presented. In many cases it was
 impossible to present to the minds of the jury, who were supposed to have no

v *Chadd*, (1762) 3 Doug 157, was a case in which an engineer was called in

*The words "or finger impressions" in both places where they occur in s. 45,
 were added by the Indian Evidence Act, 1897 (5 of 1897). For discussion in Council
 as to whether "finger impressions" include "thumb impressions", see Gazette of
 1898, Pt. VI p 24

†These words in s. 45 were inserted by the Indian Evidence Act Amendment
 Act (18 of 1872), s. 1.

- S. 45. show the effect of an embankment upon the filling up of a harbour. Lord Mansfield says: "Mr. Smcaton (the witness) understands the construction, of harbours, the cause of their construction, and how remedied. In matters of *Thornton v. Assurance Co. (1794) Peck*
 Camp. 116. In such a case often just
 The furnishing of such assistance to the
 not while after

Principle. An expert i. e. a person having special skill in a matter which is more than the jury to draw is

nces on the subject.
 skilled observer, administration is from
 times imposes re

for the proof of his case to actually tendered is relevant for the purpose. His proper work is to reason. Tal
 by them, it is they indicate.

that his reasoning has a tendency to supplant that of the jury. In the instances when administration permits an invasion of the province of the jury, an adequate forensic necessity must be shown for receiving the testimony of an expert. The administrative warrant differs, however, widely from that presented in case of the observer, whether ordinary or skilled. Where one is using sense-perception, the forensic necessity for admitting the secondary evidence of an inference or conclusion most frequently in this, that the original is ad by the witness as fully to be placed before
 is allowed, after stating such construction
 case and those previously detailed into the case

In case of the expert, however, the inadequacy which the witness is to supply
 reason No man can satisfactorily
 of art, science or
 the necessary data
 both be unknown

could properly draw for themselves. *Chamberlayne v. The King*

When Opinion evidence of expert is admissible. The principle underlying this section is clear enough, but in some cases it leads to what seem to be inconsistent results. All must decide the question on a case
 which it arises

more accuracy than the jurymen themselves. It is the nature of the subject matter

if practical everyday matter that the example, is put before the jury to give year was a proper time to set fire to the stable for horses, whether a fight is a prize fight, or whether the keeping of cows in connection with a hotel is unprofitable, the Court is presented with the question whether, because some

which permits of opinion testimony being given *McKelvey's Ev* § 134. In *Ferguson v Hubbell*, 97 N. Y. 507, 513-49 Am. Rep 544, the rule in regard to the admission of expert testimony is thus well stated by *Earl J* "It is not sufficient to warrant the introduction of expert testimony that the witness may know more of the subject of enquiry, and may better comprehend and appreciate it, than the jury, but to warrant its introduction, the subject of the enquiry must be one relating to some trade, profession, science, or art in which persons instructed therein by study or experience may be supposed to have more skill and knowledge than jurors of average intelligence may be presumed generally to have. The jurors may have less skill and experience than the witnesses, and yet parties nature to them, to resort to expert or opinion evidence." "The opinions of experts are, in general, admissible whenever the subject is one, & knowledge of which can only be acquired by special training or experience. When however, it is one upon

his view is to prevail. *The Beryl*, 9 F D 137, *The Gannet*, (1900) A C 231, 237, *The Australia v The Nautilus*, (1927) A C 145

- S. 45. questions of science, skill, trade, and others of the like kind." *Best Practice of Evidence* § 346. The rule on the subject is stated by Mr. Smith in *h. v. Carter v. B.* appears to be is admissible, persons are without such assistance; in other words, when it so far partakes of the nature of science, as to require a course of previous habit, or study, in order to the attainment of a knowledge of it. See *Folkes v. Chadd*, 3 Doug. 157; *R. v. S.* 2 M. & M. 75; *Thornton v. R. E. Assur. Co.*, Peaks 25; *Chaurand v. Angers*, Peaks 44. While on the other hand, it does not seem to be contended that the opinion of the witness, the nature

the fact that the witness, though a practising physician, was held to be an expert, *2 Q. B. 766*; *Tullis v. Hall*, 11 Ala. 648 (Am.); *Greenl. Ev.* § 440. "The term expert seems to imply but superior knowledge and practical experience in the art or profession; but generally nothing more is required to entitle one to give testimony as an expert."

Shelluson, 8 C. B. 819; *Re. Whitelegs*, (1899) P. 257; *Halsbury* v. 411 p. 481.

witness must have special knowledge of the facts concerning which he is called upon to give evidence.

existence of facts capable of being proved or disproved by evidence. But this general rule has been broken in upon by the admission of various classes of exceptions, all of which are upon the common grounds of necessity. Such necessity is allowed to exist when the facts in issue are not themselves accessible by evidence, but are future probabilities or mere contingencies, - or else actual facts but not

positive knowledge : All of these must, of necessity, be judged of only from
 their proved facts known generally to accompany or to indicate these in question,
 as, for instance, where the facts to be ascertained are inferred from some rule of
 art or science, or observed law of nature thus proved; the knowledge by which
 they may not fall
 professional or
 science relating

s frequently a question such as dealers in that article can alone decide. There
it is a matter of necessity to call in the experienced or instructed opinion of
ship after a storm
udge of those neces-
cts. Thus, also, in
Acshy, 1 Car. & P.
landsmen to draw

any inference, and experienced
of that kind amount to unjustifiable

are not admissible as such, but facts having been proved, men skilled in such

His scientific opinion is, in fact, his testimony to a law of nature. All these are testimonies to general facts which the jury can ascertain in no other way, and

in words the minute and transient facts observed by the witnesses from the
r in his

one not
which
which
Op Ev
therefore
must be
necessary
second
sary to
42 (Am):

Burr Jones § 369.

made a study of the subject. On the other hand, he may be an expert although his knowledge has been derived from the study of the subject, and not from actual experience or practice in the business or profession. Thus, it has sometimes been held that a physician may give opinions as to matters connected with his profession or with medical science, although in his own practice he may not have had experience as to such matters, and his knowledge in respect thereto is derived from study only, even though he may not have made the disease under

S. 45.

subject, he may be competent as an expert although engaged in some occupation, (*Detroit v. Van Steinbury*, 17 Mich. 99), or even if he has abandoned the business to which the enquiry relates. *Bearss v. Copley*, 10 N. Y. 43. It is necessary that the witness should possess the requisite skill that is actual study, experience or observation. The mere opportunity of obtaining such skill does not suffice. It must be shown that he is skilled or scientific at least that he has superior actual skill or knowledge in relation to the question to that possessed by ordinary witnesses or observers. *Page v. Parker*, 40 H. L. 47. To prove or disprove infringement of trade mark evidence of men in the trade is not admissible to show whether or not a combination is such as would deceive a purchaser.

41 Ind. Cas. 539;

Lal, 49 A. 92-2

is true "he must, in

the immediate line

differentia of the few experts could be admitted to testify, certainly no Courts could be capable of determining whether such experts were competent. A general

the specialty belongs would seem to be Ala. 212. The value of the testimony is the experience or study of the witness.

Wells v. Leek, 151 Pa. 431; *Burr Jones* § 368. So "the first question that arises when we are dealing with an important witness who has made observations and inferences is this: 'How intelligent is he and what use does he make of his

attention for the Court"

himself may be

subject under en

may be called

give their opinions thereon. *Alumun v. State*, 23 N. H.

But the expert cannot give his own opinion as to his own

Broadman v. Woodman, 47 N. H. 120; *Brahm v. State*, 113 Ala. 23. It is

of the qualification of the witness

to the Court

the Court

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his testimony." *Reg Exp Test* 50. The right to a full cross-examination is thus secured; and if, it turns out the witness is not qualified, the Court should

mination
witness,
Burr Jones

§ 569.

Mode of examination of experts—Hypothetical questions It may be plainly inferred from what has already been stated that the testimony of those found qualified as experts is not confined to facts within their own personal knowledge, but that they may give their opinions upon an assumed state of facts, indeed, it is probably true that in the majority of cases in which experts are examined

assumed
Raghu 15 C
589 WL form of
the hypothetical question in such cases, it is clear that the question should be so framed as to fairly and clearly present the state of facts which the counsel claims to be proved, and which the testimony on his part tends to prove. *Cowley v. People*, 83
as regards fact
v. Bell, 1 C
If the other side

examination being within
is fairly and reasonably con
other words, the hypothet

would be
defeated

Peerage, Le Marchant,
3d 379 The facts must
on, 69 Mich 400 Where

is of course no basis for the superstructure *Burr Jones* § 371, *Whart* §§ 441, 451, 452

In *Lord Melville's Trial*, 29 How St. Tr 1065, *Lord Erskine L C* said "If you take away the foundation upon which it is made, which is matter for the Court afterwards, there is an end to the superstructure All that the witness has

S. 45.

although the facts assumed by counsel to be true are not proved, or although the question does not state the facts as they actually exist. The facts are generally in dispute, and it is sufficient if the question fairly states such facts as the proof of the examiner, fairly tends to establish, and fairly presents his claim of theory. *Burr Jones* § 371. Although on questions of professional skill he can state in a general form what could be the proper cause to pursue under the circumstances proved (*Sills v. Brown*, 9 C & P 601, 603, *Chapman v. Watson*, 10 Bing 57; *Rich v. Pierpoint*, 3 F & E 35; *Collier v. Simpson*, 5 C & P 16). He may not be asked what his own conduct would have been under the circumstances (*Berthon v. Loughman*, 2 Stark. 258, *Hatch v. Lewis*, 2 F & F 457, 458, *Ramadge v. Ryan*, 9 Bing 333) *Phip Ev 7th Ed 380*

Protection

the jury, it is the existence of a fact which is controverted upon the evidence. His judgment is not to be invoked which of the two sets of witnesses is the more credible or regarding the relative probability of antagonistic stories told by the witnesses. The question is raised by the evidence.

science or skill merely in the case, (b) Where the issue is substantially one of

culpy, but not en bloc, the correct course is to put such facts to him hypothetically, asking him to assume one or more of them to be true, and to state his opinion thereon. Where, however, the facts are not in dispute, it has been said that the former question may be put as a matter of course, although not as of right. *Phip Ev 7th Ed p 380*

Form of questions. Policy as well as principle, require the form of the question to be expressly hypothetical, because otherwise the jury, and perhaps the witness, may be misled by the statement as to proved or admitted facts, of that which is in question.

considered, and the form of the question was very much considered. (Vol 512, the form of the question was adopted. "You have to be satisfied that the facts stated by her witnesses, are true, what is the prisoner's mind, at the time of the time of the alleged crime?" Was the prisoner in your opinion insane, and what kind of insanity or delusion, and what kind of insanity or delusion, conduct of a person under such circumstances, adopted the following form. "If the symptoms and manner of

testified to by other witnesses are proved and if the jury are satisfied of the truth of them, whether in their opinion, the party was insane and what was the nature and character of that insanity, what state of mind did they indicate;

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and at the same time to exclude their opinion as to the effect of the evidence in

ze as an expert (3)

, or where inferences

of facts must be drawn from the evidence, in order to be reasonably certain of the grounds on which an opinion is based, it is usually necessary that the facts should be stated hyp

rule for all cases,

presiding at the trial

or it will be held

in a hypothetical question may be very numerous, it sometimes happens that

to answer a question which confessedly rest upon no sound basis of fact Substance rather than form is the important consideration with a sound judicial

of its

he jury

It is

not deemed objectionable that the proponent uses the actual names as developed in the evidence in connection with his question to the expert Argumentative questions, that is those which involve a favourable argument which is assumed to be true, may properly be rejected *Chamberlayne's Et* §§ 2489-2494

is the cross-examination of an

test his memory, observation,

stand as a skilled witness,

his judgment upon germane matters may be tested by using premises and asking his conclusions *Higmore* § 684 The fact that the expert was not in a fit state of mind or health to form a proper opinion, or is interested, or corrupt

be elicited in cross

v *Royal Exchange*

(139) *Phy Ev* 7th

witness's opinion

unless the passages to be used are put in cross-examination to the witness, for him to explain them if he can 46 Ind Cts 393-22 C W N 745

and

ment

that

not testify that he saw a certain person at a certain time and that he was then

S. 45. labouring under an epileptic fit or stricken down and rendered unconscious. *Fetter, 25 Ia 75, per Dillon C J; & I. R. Co v. Bailey, 11 Oh St 3*.
 the witness had been a stranger to the actual facts, it would then have been necessary to assume a state of facts as the foundation of any opinion he might give; but no such assumption, it seems to us, is necessary when the witness is properly presumed to be himself personally acquainted with the material facts of the case. If an expert may give his opinion on facts testified to by him, he may also give his opinion on facts testified to by others, and it is not necessary that the fact be proved by cross-examination.

and by testimony *abunde*" *Ibid*

An expert is called to give his opinion on a matter, not the party by which such opinion is tendered. *Lila Singh v Bejoy Protap, 41 C L J 300-87 Ind Cas 1, A I R 1925 Cal 768*

Value of experts "Experts are the most important auxiliaries of the investigating officer, in some way or other nearly always are the main factor in deciding a case. But everything depends upon knowing how to make a question."

moment for putting his question i.e the moment when he is in possession of sufficient material to raise the question.

"Every Investigator"

problems, seeming to

experts in physical

chemical experiments

with certain

process, traces, once furnished the same been cut with a piece of wire.

encouraging feature of judicial enquiries in the present day is the increasing appreciation of the application of science to proof. *Ibid p 331*

the Code as best as it can and it should not rely on the outside opinion of an eminent, as to the interpretation of that Code. *Ibid* But in England the law cannot be proved by production of a matter of fact. *Mastyn v 11 Cl & F 85; Grenans Case, Moo P. C. 481* In England

where the evidence is so
reeman, 10 Moo P.
New York, 96 L J K. l
ot by mere certificates
missible, for being
n authority. *M'Cormac*
. 157; *Westlake v Westlake*, (1910) P 167; *Rt Arton*, (1896) 1 Q B 509;
Kater v Barter, (1907) P 333 Another reason for this is that the law is
ontinually liable to change. *Phipps v Esd Ed 3-12*. So foreign law is to be
roved by expert testimony. The main controversy is whether a witness to
oreign law must be by profession an advocate, attorney or Judge or whether a
yman, if he claims knowledge may be trusted as to the state of the
w The earlier practice in England seems to have been very liberal. *Vide*
Sussex Peerage Case, 11 Cl & F 117-134; *Venderduyn v Thelluson*, 8 C II
12, 824; *R v Dent*, 1 C & K 97 But in *Richardson v Anderson*, 1 Camp.
6, Lord Ellenborough insisted on the necessity of a professional character in
e witness, see al . , (1917) 1
L B. 359; *Brad,* more § 564
but the decision have been
old competent — the Courts
f his own coun . *Hanson v*
Nixon, 96 L T S ; non-lawyer,
v O K 1900 P 65). A colonial
to the law of his colony (*Sussex*
olding the office of co adjutor to
n marriage law A French Vice-

marriage law *R v Savani*, 10 East 281 But a mere tradesman in a foreign country can prove the law of that country *R v Brampton*, 10 East 287, 2 v. *Naguib*, (1917) 1 K B 359 C C A A person to become competent to expected to know the law from 11 Foreign law on particular *idha*, A. I R 1926 M 218 A *Ibrahim* 47 A 823 80 Ind 690 So also his opinion of Hindu Law is admissible *Nara Sinha v Janigana*, 29 M 437

of an individual (*Church v Hubbard*, 2 Cranch 237). The usual mode of authenticating foreign laws (as it is of authenticating foreign judgments), is by an exemplification of a copy, under the Great Seal of the State, or by a copy proved to be a true copy, by a witness who has examined and compared it with the original, or by the certificate of an officer properly authorized by law to give the copy.

S. 45. App pp. 115—141, *Brush v. Wilkins*, 4 Johns Ch 520 *Mason v. F. Cowp* 174 Sometimes, however, certificate of persons in high authority has been allowed as evidence, without other proof" *Story on Conf of Law* 647; *Greenl Ev* § 486; *In re Dormoy*, 3 Hagg EccL 767; *R v P. Howell's State Tr.* 515—673 When foreign law is allowed to be proved by experts, he is allowed to refer to accredited authorities on the subject of refreshing memory. *Nelson v Lord*, 8 Berr 527

As regards proof of foreign law, *Vide Gangadhar v. Sircar*, 11 B. Cas 112 = A. I. R. 1926 Mad. 218.

systematized, and has obtained method, relations and the forms of law *Davis J in Atchison & Co v U. S.*, 15 Ct Cl. 140 Expert testimony is usually thought of in connection with enquiry as to technical or scientific questions—questions requiring, as an essential to sound judgment, a special training of the mind—and this is the field in which the usefulness of such testimony is most often felt. The parts of human body, and the condition and operation of any of its functions, have been a fruitful field for this class of testimony *Young v. M.* 103 Mass 50, *McKelvey v. F.* 8 122 So on questions of science or art relating to some art may give their opinions to cause death, the *J. L.* of the *sible*

testimony called for from medical and surgical practitioners, and details of the various branches, upon which such evidence has been called and received, will disclose only portion of the area covered by the number of cases which increases with every discovery in either medicine or surgery. The opinions of physicians and surgeons may be admitted to show the physical condition of a person, the nature of the disease, whether temporary or permanent, the effect of disease or physical injuries upon the body or mind, as to in what manner or by what kind of instrument they were made, or at what wounds or injuries of a given character might have been inflicted, which would probably be fatal or actually did produce death, the cause, *symp*

a physician how certain wounds or injuries were actually given, what *harm*

ment or medicines (*Matteson v. New York C. S. Co.*, 30 N. Y. 22) What is the proper treatment under a given state of facts (*Wright v. Hardy*, 22 Va. 121) the probabilities of recovery from the effects of an injury (*Hall v. Watts* (Pa.), 227); what, under certain circumstances, *is real or feigned* *March, R. D. 1888* *Hayden*, 51 Vt. 296), and whether or not great mental anxiety and would tend to develop insanity, where there is an hereditary predisposition (*Dearnette v. Commonwealth*, 75 Va. 867) Upon the question of *the*

medical practitioner testifying in mental cases, there is a diversity of decision, American Courts, the preponderance of authority being in favour of accepting

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nce with the subject may always be inquired into to enable the jury to estimate

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the causes, nature and effects of disease among animals *State v. Sheets*, 89

O 543 As a preliminary question as to his qualification as an expert, a medical witness may be asked whether the examination made by him was careful

ate whether the injuries he is speaking of amount to grievous hurt or not, but ifly to describe the nature of the injuries *Empress v Bulwant*, A W N 1885,

medical man that has not seen the corpse, can give only expert evidence

orlem examination

noticed by him

leher Ali, 15 O 5

erson is in 1881

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medical

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nd to whom extracts might be put *Shea Bahadur v Beni Bahadur*, 6 O L J 78-51 Ind Cas 419

Testimony of physicians and others as to poisons Toxicology is regarded as some jurisdiction as part of scientific knowledge of physicians, and to a certain extent this is justified by the course of education of medical men Thus

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equisite knowledge of chemical science Although it is usual for experts to subject compounds to a chemical analysis before testifying whether they are poisonous, or as to their ingredients, and although this has sometimes been held indispensable, the better rule is that the opinion may be received, although his test has been omitted, it being a matter which affects the weight rather than the competency of the testimony *State v Slagle*, 83 N C 630, *Burroughs* § 379.

Mechanics and machinists as experts When a witness shows himself expert in any particular art or craft, to admit of an examination properly addressed to persons of skill in that department of industry, he is competent to give an opinion upon matters of which the jury could not be expected to judge accurately from the mere detail of facts *Cole v Clark* 3 Wis. 323 Hence it is that the opinions of machinists and artisans may be received as

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opinions are

S. 45.

(*James v Hods*
value of labour,
Cook, 69 III 531
v Naglee, 17 Cal
such work (*Shut*
such manner a
(U S) 167), or
by certain mach
certain force of n
certain mode of
machine itself w

Experts on agriculture An illustration of the same principle the op
of those skilled in farming and agriculture has received as to the pr
mode of
probable
stances,
probable
as to value, age, and weight of domestic animals and as to the us
proper management of stock Milk experts are competent to testify wh
certain liquid exhibited to them looked and tasted like milk and water
Burr Jones § 382

Insurers and insurance The opinions of persons specially skilled th
are admissible on questions
Expert & Op Ev 31, *Thornto*
Beckwith v Sydebotham 1
admitting the evidence and
say whether, upon such and such symptoms a person whose
could at the time of the insurance have been in good state of health
can testify as to the average duration of life with respect to the value of
annuities *Rouley v London*, L R 8 Ex 221

admissible —

Turn

Knight, 43 Me 27

"*Book-keepers*—As to the meaning of an entry in a bank book mar
difficult to decipher *Knox v Savings Bank*, 93 Mich 19

"*Botanists*—As to whether the working of coke ovens near a park
the trees in the neighbourhood *Salvin v Coal Co*, L R 9 Ch App 120

"*Chemists*—As to the effect of a particular poison *Harting v Pa*
Park, 319

"*Engineers Civil*—*Eggers v Huges*, 37 Pac. R 1037

"*Engineers, Electrical*—As to the imperfections of contrivances by
which, 57 N L J—
each link was

Hap v M 176

§ 171

rail road was finished there

in question

or quantity exists on the
"Inventors—As to the value of the case of certain inventions
stock cars *Burton v Burton Stock Car Co*, 50 N E. R. 1029

"*Photographers*—As to the genuineness of a signature to a note
Larnes, 16 Gray 161

"Post office—Inspectors—As to whether a document is written in feigned S. 4
 or natural hand *K v. Cator*, 4 Esp 187, *Revel v. Braham*, 4 T R 497.

"Surveyors—*Grand Rapid S R Co v Chesboro*, 74 Mich, 766

"Veterinary Surgeons—That a horse has blind staggers *People v. Bain*,
 3 Mich 453" *Lawson Op & Exp Ev* pp 7—9

Handwriting The genuineness of hand-writing, including, under this

are, however, ca

he law deems
 and that the ge

imples of the use of circumstantial evidence extrinsic to, outside of, a docu-

thought, habit, character, as these, tend to develop each from the other, in
 this order, as a result of mental action. In other words the tendency of
 mental, physical or metaphysical impulses to express themselves in phys-
 ical action is the basis on which rests the probative force of resemblance in
 as himself into his hand-writing. To
 Naturally, this can, as a general rule,
 formation of physical habits. Practi-

l as it were,
 trained eye
 cr. On this

the inference from resemblance is based

not have seen the person in question actually write. (*Chamberlaines Ev*
 §§ 2177—2179)

An opinion of
 disputed writing
 English common
 fully in *Doe v*
 divided (*Lord Denman* and *Mr Justice Williams* favouring, and *Justices*
Coleridge and *Latteson* opposing) upon the question of admitting the testimony
 of an expert who had made in examination of admittedly genuine specimens
 on the first day of the trial, and was called to testify on the second, and
 at that time stated that he thought he had acquired a knowledge of the

S. 45.

handwriting in question sufficient to enable him to tell whether the particular specimen was genuine. The Judges, however recognize with unanimity the established English common law doctrine that comparison of hands by the jury or by witnesses will not be allowed upon specimens introduced for that purpose. For purposes of comparison it is held that only original specimens may be used, press copies will not do. Lord Denman, in this case, speaks thus of this class of evidence "On the question whether handwriting, looked at by the jury is genuine or forged, the cases appear to me to have justly exploded the notion that bare inspection by the most skilful person can furnish an opinion."

in point of reason in the evidence. "But where," says Mr W D F

with the immediate evidence, as is shown by the comparison of

mind may be supposed to have acquired from the previous perusal of the very writings or even from the casual inspection of a single act is received acted upon without objection" Mr W. D. Frazer, Notes to Pothier, II, 113. That note was written by the great Judge like Lord Coke the learned Judge said not to the formation of the law.

1900 Act, as to the general character of the evidence, Mr W D F

corresponded with him" Wigmore § 1993.

Objection based

an admitted specimen placed before him. Therefore, in

genuine
 additional
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 essential
 ally stated
 by Lord Coleridge J. in *Doe v. Suckermore*, 5 A. & E. 706; "If the

of Lord Coleridge is based on the assumption that the first of these modes, as indicated by Prof Wymore is the only one which is proper and possible and

S. 45;

§ 2000 But the better way to avoid the second mode of evidencing genuineness, is proving it to the Judge. In *University of Illinois v Spalding*, 71 N H. 165, 51 Att. 731, *Rennell J* thus said: "The third objection—that to permit comparison with specimens not otherwise in evidence, and admitted for the purpose of comparison, would introduce collateral issues and confuse and distract the jury—is when applied to specimens neither admitted by the parties

undoubted evidence. This involves, indeed a marked departure from common law. It does away with the common-law limitation of comparison

exceptions *Wigmore* § 2000

Thus stood the law in Procedure Act of that year (17 of a disputed writing with any to be genuine, shall in civil such writings and the evidence of witnesses respecting the submitted to the Court and the jury as evidence of the genuineness of others

later a section in precisely the Evidence Act, 1865 (23 & 24 Vic.) interference between the rules governing and criminal cases no longer exist

Wills' Civ Ev p 233

Basis of expert testimony for proving handwriting "Unifoliated as are points of difference in the infinite variety of nature in which one man differs from another, there is nothing in which men differ more than in their handwriting and when a man comes forward and says, 'You believe that such a man is dead and gone; he is not; I am the man,' if I know the handwriting of the man supposed to be dead, the first thing I would do would be to say, 'sit down and write that I may compare it with that of the man for whom you

handwriting of the defendant, and to compare it with that of *Roger Tichborne* and with that of *Arthur Orton*" *Tichborne Trial* 1--

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most automatic succession of acts stimulated by these habits. Thus, a person's style of writing, in most details, becomes as fixed as the habit, and serves as a continuous inseparable mark of that one person. Moreover the imitation of the style of writing by another person becomes difficult, because the other person cannot by mere will-power reproduce in himself all the muscular combinations to this that modern apparatus, of details, characteristic of the imitator. (For a complete of handwriting, the reader is referred to the following masterly treatise *Albert S. Osborn, 'Questioned Documents'*)

"Thus the data of graphic science make it possible to assert almost the universality of the proposition. No two persons' handwritings are normally This proposition finger-prints and as such rship of docu-

investigating

as a standard to

termination of this skill must of
Courts as applied to the circum-
5. Various forms of test have
lute. In *Doe v. Suckermore*
ess must be convenient with the
of a Court of Justice to be
012. The following persons
iters of handwriting — (1) Post
1c 4th Ed p 556; last Ec §
246). (2) Bank clerks, and (3) Lithographers. A witness can also give opinion
as an expert if he has made a special study of the subject. *R v. Sillerlock,*

is charged with having forged a document purporting to have been executed
of the Act, if their
Empress v Tahir
been cross-examined
he had put a parti-
cular and weight to
ed by applying to it
ected *Sarwar v.*
a finger print expert
and subjected to
cross examination in open Court *Pitain v Baboo Singh*, A I R 1924 Nag 183
Court should be very chary in accepting an opinion of Finger Print Expert
when such
itself so
appears on
a document *Ramlakhan v Dharamdeo*, 37 Ind Cas 335=A I R, 1926
at 575 Under this section the opinion of an expert formed by comparison
the thumb impression of an accused taken in Court under Act XXXIII of
120, s 5 with his thumb impression on deeds is admissible in evidence.
Superintendent v Kiran Bala, 30 C W N 373=43 Cr L J 79=93 Ind Cas
1=A. I. R. 1926 Cal 531 It cannot be laid down as a rule of law that it is
unsafe to base a conviction on the uncorroborated testimony of a finger print
expert. The true rule seems to be one of caution, that is to say the Court must
not take the opinion of the expert for granted, but it must examine his evidence
in order to satisfy itself that there can be no mistake and the responsibility is
on it
are
15;
akin;
con.
imp;
is not objectionable *Public Prosecutor v Kandasami*, 50 M 462=98 Ind. Cas.
9=A. I R 1927 Mad 696

Principles of Judicial Proof p 123

Value of expert evidence generally
considered to be of slight value, since
unwittingly, biased in favour of the side
to regard harmless facts as confirmation of preconceived theories; moreover
ly be multiplied at will
ic. & G 116, 128 per Lord
Shilton, L. R. 17 Eq 373.
deserving of notice is that
all veracious and
He combines
witness—truthful,

S. 45. false, dogmatic, opinion—
more bully this man
truth You can no

tenacity of opinion is his weakness I
give up his opinion = Richard Harris Es

"It is known, for example," says Prof. Wigmore, "that the receipt of fees by experts tends to bias that kind of witness, as it would bias any and that in judicial trials incompetent persons who falsely pose as such can often be obtained for hire. It is known too, that the selection and use of expert witnesses by the parties, instead of their selection by the Judge, to create a partisan bias." *Wigmore's Principles of Judicial Proof* p. 534.

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ndness of the re
W. N. 465 In B.
v B, 42 L Jo 402, the Court accepted the evidence of a wife as to the pae
of a ten months child, inspite of the unanimous opinion of several la
A tribunal should not accept the mere untested opinion of experts in
ference to direct and positive testimony as to facts *Poynton v P*, 37 L
T 54; *Arthur v. Mc Methan*, (1895) A C 310, *Newton v. Ricketts*, 9 A. L. J
The evidence of a skilled witness, however eminent, as to what he thinks may
may not have taken place under a particular combination of circumstances

taken by his own side Besides it must be remembered that an expert
called by one simply and solely because it may be ascertained that he
views favourable to his interest. *Hari Singh v Lachmi Devi*, 3 Lah L
110-59 Ind Cas 220; *Boisagomoff v Nahapiet*, 29 O 32 Where the
called expert witnesses give no data in support of their opinions
opinions should be rejected *Purbhu v Secretary of State*, A. L. R. 18 Ind L
364. An opinion of an expert witness not based on any well known
inexorable laws of nature cannot be taken as decisive especially where the
direct evidence opposed to it. *Mansel v Emperor*, 96 Ind. Cas. 641-27 L
J 977-A I R 1926 Lah 313 See also A. I R 1923 Pat. 563-161 Ind C
698 "I am convinced" says Prof. Wigmore "that the belief that such person
must be the best witness, is false, at least as a generalization. Should
have had such experience with expert witnesses, and most of us have
observed that they often give false evidence because they treat the matter
in terms of their own interest and are convinced that things must be
according to the principles of their trade However the event shapes itself
inally implies their own apprehensions

Every witness must be produced at
trial, unless and until it is proved either to be actually impossible to produce
him or to be difficult to do so, that it is under the circumstances such as
as such as those to which

Gills v Emperor, 2 O W. N. 377-12 O. L. J. 497-63 Ind. Cas. 1232-A I R. 1925 Oudh 616. But it is not satisfactory to examine the
expert witness on commission and not in the presence of the accused. The
evidence of an expert has always to be carefully weighed but, when given

commission, its value is considerably reduced. *Nur Din v. Emperor*, 10 Lah. S. L. J. 235=108 Ind. Cas. 369=29 Cr. L. J. 377=A. I. R. 1928 Lah 533

the person whose
medical witness who
as to the nature of t
In re K. Venkatar
Code does not precl
witness, that has

elucidation,
Raghunath
case the

certificate by itself is not a
person who gave it as a wit
L. R. 893=47 B 74=A
Cr. L. J. 339. See also *Sa*
80. The certificate of a
in the form prescribed in th
His report on a case by
in evidence without proof of the truth of its contents : *Raghunath v. Aurseong*.
Municipality, 76 Ind. Cas 394

Deposition of Medical witness. Section 509 of the Criminal Procedure
Code lays down :—“(1) The deposition of a Civil Surgeon or other medical
witness, taken
taken on con
enquiry trial

is deposition” S. 509 does not
witness admissible at the trial

before the Court of Sessions it should be recorded by the Magistrate who is

even in the absence of the witness. 38 Ind. Cas 761=19 Cr. L. J. 280

Report of chemical examiner. Any document purporting to be a report
under the hand of any Chemical Examiner or Assistant Chemical Examiner to
Government upon any matter or thing duly submitted to him for examination or
analysis and report in the course of any proceeding under this Code, may be
used as evidence in any enquiry ; trial or other proceeding under this Code.
(s. 510 Cr. Pro. Code).

S. 45

The report of a chemical the signature of the Examiner App 112=15 W. R. 49; 2 We before the institution of proc in person 50 Ind Cas 26=20 Cr. L J 266 Chemical examiner's t does not require formal proof, but it must be tendered as evidence and such It can not for the first time be used in appeal 21 A L J 859=53 Cas 904, but see 98 Ind Cas 177=5 Bur L J. 100=A I R 1926 Rang Failure by prosecution to adduce evidence connecting the parcels with the blood stained clothes which reached the Chemical Examiner with

Cas 485=28 C. W N 561.

Report of experts The reports of experts are not legal evidence and are examined by parties in respect of 7=20 P. L R 125, 15 C. W N 728 Op t evidence 76 Ind Cas. 425=1 Rang Expert opinion given for the purposes of a previous suit is not evidence and its evidential value is very little 110 Ind Cas 810=A. I R 1 Lah 921

Palm impressions Palm impressions are akin to finger impressions expert evidence relating thereto should on the whole be admitted rather excluded, to be weighed by the Court and the jury for whatever it is worth *Emperor v Babu Lal* 52 B 223=29 Cr. L J 410=30 Bom L R 321=195 Cas 508=A. I R 1928 Bom 158

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stated by the Supreme Court of Ohio in *Clark v State*, 13 Ohio. + "Medical testimony is of too much importance to be disregarded When de with caution, and without bias in favor speculation and favourite theory, it t even intelligent juries from following a on inconsistent and unsound principles and received with utmost caution, and, like the opinions of neg acquaintances, should be regarded as of little weight if not well reasons of facts that admit of no misconstructions, and supported by which the judgment of

Qualifications of a medical witness. If the judge be satisfied that witness is competent to give an inference helpful to the tribunal, it is essential that he should be able to produce a diploma to be engaged in practice or even to h The rule is in case of a specialist. the witness, th the fact as to wh however must

ask

in murder, the defence was insanity, the judges were all of opinion, such as

opinion on the very point which the jury were to decide, viz, whether, from other testimony given in the case, the act charged was, in his opinion an act of insanity. *Wright, R & Ry* 456, 1831, on the authority of which *Park B* owed a medical man, who had heard a trial for cutting and maiming, to be owed symptoms of insanity

it in *Mc Naughton*, 10 Cl & F 2 Russ Cr 2262 (h) See the words of the Judge's answers. In *T Mason*, 7 Cr A. R 67=76 J P 184=T. L. II 120 (1911) murder it was held that an expert who has not seen the body, but has heard its condition described by the witnesses in their evidence, may state his opinion that death was not self inflicted. *Roscoe Cr Ev* p 170, *Reg v Newton*, Shrewsbury Spring C Sess Pap 374; *Doe d Bambridge v on*, 1b 149, *Sills v Brown*, 11 C & P 455. "A reasonable principle" says *William Wills* such, shall be permitted to testify only

such matters of professional knowledge or experience as have come within to such proved, so that testing

ness should be. "Assuming an injury of such and such a kind to have been inflicted, what is your opinion as to the nature of the weapon by which it was possibly or probably inflicted" *Rogham v Empress* 9 C 455 It is a settled question entitled to be laid by *Merway*, 10

an L. II 907 (913) For questions to be put to medical witnesses, vide *Acharian's Wills' Cr Ev App II*

The most legitimate, valuable and wonderful application of expert evidence on charge of poisoning where poison is extracted from corpse by means of chemical analysis *Best Ev* § 514

Medical Inferences—Probative weight Many considerations may, as a natural, affect the weight in evidence accorded to the inference of a recently made disease which is drawn upon the truth of the statements made to him by the patient or by others is regarded as inspiring, to a certain extent, merely the weight of his testimony, either a jury nor the trial judge is presumed to have such technical knowledge as may upon the improbability of

an examination can those reached by witness toward the way, e g that the witness is interested to support his present contention in other connections *Chamberlayne & El* § 2030

Medical I

In many instances This being so; they

it the round about way of stating that the
corroboration or rebuttal. The illustrations
for this purpose, *res inter alios acta* is
evitable. *Nort Ev p 225* So this section embodies a general rule which
says down that evidence of collateral facts cannot be received. *Vide Taylor Ev*
37. For purposes of corroboration, the proponent of the inference commonly
makes use of the text book statements at the stage of examination in-chief
sting by means of them usually takes place on cross examination. *Chamber*

opponent uses it to enhance and corroborate the force of what his expert says
is right of a proponent, who has submitted an inference, conclusion or
judgment of a skilled witness to corroborate within reasonable limits, its proba-
tive effect by showing the sound nature of the reasoning upon which it is based
seems unquestionable. *Ibid* § 2528. The authority of the text writer can not
be used as proof that the statements contained in the work are true. The
Hearsay rule forbids the use of the declarations in their assertive capacity. At

is the same as that which it has on direct. In other words the statements contained

into employing in their probative capacity. This result the judge may attempt
to reach by means of the negative proposition; and on a question of disputed
paternity, after proving as a matter of science, that children are apt to inherit
the features or general appearance of their parents, evidence will be received of
personal resemblance between the party in question and his alleged father.

by ss. 57 and 60
filled an expert

that madness is often of an hereditary character, evidence tending to show that
none of the defendant's ancestors or near relations had been insane, would be
admissible in support of the negative proposition; and on a question of disputed
paternity, after proving as a matter of science, that children are apt to inherit
the features or general appearance of their parents, evidence will be received of
personal resemblance between the party in question and his alleged father.

- S. 47. *Bagot v Bagot*, 1 L R Ir 308, *Tay Lv* (9th Ed) § 337. An expert witness himself paralysed in the arm and leg may support his opinion as to the effect of such paralysis by testifying to its effect on himself *Chicago R R v Lambert*, 119 Ill 255 (Am)

an
157

up of a harbour, and evidence of the wall, proof that the embankments, had begun to be choked about the same time as the harbour question, was admitted, as such evidence served to elucidate the real question.

As *Smeaton's* (the expert) opinion, but as to harbours in which there are embankments, we think it was improper, since *litum litu resolutum*."

47. When the Court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact.

Explanation—A person is said to be acquainted with the handwriting of another person when he has seen that person write or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents, purporting to be written by the person have been habitually submitted to him.

Illustrations.

The question is, whether a given letter is in the handwriting of a merchant in London.

B is a merchant in Calcutta, who has written letters addressed to A and received letters purporting to be written by him. C is B's clerk, whose duty it was to examine and file of B's correspondence. D is B's broker, to whom B habitually submitted the letters purporting to be written by A for the purpose of advising with him thereon.

The opinions of B, C and D on the question whether the letter is in the handwriting of A are relevant, though neither C nor D ever saw A write.

Principle

distinct kinds

the act of writing

act, secondly, evidence of the kind of handwriting, *the establishment*

mode, there is always an inference from the type to the person.

of an inference. The difficulty has not been over the relevancy of the writing traits to show the authorship of writing but over the mode of eliciting them by circumstantial evidence, and that is by examining one or

cause when the specimens to be used are themselves before the jury, they may impute them to form an opinion as to the standard or type of writing, and take the opinion of a person of ordinary experience only, based upon these specimens, being no better than that of the jury themselves, is not needed, and excluded by the opinion rule, and hence the only persons whose aid need be used in studying these standards are those who have some special experience in and above that of the jury. Thus, we see whether the person whose aid we skill not possessed by the jury."

"The rule as to the proof of handwriting, where the witness has not been in question may be stated generally that the party write on some former occasions and the transactions have taken place between them to have been written or signed by the party in question, the witness is supposed to know the handwriting, not so much of the manner in

specimens, but to the general character of the writing, which is impressed on the mind as the involuntary and unconscious result of constitution, habit, or other permanent cause, and is therefore itself permanent. And we best acquire a

mainly, but in his natural manner." Per Coleridge J. in *Doe v. Bucknall*, 5 A. & E. 703.

the latter is to be regarded as genuinely an instance of the type in question.

S. 47. How to evidence the type of specimens—is a different matter. the mode of proving it by testi- that he is acquainted with the typ situation the witness (1) must of writing with which the adequacy of this knowl- ness properly claim that opportunities of observation have been such as to give him a fair knowl- of the general type or character of the person's hand. *Wigmore § 693* ordinary methods of proving handwritings are (1) calling as a witness a person who wrote the document or saw it written, or who is qualified to express

hand. This section deals with opinion evidence of non expert witness to prove handwriting. A person is considered qualified to testify to handwriting when he has seen the person whose handwriting is in question (1) when (2) in the ordinary course of business, has become familiar with such person's handwriting through the receipt of communications purporting to be written by him, or (3) when in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him. *McKelvey's Cr § 145* This section lays down another real exception to the rule excluding hearsay evidence. The reason for the exception is that unless a signature or writing has been made in the presence of a witness who can afterwards identify it, the only possible proof of handwriting is opinion evidence, and opinion evidence of person specially qualified to testify. We have thus in proof of handwriting the same two classes of expert testimony which have been before referred to,—that which is based on observation and that which is based on special training, or education upon a particular branch. There is some difference of opinion in the authorities as to just how much familiarity from observation will suffice. The general rule has been once specially qualifies a person. *Varian, 54 N Y 395; Tait § 181*

21 Wend (N Y) 557

There should be some control of the mark is not legal, it is not & Ma 51C; *Wigmore § 693*

his signature
signature
R I. 443; R
everything
(Am); Sayo

initial amounts to a
Re Emerson, U L
underwriting includes
Webster, 5 Cush 301
either "mark" can

S,

saw

ethor
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writing, we th
with his hand,

When he has seen the person write—*Ex visu Scriptoris*—A person is acquainted with the handwriting of another when he has seen that person write whether often or seldom, much or little, recently or long ago *Lauson Op & Exp Ev* Rule 47 In *De La Motte's Case*, which took place in 1871, Mr Justice Buller said to the jury "The counsel on the part of the prisoner has just objected that similitude of handwriting is no evidence They certainly are right in the argument, but the objection does not apply to this case Similitude of

body that has
nce is made
s, but that is
the papers

which you have heard read; they have all been proved by persons who were

adnowledge they say they believe the letters and papers are of his handwriting That, gentlemen is the only evidence that can be given of handwriting; except it happens that there be a person who saw the prisoner actually write the papers" *Hensdy's Case*, 10 How St Tr 1341 In *Hoper v Ashley*, 15 Ala

rule that seeing the per
Wigmore § 694 *Garrells v*
William v Warrall, 8
Warren v. Anderson, 8 Sc

seen him
subsequent
and if he
ht go to the
ture of all
& L 793,

S.

Patteson J^r said: "All evidence of handwriting, except where the witness sees
■ belief which a
an exemplar in
vledge may have

13 W. R 191

The question is whether a certain paper was written by T W, who has not
seen T write for nineteen years, is called, and his testimony is received *Horne*
Toole's Case, 25 How St 1r 71, see also *Warren v Anderson*, 8 Scott 384,
where the witness has seen the writer to write ten years before. So in *Smith*
v. Walton, 8 Gill 18 (Am) a witness was allowed to depose after six years. In
that case the Court observes "The impression made on the mind of a witness
who has seen ■ party write his name only in a single instance may be exceed-
ingly faint and imperfect, but it is nevertheless testimony, provided the witness

more vivid and lasting impression from the examination of a single signature

—an assumption
is acquired after
comes important

fect that he had known the plaintiff for fourteen or fifteen years, did not know whether he had ever seen her write; corresponded with her about fourteen years ago, received about a dozen letters in answer to his own, with her name signed to them; had received no letters recently, had some of the letters with her. The question was then propounded to him: From your knowledge of her
 I you know
 to be asked,
 did not know

1 W. Bl. 384, per Lord Mansfield; *Barnes v Trompowsky*, 7 T R 285 *Owenston v. Wilson*, 11 C & K 1; *Murcia v Wolfshagen*, 2 C & K 741; *Turner's Case*, 3 Cr App 103, 155 = (1910) 1 K B 346 In the last mentioned case a document of consent signed by the Director of Public Prosecutions was put in In
 for
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 just
 dy,
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 for
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 oh any
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 In the
 math y

of K was clearly competent The witness testified that he had corresponded with the merchant in New York whose signature was to be proved, by writing to him, and receiving letters from him, and in this way he had acquired a knowledge of his signature The objection was, the witness had not shown himself qualified to speak of it It is within one of the above modes stated whereby the competent knowledge may be acquired, and the witness professed that in that way he had acquired his knowledge of his operations."

When in the ordinary course of business, documents purporting to be written etc—*Ex Scriptio Olim Visis* A person is acquainted with the hand writing of another when, in the ordinary course of business, writings purporting to be written by that person have passed through his hands *Berg v Peterson*, 49 Minn 420 (Am), *Pottle v Rainey*, 98 N C 513 (Am) "The clerk" as Lord Denman remarked in *Doe v Suckermore*, 5 Ad & El 703, "who con-

S. 47

by the supposed writer of the paper in question' In *Tidford v Knott*, (2 Jo¹ Cas 214) it was held that the signature of a person who had been in the habit of signing bank bills, and believed the signature to be his, was sufficient to make the plaintiff's notes, all of which, except one, were signed with his signature to them, untrue. If, then

the handwriting, being
right to have been a
handwriting if he had

answered that question affirmatively, then the receipts should have been received in evidence" *Lauson Expt & Op. Ev p 343* Where the genuineness of signatures to bank bills is disputed, the evidence of bank officers, the hands of whose hands similar bills pass daily, is obviously of highest value.

not connected with the bank, but who have frequently received and cashed bills purporting to be issued by it, and who have cashed such bills at the bank are competent to testify to the signatures of the cashier and president on bills alleged to be forgeries. *Com v American Case*, "that no cashier and cashier habit of receiving sound one been in the

to be acquainted
official position
is settled

he can testify by letter, although he has never seen him write as he has knowledge in one of the

of knowledge of the party's handwriting which enable him to give his opinion as to the genuineness he should be permitted to give to the jury his opinion as to the subject." *The case of the State of Ohio v. The Ohio & Erie Canal Co.* recorder in the office become *Geoming*

N. C. 112); a jailor through whose hands letters signed by a prisoner received from him to parties out side have passed, may, from this circumstance alone, form a sufficient knowledge of the prisoner's handwriting *State v. Hastings*, 53 N. H. 450; *Lawson Expt & Op Ev* 399 In order to prove the handwriting or signature of another person one must show that he is acquainted

Emperoi v Pande, 27 Bom L R 1031=89 Ind Cas 1042=26 Cr L J. 1474=
A. I. R 1923 Bom 429

N Y 393.

Signature of a Partnership firm A witness may be acquainted with the signature of a firm without being able to identify the handwriting of either or any partner *Gordon v Price*, 10 Ired 385 "It is of no consequence that the

the witness The substance

witness has drawn the inference that they were made by one and the same individual The strength of his belief will depend on the greater or less degree of similarity He can only testify to his own state of mind on this question. The

S. 47.

belief was properly before

he could not so understood by thereby to limit to say that the testimony of a p that he is of opinion, or that he thinks, the paper is genuine, yet, as a step further when the witness will only state that the handwriting is like a statement which may be perfectly true, but yet, within the knowledge of the witness, the paper might have been written by an utter stranger. *T. v. J.* § 1868

Knowledge of handwriting acquired for the purpose of testifying. Knowledge of handwriting, acquired for where it is clear that there was no motive to manufacture testimony. *Reese v. Ind 635 (Am); Lawson Expert & Op Ev Rule 54* The question at a trial was as to the handwriting of A B was offered as a witness. It appeared that previous to the trial, A had written his name for the purpose of showing B, his mark. *Esp 15* because, being common in writing letter, handwriting

since the controversy on the subject arose. To this general rule can be taken *Chamberlayne's Ev § 2198*; see also *R. v. Rickard*, 13 Cr R 140, *Stranger v. Seale*, 1 Esp 14; *Fitzwater Peetrage*, 10 C. & F 193, *Per Suchmore*, 6 A & E 703

proof
burden

insufficient to qualify him. *Henderson v. Bank of Montgomery*, 22 *Lauson Expert & Op Ev. rule 56* In proof of a document a witness who he was acquainted with the handwriting of the writer, but he was not a legal examination-in-chief any question which would elicit any of the several indicated in the explanation to section 47 of the Indian Evidence Act 1872. The witness was not cross-examined in the point, neither was he. *St. v. L.*

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Ham

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as it stands. *Taylor § 1863* "It is a principle of the law in this country also, expedient that the matters referred to

the handwriting. *Per Jenkins C J in Sanlarrue v. ...*

Therefore, where the witness has not been questioned on the trial as to his means of knowing a certain handwriting, no objection to the want of qualifications so to testify can be made on appeal. *Ibid*; *Berryman v Dahlgren*, 6 Rob 188, *Smith v Walton*, 8 Gill 81. So the evidence of a witness contained in a deposition that he knows a certain paper to be in the handwriting of a party is sufficient, on appeal, where the opposite party has declined to cross-examine as to his means of knowledge. *Huttner v Gould*, 8 Walls, 485. So where the

S.

Ev 332.

nce The testimony of one witness to a sign the instrument, and whose credi-

the similarity and likeness to signatures of his which they have seen. Such

features or their expression remain as we have been accustomed to see them. We know the face, though derangement has imparted to it a new appearance, or when distorted by pain or disfigured by wounds and presented in an entire
 3 the memory. The
 and trees, and to dis-
 general class. We

daily meet those who, with
 precise kind of fruit it will bear
 although, if questioned, they
 between the several species. We judge of writings, as of other things, by its
 individual character as a whole. We must take the opinion of those witnesses
 altogether, and judge of their testimony as under all the circumstances they
 shall appear entitled to weight, from their opportunity of knowing the
 defendant's handwriting, and your estimate of their skill and judgment.
 A cashier of a bank is entitled to no more credit than any other person
 of equal skill." The jury found for the plaintiff. *Lawson, Exr & Op*
 Ev. 330.

- S. 48. 48 When the Court has to form an opinion as to the existence of any general custom or right of opinion, as to the existence of such custom, when relevant or right, of persons who would be likely to know of its existence if it existed, are relevant.

Explanation.—The expression “general custom or right” includes customs or right common to any considerable class of persons.

Illustration

gation no better evidence can be obtained, or the facts cannot be presented to the tribunal *Lauson, Op & Expert* L.R. Rule 63 frequently collective where a combination of the known elements may be pressed in the form of a conclusion or inference. Such inference is not

are, so to speak, the depositories of the customary law just as the depositories of the general law *Jag Mohan Das v Ma* L.R. 528 (543)

Scope of the section In *Bai D.* L.R. 10 B 43 (59) It is said “Mere opinion evidence is not sufficient. Custom must be proved by specific evidence. It failed to adduce (*Rahmat Bai v Akbar Khan*, 1 A 441) But in a later case, a tribal or family custom excluding a daughter or sister from inheritance in favour of a collateral may be proved by general evidence as to its existence among members of the tribe or family who would naturally be cognizant of its existence and its operation. In such cases, the instances need not be numerous.

who would be likely to know of its existence, if it existed, are relevant, but such opinions must be given by witnesses who give them as facts. *Maung On v Maung Shus Bum* 1 L. B. R. 80, *Hudray v Chandra* L.R. 1921 Oudh 89—S. O. W. N. 6 So the statements made by persons who are in a position to know of the existence of a custom or usage in the relevant area are admissible under this section. *Sariatullah v Pran Nath*, 26 C. L. J. 101 on the existence of a custom.

excluding daughters and papers, directed to be received of this kind of

under s 35 of the Evidence Act, though they had been prepared by the settlement S. 4

most important document contained in the official records relating to the village

of inheritance, or, under section 48 as the record of opinion is to the existence
it" So their Lordships think
who holds that opinion should
sed on hearsay Vide Per Lord

Dary in *Gurudhuaya v. Suparandhuaya*, 23 A 37-27 I A 238 supra. So
according to their Lordships
admissible in evidence
tion of the section can
construction of the words
lay down certain well
is admissible. But these sections are not in any way exceptions to section 60
of the Evidence Act, which lays down that if it refers to an opinion or to the
grounds on which that opinion is held it must be the evidence of the person

M L T. 1-5 A L J
and customs, public
in evidence Section
in cases in which the declarant cannot be brought before the Court, whether in
consequence of death or from other cause This section refers only to general

has personally known the right or custom exercised as a matter of fact Custom
is not a matter to be submitted to the senses It is made up of an aggregated
repetition of the same though a
bare opinion is worth data on
which it is founded; to be

the limits of a village or of
exclusion of others, a right
roads, or plant trees, rights
of common and the like, will
Not Ex 227

Customs A custom is a particular rule which had existed either actually
obtained the force of law in
not consistent with the general
od, 6 Q B 50, *Halsbury Vol X*
finite limited locality It may
prior, 4 Burr. 2305 For further
annotations, vide p 211 supra

S. 49.

Right "It may be difficult, perhaps to define precisely the scope of the word 'right' but I think it was here intended to include those properties of an incorporeal nature, which in legal phraseology are generally called rights."

6 C 171 (F B) at p 185 In the same case *Jackson J* said "It seems to

a very wide interpretation to the has been said that, in section 13 of refer to incorporeal rights only, in ss 32 and 48, where the same word occurs in conjunction with the 'custom' it has been used in that sense. In the first place, it is by no means clear that ss to conceive that in the

confined to that class only". See also *Tippu Khan v. Rajani*, 2 C 11 (F B), *Collector of Gorakhpur v. Palakdhari*, 12 A 1 (F B), *Rajani v. Bapu*, 10 B 439; *Lakshman v. Anrit*, 24 B 591; *Ramdas v. Ajpari*, 12 M 1; *Venkatasami v. Venkataradda*, 15 M. 12; *Vythilinga v. Venkatacharya*, 16 M. 1.

Person who would be likely to know The opinion must be of the person who are likely to know of its existence if it existed *Jugmohandas v. M*, 10 B 528 (542) In *Sariatullah v. Prannath Nandi*, 26 C 184, the question whether occupancy right was transferable by custom In deciding whether competent to prove customs the Court observed "We in the present case also the to know of the existence of

and I think that the opinion is out by the learned Judges under

custom *Nort* Ev 227. In *Wright v. Tatham*, 7 A & E 227, 5 Cl & F. 720, *Collman J.* asked: "Where boundary is proved by custom what is the guarantee for a man?" *Mr. Steel* replied: "The public

v. Sparks, 1 M. & S 690, per *Baley J.*

Opinion as to usages, tenets, etc., when relevant

49. When the Court has to form an opinion as to—

the usages and tenets of any body of men or family, the constitution and government of any religious or charitable foundation, or

the meaning of words or terms used in particular districts or by particular classes of people, S. 49

the opinions of persons having special means of knowledge thereon, are relevant facts.

Principle The matters mentioned in this section can only be proved by persons having special means of knowledge.

Scope of the Section The kind of evidence contemplated by this section must be the expression of opinion based on personal knowledge, and not the repetition of hearsay.

the existence of a fact information derived from deceased persons *Gurudhuaya v Suparandhuaya*, 23 A. 37-5 C. W. N. 33 (P. C.)=27 I. A. 238=10 M. L. J. 267 (P. C.)=2 Bom. L. R. 831 Where a certain member of a family accepted a certain interpretation of a clause in *Wajib-ul arz* the fact is admissible in evidence as to how a custom applying to the family is interpreted by members of that family. *Sharfuddin v Niamut Ali* 87 Ind. Cas. 8-A I. R. 1925 Oudh. 688 Opinion

R 6 O. 101.

omitting any reference to the legal effect. *Wigmore* § 1954 But the mere assertion of a "custom" does not involve opinion *Conner v R Co*, 148 Ind.

The effect is to be determined by the Court. *Hoskins v Warren*, 115 Mass. 514, 535, "The inquiry is not after the opinion of traders and merchants in respect to the law upon a given question, but after the evidence of a fact, to wit the usage or practice in the course of mercantile business" *Allen v Merchant's Bank*, 16 Wend. N. Y. 482, 488 So a party may examine witnesses to prove a particular course of facts, but not to show what the law is. 145 (149) It is sometimes said that a specific instances, or must at least a statement of the general practice.

Lord Mansfield and later Judges, *Edie v East India Co*, 1 W. Bl. 295 (297), 2 Burr 1216 (1222), *Mansfield* L. C. J. said "Many witnesses were examined by defendants to prove this

Denson, 7 C. & P. 711 (714) *Tindal C. J.* observed "Is there any general course of business? Let your mind revolve over instances I am not asking you whether it is just and proper, but whether there is any prevailing course of business." "But" says *Prof. Wigmore* "there is no rule of exclusion. The usage is itself a fact, and the opinion rule does not treat such testimony as an inference from data which can be adequately stated without the inference." *Wigmore* § 1954 This view is in accord with the opinion of Lord Mansfield, in *Camden v Couley*, 1 W. Bl. 417, where he ruled that insurance brokers and others might be examined as to the general opinion and understanding of the persons concerned in trade, though they knew no particular instance in the fact, upon which such opinion was founded. So the evidence of a well qualified witness as regards a trade usage, who could not state individual cases is admitted inasmuch as the *factum probandum* is not a single isolated act or

- S. 49. occurrence, but the result or conclusion derived from a series of facts or circumstances, creating and establishing in the mind of the witness a notion or belief of the complex whole. *Nicherson* 13 All Miss 351; *Wignor* of a witness as regards trade usage section 13, specific instances of usage this section all usages of trade and persons having special means of knowledge. 1 Sm L C 546.

long

able.

316,

lished

J. 240; *Lal Gajen*

W R (1864) 20

this section it can be

ame. Family custom includes the custom of descent in a family and other customary

Tenets of any body of men. This will include any opinion, dogma, or doctrine which is held or maintained as truth. It will include religion, politics, science, etc. *Nort Ev.* p 228.

The constitution and government of any religious or charitable foundation. The opinions of constitution and, variant under this

Thus in *Shore v* early part of the eighteenth century, had, in the deed of grant, and objects of her munificence as 'Godly preachers of Christ's Holy Gospel' it became necessary to determine a few years ago what persons were

(308) where the grant of land was for a meeting house, the worship and service of God. The trustees and the majority of the congregation, having later ceased to be Trinitarian in belief a bill to rescind

v Briggs, 2 Car. & P 525; "in the Month of October" *Peake*, 41 *Barrist & Bench* 710 "highly honoured" *Laurie*, 17 *Taunt* 7 *Perrin*, 2 *conv* (v)

unless it comes from persons who are shown to have

There is thus analogy between opinion evidence under this section and hearsay evidence of custom based on hearsay. *Vide Per Parke B in Crease v. Barrett*, 1 Cr. M. & R. 929, *per Parke B*. S.

50. When the Court has to form an opinion as to the

Opinion on relationship, when relevant

relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person

who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact :

Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act*, or in prosecutions under section 494, 495, 497 or 498 of the Indian Penal Code†.

Illustrations.

(a) The question is, whether A and B were married.

The fact that they were usually received and treated by their friends as husband and wife, is relevant

(b) The question is, whether A was the legitimate son of B. The fact that A was always treated as such by members of the family, is relevant

Principle The question of presumption of relationship by conduct of parties often arises in cases of marriage and legitimacy. When the fact of marriage is in issue, subsequent conduct of the man and woman, said to have been the parties to it, is receivable to evidence the marriage. This conduct is traditionally spoken of as "habit", and this common source of proof, with the reputation evidence which usually accompanies it, has come to be known by the phrase "habit and repute". The logical nature of the argument indicates it plainly to fall under the principle, that from the conduct of the man and the woman as married persons may be inferred their firm belief that they were at some prior time made husband and wife, and from this belief may be inferred

Scope of the section This section is taken from section 649 of *Taylor* which is as follows: "Next, family conduct,—such as the tacit recognition of relationship, and the distribution and devolution of property,—is frequently received as evidence from which opinion and belief of the family may be inferred, as resting ultimately on the same basis as evidence of family tradition. For, since the principal question in pedigree cases turns on the parentage or descent of an individual, it is obviously material, in order to resolve this question, to ascertain how he was treated and acknowledged by those who sustained towards him any relations of blood or of affinity." The presumption in favour of wedlock is another instance of the rule *omnia presumuntur rite esse acta* (all things are presumed to be rightly and solemnly done) *Poz v. Bearblock*, 17 Ch D 499. It has its own special maxim *semper presumitur pro matrimonio*

"By the
as man
there is a
of profess

50 child should be severed in two parts, and that each take half; the true mother decided, upon that, that the child was hers? Not, perhaps that mere declarations, may be made for a temporary purpose (in that case both women made declarations, and one of course false declarations); but it teaches that the conduct of a parent, the feeling a parent—those feelings being inferred from such conduct—afford evidence assisting us in arriving at a right conclusion as to the truth of the controversy. It has been argued at the bar that mere declarations of

ground for inference, for it comes from the least suspicious source, that the very individuals who are the most interested to give a different test in If there ever was a case where circumstantial evidence of this description admissible, it is this. In the same case

ment is sufficient evidence, if not rebut *Wigmore* § 269 So also the concealment husband *Hargrave v Hargrave*, 2 C & D 101 such child by the person who, at the time of its conception, was living in the of adultery with the mother and the fact that the child and its mother

the family appear to have been mentioned in the Will, and the taken of such person is strong evidence to show, either that he was not the testator (the Will) (Tracey v

W. N 130 (P C)

conduct of parties is very true *Mullangi v Venkataswami* 1851 515 Such evidence is also *Maharaja Perloo v Mahara*

§ C. 626 P C - 1 C L R 113

Proviso The proviso is inserted, because in divorce, a husband and wife cases the marriage must be strictly proved, that is, by the evidence of a person who was present at the marriage, or by the production of the register, or such other record as the law of the country, or a class, may provide. *Nort* Ev 101 34-101 34-101 bigamy proof of second marriage is *U S. v. Miles*, 103 U S 301 But *Com. v. Jackson*, 11 Bush. (Ky) 679

an indictment or a civil action, the case for the prosecution is not made out S. 5

& W. 265; *Roscoe Cr.*
of the marriage, even
Williams v. Williams,

in *Morris v. Miller*,
: hat case the opinion of
to support an action

or criminal conversation, there must not be proof of an actual marriage; the
act was, they were married at *Manfair* Chapel; the register or books could not

plaintiff's power, (2) it was not an actual ceremonial marriage, *Lord*

action . . . Perhaps there need not be strict proof from the register, or by a
person present, but strong evidence must be had of the fact,—as by a person
present at the wedding dinner, if the register be burnt and the person and clerk

as before. But an action for criminal conversation has a mixture of penal
purpose by
they are not
an action #
1, 195 From
clear that this
ses of cases,

namely (1) where the charge is a criminal one and (2) in the civil action of
f of a marriage in fact" or actual
c. either by the register containing
of parson clerk or some other person

time, the action of criminal conversation occupied a far more prominent position
and was therefore more liable to abuse. *II ymore* § 2031. Nevertheless the rule

S. 50. of law as laid down by *Lord Mansfield* in the above two cases is applied in common law of England *Catherwood v. Castle*, 13 M & W 200 (1846) 11 Ex 116 days has

cient to prove a marriage in a prosecution for bigamy or in procuring a divorce, or in a petition for damages against an adulterer. But it is to put it too broadly. The marriage and subsequent ceremony upon the prosecution is based certainly cannot be so proved but it may be another marriage becomes material in such prosecution, and such marriage certainly be proved by a reputation, although it is proving a marriage prosecution for bigamy. Thus in the case of *R v. Wilson*, 3 F & 12 the prisoner pleaded that when she went through the first ceremony and

24 & 25 Vict C 100, § 57, Stat 20 & 21 Vic C 85 § 33 These exceptions rest on the ground that such proceedings, being of a penal nature require the strictest proof, and a further reason for the exception in the cases of

another, as well as the injury to the progeny by placing them without rights of legitimate children. Now this deception and

to be more cautious and tender in favour of an opponent in a criminal charge in which the opponent has placed himself on a level of meanness below that of the least meritorious opponent in any civil case. *Wigmore* § 2081.

Under the proviso to this section, in proceedings of the kind specified, the rule is not to be applied by itself.

in the ordinary way, i.e., by other and more reliable evidence than the mere opinion of a person who, as a member of the family or otherwise, has special means of knowledge. *Queen Empress v. Subbarao*, 9 M 921 572 This is in accordance with the principle that strict proof is required in all criminal cases. *Empress v. Kallu*, 5 A 233 = 1 W 1 *Empress v. Plambar*, 5 C 566. But that principle is not applied inasmuch as in criminal cases a rule has grown up that the presumption is beyond a reasonable doubt. *Wigmore* §§ 4051, 2437. But according to

is section in all prosecutions for adultery under s. 497 Penal Code, the marriage must be strictly proved. *Gopal v. Emperor*, 4 Bur. L. J. 107 = I. R. 1925 Rang. 328. So the existence of a legal marriage has to be

S. 5

tion under s. 497, Penal Code the actual fact of the marriage between the

rem *Chand v. Hira*, A. J. R. 1927 B. 594.

51. Whenever the opinion of any living person is relevant, the grounds of opinion, the grounds on which such opinion is based are also relevant.

Illustration.

An expert may give an account of experiments performed by him for the purpose of forming his opinion.

Principle "The mere opinions of the witnesses are entitled to little or no regard, unless they are supported by good warrant them in the opinion of the jury. Exclusive, the opinions of the witnesses are weighty. *Harrison v. Rouan*, 3 Wash. C. C. 587. "Opinion is no evidence, without assigning the reason for such opinion." *Per Duncan J. in Rambler v. Tryon*, S. & R. 94; *Wigmore* § 1917.

Scope of the section. In all cases in which opinion of experts are receivable, the grounds or reasoning upon which such opinion is based may also be required into *Phip Ev 4th Ed.* 362; *Gost of Bombay v. Merwanji*, 10 Bom.

S. 51. that case the Court observed, "The ground on which an expert, a

Court that the witness should be permitted to explain the ground is and of his opinion to the Court and jury, they may readily perceive the force reasoning, the soundness or fallacy of his logic, and therefore in a capacity to give an opinion on the subject and the correctness of his

taken to be true because the witness has stated that he founds them, but this is quite a mistake. In order to obtain facts the opinion

all questions of fact upon competent evidence laid before them

of science they may be aided by the more exact observation and experience of the trained expert." *Lauson Expert & Op Ac pp 21-22*

CHARACTER WHEN RELEVANT.

it is said of a person that he bears a good reputation, mean

Chamberlayne's S. 5
 racter which is a
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position in this, that the latter is easily moveable, the former of longer
 ration and more difficult to be moved' I may notice that habit is formed
 or passion, and that this repetition
Metaphysics Vol I p 178 Habit
Chamberlayne's Ev § 3263

Act In explanation to section 55, the
 cter" includes both reputation and disposi-
 that actual character" says *Prof Wigmore*
 and the latter is merely evidence to prove
 common use of the word 'character' in the

hers, especially the popular opinion, whether favourable or the reverse
Standard Dictionary "Character lives in a man, reputation outside him"
Holland, Gold Idol, C 19 p 219 "Character is like an inward and spiritual
 vice of which reputation is, or should be the outward and visible sign"

of opinion arising from the deportment of a man in society As a man's deport-
 ment, good, or bad, necessarily produces one circle without another, and so ex-
 tends itself till it unites in one general opinion, that general opinion is allowed to
 be given in evidence" *State v Lanton*, 76 N C 216; *Burr Jones* § 153.

Scope of Sections 52 to 55 The framer of the Act has dealt with these sections
 under the heading 'character when relevant.' But in the explanation of section
 55 he has indicated how the character of a person can be evidenced We have
 character includes both
 erroneous. Character and
 cases the term "general
 But there are two distinct
 common use of one word

S. 52. for two ideas has caused confusion. (1) Is a person's disposition—or group of traits, or the sum of his traits—relevant and admissible for purposes? (2) Whenever it is so admissible as an evidentiary fact: becomes in its turn a proper first question is essentially in to exclude relevant character entirely different quarter, it has nothing to do with character, as an ev fact, but with the mode of proving character, assuming it to be provable either as an evidentiary fact or as an issue. *Wigmore* § far as the first point is concerned, character is offered as an ev fact—as a basis for an inference as to conduct—in section 52, 53 may also be a fact in issue (Vide explanation in the latter contingency, character not ut character in the sense of "general character" or "reputation" may also be a fact in issue, as in the case of a criminal case, proof of that character is always admissible. *Taylor* Best § 258. So also whenever character is relevant as a basis of an inference (than the inference of conduct), it is admissible without a *Chamberlayne's Ev* § 3307. But when a party's character is required proved not as a fact in issue but as an evidentiary fact to prove conduct generally excluded. So the general rule is that from a party's character conduct can not be presumed. So in civil cases a party's character as an evidentiary fact is wholly excluded. Such evidence can be given only in cases, where the amount of damage.

good character has been once established. But the bad character of a party in a criminal case may also be a fact in issue. In such a case of course, evidence of his bad character is always admissible. These are the questions which are essentially one of relevancy. Now we come to the second phase of the question: how the character is to be evidenced. Two special problems arise: (1) Opinion; (2) Hearsay, on what

observations of the conduct of the person under peculiar circumstances. (1) A man the estimated character, or reputation, of being honest, or of being cruel, or of being passionate, or humane, or cruel—this general character, as it is called, is also a fact; it is the opinion which those who are acquainted with him have proved in respect to his several traits of character. This is the mode of proving real character, which is the object in view. But it is not the fact, like

admissible in more instances than the other. *Per Pearson* in *Jones* L. 160, *Wigmore* § 52. For further discussion on this point see under s 55 *infra*.

52. In civil cases the fact that the character of any person is such as to render improbable any conduct imputed to him is irrelevant, except in so far as such character appears from facts otherwise relevant.

Principle Evidence of a party's character in a civil suit is irrelevant for two-fold reasons, namely, (1) A party's character is usually of no probative issues and to orecessfully stated 9 "But in a civil suit, where the personal rights of opposite parties are to be weighed in a nicely adjusted balance, no proof except that relating to the facts in controversy should be admitted to turn the scale" Here the rejection of evidence on the ground of principal and evidence of good character is inadmissible in evidence, because there is a fair and just presumption that a person of good character would not commit a crime But in civil cases such evidence is with equal good reason not admitted, because no presumption would

would be infinitely er C
I in *Slaw v Conte* er is
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'very bad man may have a very righteous cause' *Thompson v Church*, 1
Root (Conn) 312 (1791) But in civil cases of a quasi criminal nature the
reason for exclusion is not so clear in principle and the Courts do not speak
§ 3275 In
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ful and nicely balanced, it may then perhaps suffice to turn the wavering scale;

or to form their opinion upon the opinions of others The introduction of such

or bad simply renders his doing a particular act more or less probable It has not the belief compelling power, in reference to the proof of the matter in question, of a probative fact, properly so called *Chamberlayne's Ev* § 3266

words: § 2053 Evidence of good character of a party is not admissible in civil

S. 52. pursuant to a Statute to recover treble the value of property taken the Court said "All the rules of evidence applicable in civil cases are applicable to this" *Hall v Brown*, 30 Conn 551 So in an English case, [*Att Gen v. Bauman*, 2 B & P 532 note (a)] the question was squarely presented to the Court The trial was of an information for offering to corrupt so with the defendant's character but the defendant was indicted for the crime imputed to him The evidence was rejected *Egry & B.* cannot admit this evidence in a civil suit The offence imputed by the action is not in the shape of a crime It would be contrary to the true distinction to admit it, which is this, that in a direct prosecution for such evidence is admissible, but where the prosecution is not directly for a crime, but for the penalty, as in this information, it is not If evidence of character is admissible in such a case as this, it would be precluded in any charge of fraud upon the Excise and Custom House *Chamberlayne's Ex* § 3260.

Crumm principle it received as evidence, the more such action law of evidence and must be of relevancy to make it worthy of consideration and to avoid, of course, similar objections exist in reference to the use of such evidence in criminal cases, but they are disregarded by reason of the humane principle in view of the fact that in criminal cases human life and liberty are at stake and the good character of the defendant is a material consideration.

Character in action for fraud. Where the nature of a civil action involve the general character of a party, evidence as to that character may not be offered to contradict an imputation of dishonesty, or even of fraud in a transaction presented in an ordinary civil case must depend upon the facts and circumstances, and not upon the character of the parties. In such a case, how serious a moral delinquency may be involved in a fact and the establishment of that fact may affect a party's reputation, he cannot rely on the aid of his previous reputation to disprove the fact. *Strob* (S C) 372 The doctrine has been announced in a few cases in the Courts that, if a party is charged with fraud or other act involving turpitude and the charge is based only on circumstantial evidence, he may rebut the charge by proof of his good character. *Henry v. Brown* (Ten) 213; *State v. Becht*, 17 *Walker v. Stephenson*, 3 Esp has said "And generally it is not admissible to repel it." *Greenl Ex* § 51 But this view is not upon any principle of law.

S. 53.

only was altogether unsatisfactory to his mind. It was said to be *vitae*, but he had no conception, according to the principle, of sound sense or right reason, that character could be evidence in a case affecting the life of a man, and yet not evidence in a case affecting his freedom, his property, or his reputation. *Wignmore Cus Ex Case No 21; Wignmore § 56*. A right second limitation that such evidence was limited to doubtful cases only.

following charges to

St Tr 217 are pertinent should have an effect,

be permitted to operate where a crime is clearly proved, it would not be brought forward; because there is hardly any one who has not at some time maintained a good character. . . . If the evidence were in even balance, character should make it preponderate in favour of a defendant; but in order that character have its operation, the case must be reduced to this situation. *more § 56*, see also *R v Broodhuns*, 13 Cr. App. R 125. But now it is settled that an accused in a criminal case can always adduce evidence of good character. *with v Hardy*, (1877) 1 Q.B. 361.

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Scope. The prosecution in . . .
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that such evidence is too likely to move the jury to conclude that his actual guilt of the offence charged. *R v. Boulton*, Leigh & Co. v. Boulton. But the accused himself may always invoke his good character as a defence. If he disprove his commission of the offence, no matter what the evidence against him, and no matter how strong the evidence against him, he is acquitted. *§ 11 (b)* The character, by whichever party offered, must be as to the fact of honesty, violence, charity, etc., involved in the fact of the offence. *Erskine in Harbottle's Case*, 11 How. St Tr 1076. It has already been held that the rule was in early

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and it was

ference that the accused would not have committed the crime. The fact that therefore the crime was not in fact committed by him. The fact that the crime was not in fact committed by him. The fact that the crime was not in fact committed by him.

are left in doubt. It is to be treated just as other circumstances.

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88 Ala. 221

"It is needless to dwell on the fact" says Mr *McKelvey* "that the character

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Character

than of the

5. 53. deed in question. This relevancy depends on the assumption that it was substantially unchanged in the meantime Character at the earlier or later time is offered not to prove or disprove the act in question but to prove the character at the time when the deed in question was done All that is required is that the character must relate to a period proximate to the period of the offence. *R v Stannard*, 14 How St. Tr 596. Similarly character in one place stands on precisely the same footing as character in another place. The person is the same wherever he is and it is a matter of fact that the test of

reputation in a community other than the prisoner's home may be all for *Hignore* § 60 So far as this section is concerned which deals with relevancy those questions do not arise and more so as under the Indian Evidence Act character includes both reputation and disposition No importance can be attached to evidence of good character where the case again is the same. *Queen E v Nur Mahomed*, 11 B 223.

Effect and operation of evidence of good character Good character should be permitted to operate as a positive, appropriate and substantial defence. No distinction should be made, in application and effect, between evidence to prove exculpatory facts and evidence to prove the character of the accused. *State v Murry*, 118 Mo 7, 25, *Stannard*, 7 C & P. 673 Both rest on the fact making strongly

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turn their attention to his good character. [Vide *R v Davison* (1866) 11 St. Tr. 99 at p. 217 per Lord Ellenborough] It is, however, a substantial defence, that the good character of the party accused, when established, is an ingredient which ought always to be submitted to the jury together with the charge as an ingredient in any case, even one previously called upon to answer. 2 Russ Cr 74. The correct rule is that a good character, if proved, to the satisfaction of the jury must be considered. *Percy v Van Dam*, 107 Mich 425

just if it creates

question of the guilt or innocence of the accused. The jury have no right to separate it from the mass of the testimony, and to say that they believe the accused has a good character and that therefore they will infer his innocence of guilt. *Suett v. State*, 75 Neb 263 But while proof of good character alone may not be sufficient as against proof of guilt beyond a reasonable

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a life of honesty during the past, is no reason to suppose that he will not succumb to temptation at the close of his career, but before a man of this type and such antecedents is adjudged guilty, the evidence against him must be of an unimpeachable character *Mangat Rai v Emperor*, 10 Lah L J 262-29 Cr. L. J. 740

Trait must be relevant It is a rule well enforced by reason and sanctioned by authority that character evidence, introduced for the purpose of laying a

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character should relate to a period proximate to the period of trial *R v Swendsen*, 14 How St. Tr 696

Adultery In a criminal prosecution for adultery, the previous good character of the defendant for chastity is admissible in his favour *Chamberlayne v R* § 3289

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Assault The defendant's good character as a peaceable, law abiding citizen is admissible in his favour in a prosecution for assault with intent to

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relevant. For
example, the accused in a criminal action for burglary who had been employed

S. 53. on the police force of a city was not allowed to show by the chief of police that his work had been of a satisfying character *Chamberlayne's Ev* § 3292

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Fraud In criminal actions for fraud or involving fraud, the good character of the accused with respect to the truth involved may be shown in his life but his personal habits or character for sobriety and morality are not relevant likewise his reputation for industry. *Chamberlayne's Ev* § 3294

Homicide Character evidence is probably more frequently used in

in such a case to the accused has sometimes led to a liberal construction of a general rule. The good character of the accused for peaceableness and industry is admissible even where the instrument of death was poison. Example: evidence, offered as character evidence on behalf of the accused, that he had been excluded are that the accused was industrious and honest, a valiant worker. That the accused may, on the other hand, be engaged in selling whiskey, was unchristian or that he was a drinking man, there was no evidence that he had been drinking on the occasion in question. *Chamberlayne's Ev* § 3295

Indecent assault The character of the accused for chastity is relevant in such actions.

are the victim is other than a child, regarded as the only relevant trait would seem that other traits as cruelty, brutality and their opposites ought often to be considered. view has been recognized in a case of infanticide wherein the accused was allowed to show that he was of a humane and kindly disposition towards children. *Chamberlayne's Ev* § 3293

Larceny In larceny cases, proof of character must likewise be confined to the trait involved in the crime, honesty, being regarded as such trait. good character of the accused for truthfulness is not admissible in larceny nor is his character in respect to sobriety. *Chamberlayne's Ev* § 3290

Libel The reputation of the accused in a prosecution for criminal libel for truth and veracity, is inadmissible as is likewise his reputation for peaceableness and orderliness. What trait would be relevant in a libel appears to be honesty. *Chamberlayne's Ev* § 3300

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Rape The Courts have experienced some difficulty in the trait of character of the accused in a prosecution for rape is in his favour. His reputation for "morality, virtue and honesty" is relevant in that context. If the accused is shown to have committed rape, the defendant's reputation for chastity and

is rejected as was likewise evidence of his general character. The reputation of the prosecutrix in rape for chastity may always be shown by the accused as being on the question of consent. It must be observed that proof of character of the female involved in all cases of this general class, which includes adultery, rape, seduction and the like, is proof of the character of a person placed upon proof of character by the prosecution in the first instance. *Chamberlayne's Ev* § 3303.

Receiving stolen property. The trait of character regarded by the Courts as relevant in a prosecution for receiving stolen goods is honesty. The accused may introduce evidence of his character for honesty and probity for the purpose of raising an inference that he is not guilty of the crime charged but traits other than honesty are not regarded as relevant and are therefore excluded. The language, however, which is used to express that general trait may vary, the words probity and integrity, for example, not being objectionable. The reputation of the person from whom the goods were received as a regular and honest dealer in goods such as those in question is relevant on behalf of the accused. Such evidence bears upon the good faith in which the goods were received and tends to prove absence of criminal intent. *Chamberlayne's Ev* § 3304.

Seduction. Evidence of character may not be introduced for the purpose of rebuttal the trait of character of the accused of the crime. *Chamberlayne's Ev* § 3305.

Train wrecking. In a prosecution for attempting to wreck a train by placing a tie upon a railroad track, the good character of the accused as a peaceable, orderly and law abiding citizen was held admissible in his behalf. *Chamberlayne's Ev* § 3306.

54. *In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

Previous bad character not relevant, except in reply.

Explanation 1.—This section does not apply to cases in which the bad character of any person is itself a fact in issue.

Explanation 2.—A previous conviction is relevant as evidence of bad character.

Requires. The evidence is relevant to the issue, but is excluded for reasons of

* This section was substituted for the original section 54 by the Indian Evidence Act (1872) Amendment Act, 1891 (3 of 1891), s. 6

- S. 54. *Nath*, 10 W. R. Cr. 17; *R v. Tubersfield*, 10 Cox. 1; *Amrita I Emperor*, 42 C. 957. But after a defendant has attempted to shew character in his own aid, prosecution may in rebuttal offer as evidence character. *Wignmore* § 58. The reason for the reception of this evidence stated by *Earle J.* in *R v. Boulton supra*: "If the prisoner, by shewing character, misleads the Court... the false impression should be corrected." See also *Per A.* *Shrimpy* Cr. C. 322. In *Shrimpy* by own character "v. *Per* 333 (339).

Old Section. Before the amendment of the section by Act I s. 6, the section ran as follows: "In criminal proceedings, the fact that an accused person has been previously convicted of any offence is relevant if it is proved that he has a bad character is irrelevant unless evidence has been given that he has a good character in which case it is relevant (English section does not apply in fact in issue)." In criminal proceedings are in every

had been given of good character or not. *Queen-Empress v. Karich Das*, 14 C. 721; 2 Weir 760; *Empress v. Sukha*, A. W. N. 1886; *Roshun Dosadh v. Empress*, 5 C 763=6 C. L R. 219. In framing the section the framers of the Act said: "We permit evidence of previous convictions against a prisoner for the purpose of prejudicing the jury, but we do not see why he should not be prejudiced by such evidence, if the Report of the Select Committee see also *Queen-Empress v. Karich*

Queen-Empress v. Hughes, 14 A. 25=A. W. N. 1891, 170.

Scope of the present section. As a general rule the badness of character is not a fact in issue, or relevant to the issue, but that he is of bad character or that he is of the same kind of offence as that of the accused is competent for the prosecutor to adduce evidence tending to show that the accused has been guilty of criminal acts.

Sir James Fitz-james Stephen in his general view of the law of evidence, a work named

It is an inflexible rule of English Criminal Law that a person who has been guilty of a criminal transaction." *Woodroffe's Lr.* p. 451. Under this section the

which has a bad character is irrelevant, and cannot be admitted whether introduced by the prosecution or by the defence. *M. Myn v. King-Emperor*, 6 L. R. 4-9 Cr. L. J. 576-2 Ind. Cas. 349; see also *Emperor v. Wahiduddin*, 54 S. 54

before the passing of the Indian Evidence Act. *Queen v. Mahima*, 6 B. L. R. 131-15 W. R. 37 Cr.; *Queen v. Behary* 7 W. R. 7. Cr.; *Queen v. Phoolchand*, 11 W. R. Cr. 11; *Queen v. Gopal Thakoor*, 6 W. R. Cr. 72; *Queen v. Bykunt*, 10 W. R. Cr. 17; *Queen v. Kulam Sheikh*, 10 W. R. Cr. 39; *Reg v. Timmit*, 2 B. H.

in consideration for the accused was tried, and evidence for which he was

accused person has not been

Cr. L. J. 411. Such as to show that he has a good character or where the bad character of any person is itself a fact in issue. *Wazir v. Empress* 7 P. R. 189 Cr. Except for the purposes of the Act, III of 1892, as other *Emperor v. L. R. 1034*. relevant fact under s. 14 of the Act. *R v. Naba Kumar*, 1 C. W. N. 146. In a trial for an

evidence which is required to prove a motive for the crime which is otherwise irrelevant. *Jagua v. Emperor*, 5 Pat. 63-93 Ind. Cas. 834-7 Pat. L. T. 396-397. I. R. 1926 Pat. 232. See also *Emperor v. Aloomiya*, 5 Bom. L. R. 805-28

particular locality. And in regard to this second question the ordinary rules of evidence do not apply or at least are greatly relaxed. The Indian Law has

S. 54. adopted the policy of less discretion of the Court no bearing whatever upon it; after an accused charged it is relevant for the purpose of enhancing the sentence to be put on him. *Emperor v. Nga Ba*, 111 Ind. Cts 453=29 Cr L J 40; 1928 Rang 200 (F. B); see also *Emperor v. Ismail* 39 B 30; *Emperor*, A 1 R 1929 Mad 306. So also records of such convict put at the end of the trial *Queen v. Shuboo*, 3 W. R Cr 33; *Delmer* 50 C 367.

Accused person's bad character is relevant The evidence to prove that the accused person's character is such that he is likely to be the author of the cheating *v. Crown*, 26 P W R *v. Emperor*, 48 C L J of the accused in the character *Felsenthal v. State*, 50 Cal App 2d, 111

rule and practice of our law in relation to evidence of character rests on the deepest principles of truth and justice. The protection of law is due to the righteous and unrighteous. The sun of justice shines alike for the good, the just and the unjust. The crime must be proved, not for the contrary, the most vicious is presumed innocent until proved guilty. The admission of a contrary rule, even in any degree, would open the door only to direct oppression of those who are vicious because they are weak, but even to the operation of prejudices as to religion, race, colour, character, profession, manners, upon the minds of honest and well-disposed persons.

White, 24 Wind. 574 *White*

disposition is not relevant *White*

White, 1 Phil Ev 603 *The State*

Peckham J in *People v. White*

N Y 78 (Am), when he said: "Two antagonistic methods for the investigation of crime and the conduct of criminal trial have existed for many years. One of these methods, favoured, this kind of evidence is that the tribunal which is engaged in the trial of the accused may

which is pursued in France, and it is claimed that course is to be done where such course is pursued than where it is omitted. The law of England, however, has adopted another, and, so far as the party is concerned, it is proved that

is an exception (which is a peculiarity of precedents of the law) in the admission of relevant evidence of a defendant's general and notorious character to prove that he committed such crimes or torts as that with which he is charged. In criminal cases, evidence is relevant, the law acknowledges by receiving in evidence in some civil cases, evidence of a defendant's good character in order to allow such evidence to be rebutted; and by receiving evidence of the character of witnesses and of other persons. The exclusion of such evidence is a plain departure from the material evidence in a case of usurpation to mitigate the way of its operation given for the purpose of showing that the accused was not likely to commit the crime charged. But after a conviction, the evidence is not relevant to prove that the accused was not likely to commit the crime charged.

Emperor, A I R 1931 Pat 345=12 Pat L T. 471 But evidence is otherwise relevant if it is not rendered inadmissible merely because it shows bad character the admission of offences other than the offence with which the accused is charged. *Saroj v Emperor*, A I R 1932 Cal 474.

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examined R v
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 1 man slaughter, it
 eed he ran down
 and killed a boy, the accused in cross-examination was repeatedly asked and

was called by the accused for the sole purpose of producing some letters This

was not endeavouring to establish a good character merely because a witness whom he called volunteered a statement as to the appellant's good character not only uninvited but probably also against the appellant's wish, and therefore the
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that he should have the advantage of a character which in point of fact is undeserved R v Rounton, L. & C. 520 (5-9); Wills' L. 2nd Ed 55. 150
 I. E. A.—101.

S. 54. prosecution may rebut the evidence of good character either by cross

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prevent the accused person from pleading that the act under consideration committed without a dishonest intention. *Emperor v. Bahadur*, L. R. 313=102 Ind. Cas. 492=28 Cr. L. J. 556. The presumption of evidence of good character, and of the fact that an accused person is a man of good family connection, which would render it *prima facie* unlikely he would be guilty of crimes of violence, cannot be pressed too far in cases of offences originating in extreme political feeling. *In re Lord*, 6 M. L. T. 17=11 Cr. L. J. 30=4 Ind. Cas. 700. But in other cases character of an accused person, and the insignificance of the gain which result from the offence committed by him are circumstances which in cases have occasionally great weight, but neither of them can displace undisputed facts. *Government of Bengal v. Umesh Chunder*, 16 C.

must

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in which the evidence is offered. *Chamberlayne's Ex.* 3 S. 553. Any other traits is irrelevant. *Vide* notes under s. 53.

Previous conviction when relevant under other law. Previous conviction may also be relevant in cases where the accused is liable to enhanced punishment; *vide* s. 75 of the Indian Penal Code; ss 221, 310, 311, 311 of the Procedure Code.

Explanation I. This section is not applicable in cases when the fact of a previous conviction is relevant under other law. *Emperor*, A. I. R. 1-1-1911.

of that section. *Sher Zaman v. Empress*, 10 P. R. 1800. 14 of the End.

of bad character is admissible.

murder to prove that the accused

as being evidence of character it is admissible. *Khilauan v. Emperor*, 5 O. W. N. 1928 Oudh. 430.

Explanation II. Whenever under this section evidence as to the character of an accused is admissible, his previous conviction is also admissible as evidence of his bad character. But in other cases evidence of a previous conviction is not admissible unless accused produces evidence of a previous conviction. Such evidence of the previous conviction of an accused amounts to evidence of bad character. *Teka Ali v. Emperor*, 5 P. R. 76=60 Ind. Cas. 331=23 Cr. L. J. 219; see also *Bahadur v. Emperor*, C. L. J. 578; *Emperor v. Dunning*, 5 Bom. L. R. 1031. The evidence of a previous conviction may be considered in enhancing the sentence after the conviction is proved. *Rahim Bux v. Emperor*, 5 O. W. N. 124=103 Ind. Cas. 124. Strict proof must be given of previous conviction. *Emperor v. ...* Upon the conviction of an accused, the Court has to determine whether

award, and, to do this, should take into consideration, not only the nature and gravity of the offence committed, but the character of the accused then before the court, and the character being admissible as affecting general reputation and general disposition and not of particular acts by which reputation and disposition is shown. Evidence of character is not admissible for the purpose of showing the above purpose. *Naga Po v* The object of this section is to lay down

S. 55

N 351, see also *Rahim v*

Character of prosecutor when relevant In a prosecution for rape or for attempting to commit rape, the character of the prosecutor is relevant as a general bad character.

may call evidence to rebut it. *Wills Ev 2nd Ed 86*

55. In civil cases the fact that the character of any person is such as to affect the amount of damages which he ought to receive, is relevant.

Explanation.—In sections 52, 53, 54, and 55, the word “character” includes both reputation and disposition, but *except as provided in section 54, evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition were shown.

Principle The possession of a particular trait of character or the contrary by one of the parties to a suit in that regard must often be

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larger

*These words and figures in the *Explanation* to section 55 were inserted by the Indian Evidence Act (1872) Amendment Act, 1891 (3 of 1891), s. 7.

S. 55. amount of damages, while a contrary finding may properly result award of damages or none at all. Reputation rather than actual character usually investigated as that is commonly the important consideration; it is difficult to always draw a line of demarcation between the two related (in law) intangible subjects *Chamberlayne's Ex* § 3503.

Scope of the section. In civil cases, good character being proved, not be proved in aggravation of damages; but the party attacked may meet evidence of specific acts of impropriety by disproof of such acts, not by evidence of general good character. *Jones v Janes*, 13 L. J. 111; *Narracott v Narracott*, 33 L. J. P. & M. 61, Pamp. Ex. 714; *Ex 11* obvious that, on the principle so generally accepted for an action of damages (vide *infra*), the plaintiff's reputed character may be considered, in an action of damages, in any other action in which the law of damages requires harm to reputation as one of the elements of recovery. This has also been conceded for the actions of seduction, criminal conversation, breach of promises of marriage, malicious prosecutions, etc. *See also Per R. J. C. B. in Bell v. Parke*, 11 Ir. C. L. 423, 475.

It is not admissible to affect the question of damages, is a point which has been controverted. On the one hand it is urged, that the admission of such evidence would be cruelly unjust, as it would throw upon the plaintiff, who

is not admissible to affect the question of damages, is a point which has been controverted. On the one hand it is urged, that the admission of such evidence would be cruelly unjust, as it would throw upon the plaintiff, who

cannot be a good man, even by means of the very action which he sues himself from the effects of malicious slander. *Per Graham B. in Jones v. Janes*, 13 L. J. 111; *Price* 235, 256, 269. In the same case *Garrow B.* said, "If it were to become the law that such evidence should be admissible, the law would be broken down, and the plaintiff would be ruined now, for he would be ruined by the very action which he sues himself from the effects of malicious slander."

tion; that every man who demands compensation for injury to his character ought to be prepared to rebut any evidence of his bad character; that the danger of admitting testimony of this kind is great, since the witnesses, on cross-examination, might be compelled to give grounds of their belief, that, as any failure in the evidence would much increase the damages, witnesses would naturally be induced to support of a decisive case; that the law will not presume that

criminal conspiracies to ruin reputations, and cannot be moulded to suit the S. 1

best, if not only, arrive at a safe conclusion on this point, by inquiring what opinion was previously entertained respecting him, by those with whom he was

person of whom they are made, he had a right of action. The damage, however, which he has sustained must depend entirely on the estimation in which he was previously held. He complains of an injury to his reputation, and seeks to

damages with one of unsullied and unblemished reputation. A reputed thief would be placed on the same footing with the most honourable merchant, a virtuous woman with the most abandoned prostitute. To enable the jury to estimate the probable quantity of damage, the previous character is not only material, but is said that the admission of such

friends who have known him to prove that his reputation has been good.' *Wigmore* § 70, *Wood v. Durham*, 21 Q. B.

of the character of the plaintiff without the leave of the Judge unless seven

If the general issue is pleaded, the amount of damages is properly in issue, and

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Scope of the section. In civil cases, good character being not be proved in aggravation of damages; but the party a to ke general evidence of bad character by general evidence of good ch meet evidence of specific acts of impropriety by disproof of such a not by evidence of general good character *Jones v James*, 13 I *Narracott v Narracott*, 33 L J P & M 61, *Phil Ev 7th Ed* obvious that, on the principle so generally accepted for an action of (vide *infra*), the plaintiff's reputed character may be considered, in of damages, in any other action in which the law of damages reco harm to reputation as one of the elements of recovery This has al conceded for the actions of seduction, criminal conversation, and breach of promises of marriage, malicious prosecutions, etc *Wig* see also *Per Rigot C B in Bell v. Parke*, 11 Ir C L 423, 475

Character evidence in suits for defamation Whether, in an ntiff's previous general cha, he laboured under a general, to him by the defendant,

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good name, even by means of the very action which he sho himself from the effects of malicious slander" *Per Graham B in Jones* 11 Price 235, 256, 269 In the same case *Garrow B* said "It ever become the law that such evidence should be admissible, the become a much more a of him now, for he protection of his male

to vindicate their characters in Courts of Justice, and thus a most dangerous impunity. *Taylor* § 359 To this it is ref force, that, though the arguments on the other side would be ent weight, if the question respected the right of proving punishment conduct, they do not apply where evidence is offered of criminally conduct; that every man who demands compensation for the character ought to be prepared to rebut any evidence of his character; that the danger of admitting testimony of this kind is since the witness, on cross-examination, might be compelled to grounds of their belief, that, as any failure in the evidence much increase the damages, witnesses would scarcely be support of a decisive case; that the law will not presume

criminal conspiracies to ruin reputations, and cannot be moulded to suit the convenience of irrational timidity; that to estimate the extent of the injury which a plaintiff has sustained, and, consequently, the amount of damages to which he is entitled, the jury must first ascertain what was the real value of his character at the time when it was attacked by the defendant, and that they can

recover damages for that injury, and it seems most material that the jury who have to award those damages should know, if the fact is so, that he is a man of no reputation. 'To deny this would', as is observed in *Stallis on Evidence*, be to decide that a man of the worst character is to be placed on the same footing as a virtuous woman with the most abandoned prostitute. To enable the jury to estimate the probable quantity of injury sustained, a knowledge of the party's previous character is not only material but seems to be absolutely essential. It is said that the admission of such evidence will be hardship upon the plaintiff,

friends who have known
Wignore § 70, *Wood v*
 defamation the defendant,
 in substance and in fact
Wood v. Durham, 21 Q. B.

rumours or
English
 Art 57,
 Per Add

70, *Llleschan v Robinson*, 2 St Lx 641;
Barber, 2 St Ev 641, *Kirkman v Onley*,
 11 Price 235 *Wauthman v Weaver*,

D & R. N. P C 10, *Cornwall v Richardson*, Ry & M 307, see also notes
 under § 12 at p 176 *supra*. But in England where the defendant does not
 plead the truth of the libel he cannot give evidence in chief in mitigation of
 damages, of the circumstances under which the libel or slander was published,
 or of the character of the plaintiff without the leave of the Judge unless seven

If the general issue is pleaded, the amount of damages is properly in issue, and

S. 55. the result is
pleaded, &c

mitting the plaintiff's bad reputation
1) his general bad reputation alone
-- for the particular trait involved in the
tion, e.g. honesty, chastity, etc., or (dⁱⁱⁱ) both may be used. *Gr*
§ 14 (d).

Seduction Character evidence of the daughter is admissible in an
for seduction, for here the disgrace to the father must naturally be
lacking if the daughter is already of bad reputation for chastity, her
bad reputation may therefore be shown. *Damfield v Massey*, 1 Ca.
Dodd v Norris, 3 Camp 519, *Carpenter v Wall*, 11 A & E 804, 11
§ 75 The father's own reputation is immaterial. *Ibid* In such an action
element of damage is the wounded sensibility of the injured party.

shown *Smith v Milburn*, 17
§ 3308, *Phip Ev 7th Ed* p 186.
character is not admissible under
supra

Criminal Conversation In an action for criminal conversation the
previous bad reput.
305 § 75, *Smith v*
reputation is immaterial
or character, for this
well serve in mitigation, in as much as the loss of his wife's virtue

thus the reputation is here rece
note § 75; *Bromley v Wallace*, 4 E.
character is in question

he can claim
362; *Jones v*

T. N. 11, *Narracott v Narracott*, 33 L. J. P. & M 61

in an action
reputation
The plaintiff
the 153
from an

assault would be less than that of a modest and virtuous woman
Work, 13 R. L 643, *Wignmore* § 75

the bad character of the
is clearly in
mitigation of
such a
woman is
none of
is of, immaterial

unchastity a defence the defendant must not only prove

unchaste, but also that he had no knowledge of such unchastity at the time of making the promise to marry. *Foster v. Hanchett*, 68 Vt. 319 (Am.).

S. 55

Malicious prosecution In actions for malicious prosecution, the defendant may show the general bad reputation of the plaintiff as known to him when he launched the prosecution. *Martin v. Hardesty*, 27 Ala. 458 (Am.), *Hamberlayne's Ex* § 9308

Explanation. rac-
er cannot include ion.
'That actual charac- it,
and the latter is merely evidence to prove the former, ought to be a truism."
Wigmore § 1608 "The term 'character' when more strictly applied, refers to
his inherent qualities of the person, rather than to any opinion that may be
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traufords-
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55, has been used in the sense of
to prove the disposition of a person,
e given and to prove his reputation, his

English law Under the English law the term 'character' was normally applied to the actual qualities, and not to the community's estimates of these qualities. *Wigmore* § 1931 In *Thomas Hardy's Trial*, 24 How St Tr 990, evidence was admissible to the effect "I have always esteemed him as a man of a mild and peaceful disposition"

Trial, 31 How St Tr 186, *Lord Ellenborough*.
as to the general character of the accused,
likely to be guilty of
§ 1931, see also *Trial of*
1160 ff, *Fernley's Trial*,
How St Tr 40, *Butler's*.
spoke from personal knowledge alone, and often (though less frequently)
from personal knowledge plus reputation, but to speak from reputation
alone is regarded in the 1700 S as improper On this point the law in
England was afterwards changed and allowed reputation alone *Wigmore*
§ 1931 In *Jones Trial*, 31 How St Tr 310 (1809), *Lord Ellenborough C J*
incidentally said. "It is reputation; it is not what a person knows" But the
isolated phrase above in *Jone's Trial* somehow caught the attention of later

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the usage of the term character in this connection *Parks Ex* 2nd Ed 8
(1802), *McNelly Tr* 321 (1814) *Starkie Ex* 1st Ed Vol. II, 366 (1824);
Phillips Tr 1st Ed 72, 103 (1814) That personal belief, estimate, or know-
ledge—under whatever name—was proper and unquestionable testimony to
character seem
whole period
Cox Cr 25,
Cockburn C J

[illegible]

prisoner, as to show the means they had had of forming an opinion upon his disposition. The first witness stated the length of time that the prisoner was not

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possible.

Each of the witnesses was asked as to his means of knowledge and his opinion of the prisoner's disposition, and Lord Ellenborough says, 'the correct inquiry is in the general character of the accused and whether the witness thinks him likely to be guilty of the offence charged in the information' This is very strong proof that the practice is to stop a witness when he refers to particular

gave his answer according to the
that experience. But the witness a
brothers. Strictly that specific fact
involving a very important question, I cannot rest my decision on the particular

cular witness, is superior in quality and value to mere rumour. Numerous

character, because the prisoner was charged with an offence which would not only be committed in secret if it were committed at all, but would be likely to be kept secret by the persons who were subjected to it. Such being the case,

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attended to. In 1791, in *Hardy's Case*, 21 How St Tr. 999, there is a passage in the examination of witness, *John Carr*, which shows what was then regarded as the true rule, and how common it was to disregard it. 'How long have you known Mr. Carr? Towards of twenty years. Have you known him well during that time? The

—From what you know of
sturbance, or commit any
acts of violence? Never.—*My Attorney General.* That is a question never put,

S. 55. that a prisoner is entitled to give evidence as to his general character. What does it mean? Does it mean evidence as to his reputation as to those to whom his conduct and position are known, or does it mean evidence of disposition? I think it means evidence of reputation only. I have heard of a question put deliberately to a witness called on behalf of a prisoner as to the prisoner's disposition of mind; the way, and the only way, in which I find the word 'character' used and applied in all the books of text-writers of authority upon the subject of evidence. When we consider the question of what, in the strict interpretation of the law, is the limit of such evidence I must say that, in my judgment, it must be confined to this: the evidence must be of the man's general reputation, as seen by the individual opinion of the witness. The witness who acknowledged that nothing of the general character or sense of reputation, would not be character in more limited sense.

Blackburn, Byles, Keating, Mellor and Piggot, B B, concurred and Earle C J said: "What character is admitted? It seems to me that such evidence is admissible for the purpose of showing the disposition of any party accused, and that it is a presumption that he did not commit the crime imputed to him. It cannot be ascertained directly; it is only to be ascertained by the opinion formed concerning the man, which must be founded either on personal experience or on the expression of opinion by others whose opinion again must be founded on the Court's estimate of the prisoner's character. The Court must state that estimate and state that estimate which the prisoner has enabled to be admissible. You may examine the prisoner's neighbourhood, the personal judgment of those who are capable of forming a moral and guiding opinion than that which is to be gathered from general reputation. I have never seen a witness examined to character without an error."

esteem and respect, and have had abundant experience that we have the worthiest men in the world. The principle the Lord Chief Justice laid down would exclude his evidence, and that is the point, where I differ. To my mind personal experience gives cogency to the evidence; and I have heard some persons speak well of him, and I have heard a very able general report in favour of the prisoner. There is a very able comparison. Again, to the proposition that general character is admissible the answer is that it is impossible to get at it. There is no such thing as general character, it is the general inference supposed to arise from the statements in favour of

upon the branch of the case have commanded my assent. In *Ellenborough* held that the personal experience of a witness, founded upon his personal experience, was admissible. In that case there were thirteen witnesses to character, and five or six gave evidence of very considerable personal

evidence than that of a witness who testifies to the general repute of this person as to this mental characteristic? His testimony is based upon hearsay, and quite likely rumour and goes up. If mental characteristic is a fact, there is no valid reason why this fact should be proved by general reputation.

Personal observation

than general reputation

others to which

from those who know" *Wigmore* § 1956. Similarly in *State v Lee* 22 Minn 469, *Berry J* said "As it is the fact of disposition which is important and material, there can be no reason why this fact may not be proved by any witness who knows what it is. There is certainly no reason why general reputation is any

Except as provided in section 54. The character evidence as contemplated in section 51 is not confined to general disposition or general reputation. The character or disposition offered whether for or against him must involve the specific trait related to the act charged. *Wigmore* § 59. "The object and effect of such evidence is to disprove guilt by furnishing a presumption that the defendant could not have committed the offence and hence the character sought to be proved must be such as would make it unlikely that the party would do the controverted act." *McClellin J* in *Morgan v State* 88 Ala 221 (1st), *Wigmore* § 59.

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it a fact.

It may be a part of the very issue, as where the reputation of a plaintiff is in issue to determine the damages in an action in issue, in respect of concern this issue, (2) the right to testify to

regards p

accusation may have contributed to colour the reputation and render it untrustworthy. *Grice v. Ex.* § 461 (d), *Chamberlayne's Ex.* § 3329.

Nature and formation of Reputation. In enquiry into the limitations affecting the nature and formation of a reputation, it must be remembered that

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reputation is used only by way of an exception to the hearsay rule; it must therefore take such a solid and definite shape as to be worthy of, and to justify the exceptional resort to such evidence. Mere rumour, coarse not reputation of the community as a whole, but what the community
Scott v Sampson, L R 8 Q B D 491 If the public opinion be of

proportion of them, should have been heard to speak on the subject, if

the person's veracity or honesty or other quality in question is not deemed to be equivalent and therefore to be trustworthy only so far as the facilities of ascertaining persons among whom he has merely sojourned; the form of the question usually put is opinion in the neighbourhood vary *Greenl Ev* another aspect A or occurrence, while a man's reputation, for example, may declare him honest, and yet a rumour may have circulated that this reputed honest man has defrauded accounts *Wignmore* § 1611.

The persons qualified to testify to reputation The witness to reputation must be one who, by evidence in the community, or otherwise, has had opportunity to learn the community's estimate, and the preliminary question whether he knows the person's reputation, is usually insisted upon *Wign v Norris*, 103 Mass 566 A person who lives out of the neighbourhood is therefore not qualified and it has been doubted whether a person can express purpose of learning the reputation of a person *4 Esp 102, Douglass v The Y N B* *Wignmore*, § 1611 (d), *Greenl Ev* § 161 (d), *Chamberlayne's Ev* § 3315.

Cross-examination of a witness to reputation In testing a witness who speaks of good character, it will expose the unworthiness of his testimony if he admits that rumours of misconduct are known to him, for knowledge of such rumours may well be inconsistent with his assertion that the person's reputation is good *Wignmore* § 1611 (d), *Greenl Ev* § 161 (d), *Chamberlayne's Ev* § 3315. In fact, the propriety of reputation he has support usually been conceded. Cross-examination by requiring him to speak of his information, and in particular the persons whose remarks have given rise to his assertion, is not admissible because there is no other effective way of testing the reputation *Wignmore* § 1611 (d), *Greenl Ev* § 161 (d), *Chamberlayne's Ev* § 3315. It is conceded to be proper to cross-examine the defendant's or other persons' reputation as well as of a witness *Greenl Ev* § 161 (d), *Chamberlayne's Ev* § 3315.

It is impossible to exact unanimity; for there are always dissenters. It is precisely that quality of public opinion thus commonly described as "general" therefore a difficult thing *Wignmore* § 1612. "A reputation, to be of any value, must be based on a general opinion, and not on a particular opinion. If the community is harmonious, the reputation will be of little value. It is only when there are dissenters that the reputation is of any value." *Wignmore* § 1612.

putation at all, must be a general reputation. It may be either one of two opposites; for instance, either good or bad; or it may be partly one and partly the other; but in any case, it must be a general reputation. It could then be no general reputation if it were only a partial, limited, or qualified reputation. The existence of a diversity of opinion is one of the means by which a witness may know there is general reputation, but this means of knowledge, apart from the fact that there is or is not a general reputation, is not sufficient to establish the fact.

actual commission of the crime. In the matter of the petition of Poldia Siva di, 3 M. 238 = 2 Weir 51

General Disposition. Here the character is applied to the actual qualities of the person, not to the community's estimate of these qualities. The term "general disposition" is distinguished from the "particular character" (i.e. general disposition showing it) seems to have been the original and natural source of the phrase and the orthodox application of it. In *Layers' Trial*, 16 How St Tr 246, various discreditable facts being

the particular facts to charge the reputation of any witness, but only in general

itself." *Wigmore* § 1981. In *R v Cobbit*, 2 State Tr. N S 789, 873, Lord Alderden C J said, "The proper inquiry for a gentleman who has known Mr. many years is as to his general character, not as to any individual or particular acts . . . you may ask, wh

particular witness—such opinion being the result of the witness's personal experience and observation—will also be evidence as to his character. But the evidence need not show that such general opinion is based on the personal knowledge of the man by his neighbours generally, nor does it show that such general opinion has been publicly expressed by his neighbours. *Duma Singh v. the Emperor*, 5 O C 203

PART II.

ON PROOF.

CHAPTER III.

FACTS WHICH NEED NOT BE PROVED

S. 56. Fact judicially noticeable need not be proved

56. No fact of which the Court take judicial notice need be proved.

Scope of Part II In part I of the Evidence Act, what facts may not be proved in a civil or criminal case has been dealt with. After ascertaining that question, the framers of the Act now propose to deal with the question what sort of evidence must be given

the contents of a document, must be proved by oral evidence. Oral evidence must consist of an affidavit or the fact to the effect of the

been reduced to a documentary form, the document in which that transaction, and its contents cannot be varied by oral evidence though the contents of the document. *Step Day Et 1*

Proof The terms "evidence" and "proof" are often used in such a way as to include at one time the media by which facts are established, and at the effect or conclusions produced by the testimony. It is true the attempt is frequently made to distinguish between the two terms "evidence" and "proof".

more of a question of fact, and not of law, and is not a question of law. In the case of a fact, the fact to be proved may be one of so much notoriety that the Court take judicial notice of it, or it may be admitted by the parties. In either of these cases no evidence of its existence need be given. Chapter III, which relates to the proof of facts, is taken in part from Act II of 1935 (Am); *Burr Jones* § 4.

Scope of Chapter III The second chapter having decided what facts are relevant we proceed to show how a relevant fact is to be proved. In the place, the fact to be proved may be one of so much notoriety that the Court take judicial notice of it, or it may be admitted by the parties. In either of these cases no evidence of its existence need be given. Chapter III, which relates to the proof of facts, is taken in part from Act II of 1935 (Am); *Burr Jones* § 4.

part from the Commissioner's Draft Bill, and in part from the Law of
 gland" *Draft Report of the Select Committee—The Gazette of India, July, 1,*
Part I, p. 271. "W

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known already, and

ted and reasoned upon without discussion. Often, also, much of which
 re might, in point of mere theory be a doubt, will, as a matter of established
 ictice, be allowed by the Court, in the first instance, without formal proof,
 id there is much which belongs to a dubious and arguable region as to which
 ourt may or may not proceed in this manner *Thayer's Ec. Ev. 277*

In another case proof by evidence may be dispensed with, namely, where
 1 opponent by a solemn *in facie judicialis* admission has waived dispute. This
 known as Judicial Admission *Wigmore § 2663.*

Facts which need not be proved. *Stephen* in his Digest of the Law of
 idence (1st and 2nd editions,) Chap. VII originally dealt with "judicial
 tics" under the general head of 'Proof' and the special head of 'Facts
 hich need not be proved,' as in this Act 1 of this he was taken to task by
 acute critic (in 20 *Solicitors' Journal*, 937) who suggested that since *Stephen's*

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 about judicial notice) declares that some facts asserted by a party need not be

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office, of consciously recalling to the mind a fact known, but not for the moment
 erted to, is an act of precisely the same kind as listening to the evidence of a

tel to the Judge's inspection in Court. But the true conception of what is

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Thayer *Ev* pp 278-280

Principle. Judicial notice is based upon very obvious reasons of convenience and expediency; and the wisdom of dispensing with proof of matters

tion. There is, however no rule of any practical importance which governs
arises must be decided
precedents, than the
words of *Greenleaf*,
"Courts will generally take notice of whatever ought to be generally known
within the limits of their jurisdiction" *Green* *Ev* § 8; *Burr* *Jones* § 105 (a)
"Courts will not pretend to be more ignorant than the rest of mankind" *Fisher*
v. Jamson, 30 Ill. App 91.

(2) all public Acts passed or hereafter to be passed by Parliament, and all local and personal Acts directed by Parliament to be judicially noticed :

(3) Articles of War for Her Majesty's Army, "Navy or air force" :•

(4) the course of proceeding of Parliament and of the Councils for the purposes of making Laws and Regulations established under the Indian Councils Act,† or any other law for the time being relating thereto.

Explanation.—The word "Parliament" in clauses (2) and (4) includes—

(1) the Parliament of the United Kingdom of Great Britain and Ireland ;

(2) the Parliament of Great Britain ;

(3) the Parliament of England ;

(4) the Parliament of Scotland ; and

(5) the Parliament of Ireland :

(5) the accession and the sign manual of the Sovereign for the time being of the United Kingdom of Great Britain and Ireland :

(6) all seals of which English Courts take judicial notice : the seals of all the Courts of British India, and of all Courts out of British India, established by the authority of the Governor-General‡ or any Local Government in Council : the seals of Courts of Admiralty and Maritime Jurisdiction and of Notaries Public, and all seals which any person is authorized to use by any Act of Parliament or other Act or Regulation having the force of law in British India :

(7) the accession to office, names, titles, functions and signatures of the persons filling for the time being any public office in any part of British India, if the fact of their appointment to such office is notified in the Gazette of India or in the official Gazette of any Local Government :

(8) the existence, title and national flag of every State or Sovereign recognized by the British Crown :

(9) the divisions of time, the geographical divisions of the world, and public festivals, fasts, and holidays notified in the official Gazette :

(10) the territories under the dominion of the British Crown :

(11) the commencement, continuance and termination of hostilities between the British Crown and any other State or body of persons :

*Substituted by Act X of 1887.

†24 & 25 Vict. c. 67.

‡For lists of such Courts, see the notifications printed on pp. 372 to 374 of the Western India Volume of Macpherson's Lists of British Enactments in force in Indian States

7. (12) the names of the members and officers of the Court and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of all advocates, attorneys, proctors, vakils, pleaders and other persons authorized by law to appear or act before it :

(13) the rule of the road * [on land or at sea]. In all these cases and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference.

If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it may consider necessary to enable it to do so

Whether the list is complete. A similar list is also given by Sir J. M. Fitzjames Stephen in art. 55 of his Digest of the Law of Evidence. As regards that list he remarks "The list of matters judicially noticed in this article is not intended to be quite complete. It is compiled from 1 Ph. Ev. 455-67 and T. E. ss 1-20, where the subject is gone into more minutely."

the ordinary course of nature the meaning of English words, and all other matters which they are directed by any Act to notice, such as, in Bengal, lists of land holders who have not made road-tax returns (Ben. Act IX of 1833 = 194

cases that which was already and more widely the law, have occasionally furnished ground for the contention that an intention to alter the general law was to be inferred from the partial or limited enactment; resting on the maxim, *expressio unius est exclusio alterius*. But these cases. The only inference which a Court can draw from such provisions (which generally find a place in the Evidence Act) and idle doubts) is that the Legislature was either ignorant or unmindful of the

* These words in section 57, para. (13), were inserted by the Indian Evidence Act Amendment Act (18 of 1872), s. 5.

real state of the law, or that it acted under the influence of excessive caution and if the law be different from what the Legislature supposed it to be the implication arising from the statute, it has been said, cannot operate as a negation of its existence; any legislation founded on such a mistake has not the effect of making that law which the Legislature erroneously assumed it to be so. *Virucll*, 748. Similarly in *Kron's Admiralty v. Adams* 11, 73 Ind. Cts. 312 at p. 316—A. I. R. 1923 Cal. 66, *Mr. Justice MacKerzie* said: "The only inference which a Court can draw from such superfluous provisions (which often find place in Acts to meet unfounded objections and ill-dubias), is that the Legislature was either ignorant or unmindful of the real state of the law or that it acted

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shall take judicial notice. In the circumstances the proper meaning of the section is that it does not forbid the Court to take judicial notice of any fact which is a proper subject of taking such notice, but the Court must take judicial notice of the facts mentioned in this section and as regards that the Court is not at liberty to exercise any discretion. It was pointed out with regard to the corresponding section of Act II of 1875 that the last mentioned therein was not exhaustive and the Court was at liberty to take judicial notice of any fact of which English Courts take judicial notice. *Queen v. Nabalup (a suami)*, 1 B. L. O. Cr. 27-5, *Wells v. Wells* 11, 8th L. 169. But why should it be confined to facts of which the English Courts ordinarily take judicial notice? The maxim that what is known need not be proved *manifesta (or notoria) non indigent probatione*, may be traced far back in the civil and canon law, indeed it is coeval with the legal procedure itself. We find it a maxim in English law

res judicata, si notum non sit in forma judicii. Per Coke C. J. in Cranford v.

future possibility of the doctrine of judicial notice. Courts may judicially notice much which they cannot be required to notice. That is well worth emphasizing, for it points to a great possible usefulness in this doctrine, in helping to shorten and simplify trials. It is an instrument of great efficacy, in the hands of a competent Judge, and it is not nearly as much used, in the region of practice and evidence, as

daily to smother trials
Thayer Prcl. Treat. L. v. 30

by Judges? One reason is that they apparently forget that (as *Professor Thayer* says) they might notice much that they cannot be required to notice by general rule made in advance, e. g., a rule requiring them to notice always the incumbency of a sheriff as office might go too far, but they may in a given case be justified in declaring a specific sheriff to be notorious; and so on, in a thousand

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7. notice given to this branch of the subject is, that diversity of opinion has existed as to whether certain laws of a private nature were entitled to the judicial notice, and it has therefore become the task of the legal chronicler to mark them. The law of the jurisdiction is peculiarly a matter of judicial cognizance. It is only on the presumption that the law is known to the Court that there can be any proceedings whatever in Courts of Justice. *Burr Jones* § 11? The Mahomedan ecclesiastical law is a law having the force of law in British India, and as such will be taken judicial notice of by Courts. *Whitley Stokes* Vol II p 887, *Queen Empress v Ram an* 7 A 161. The general rules of Hindu and Mahomedan law do not require proof. They can be ascertained by making necessary reference to authoritative text books, judicial decisions as well as from the opinions of the Pandits or Mullahs. *Bhagwan v Bhagwan*, *supra*. The Court can take judicial notice of what the Hindu Law is with regard to Hindu custom, that always must be proved. *Per Garth C J in Jagjit Mohini v Dhananath*, 8 C 582 (587). But where a custom is judicially recognised it need not be proved. *Ham v Amin* *lar of Patapur*, 23 C 101, 93 Ind Crs 321, 78 Ind Crs 101, 1 R 19-6 Oudh 352, etc also.

Pamalinga, 12 M I A

customs of any particular community may acquire, by being repeatedly proved in the Court, such a status as to make it unnecessary in any subsequent case for

to prove the existence of a body of customs. Assuming that a rule of *Majasa itana* has the term of s 57 of the Evidence Act operation of customs which necessarily enacted by the Legislature, Courts have to take judicial notice not only of the effect of the rules but also of those facts which are necessary for showing that

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taken notice of as such, and as the contrary be expressly provided and declared by such Act." This provision is now repealed by the Interpretation Act, 1889, 52 and 53 Vict. C. 63, which provides, by s. 3, that every Act passed after 1850 "shall be a Public Act and shall be judicially noticed as such, unless the contrary be expressly provided by the Act." So now every personal Act or local Act should also be taken judicial notice of by the Indian Courts.

Clause III. The Court will recognize without proof the Articles of War, whether in the naval, the marine, or the land service, as well as the auxiliary forces,—that is the militia, yeomanry, and the volunteers,—and also the marine force, (*Taylor* § 5), but not of a book called the Rules and Regulations for the Government of the Army (*Boyle v. Arthur*, 1 B. & C. 300) nor the Regulations of the territorial force (*Fulton v. Anderson*, [1912] 1 C. 1 107).

Clause IV. The English Courts take judicial notice of the laws of England and Ireland, including the laws and custom of Parliament and the privileges and course of proceedings of each House of Parliament. (*Stockdale v. Hansard*, 9 A. & M. 1—2 P. & D. 1, *Eastbury v. Fox* et 12 Q. B. D. 271. The Indian Courts should take judicial notice of decisions of Parliament. *The Englishman v. Lloyd* et 1st C. 700—14 C. W. N. 713. The proceedings of the Legislature" says Prof. Hargrave as shown in its journal are by some Courts noticed, but this is an artificial theory on principle, the proceedings as contained in the

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stated under it. *R. v. Gully*, 1 L. & 93, *Mephell v. Sultan of Shore*, (1891) 1 Q. B. 119.

Clause VI. The English Courts take judicial notice of the Great Privy Seal (*Lord Melville's Case*, 29 How. St. Tr. 707; royal proclamation, of the signature of the clerk, *Levinstein*, 1 R. P. C. 170), seal of the Corp

Crown Office Act, 1877, the Seal and the Privy Seal of the Duchy of Lancaster, the Seal and the Privy seal of the Duchy of Cornwall, the Seals of the old Superior Courts of Justice, and of the Supreme Court and its several divisions; the old office of the P^rince of Wales, the Seals of Courts constituted by Act of Parliament, if Seals are

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Ireland, which since the 6th of August, 1877, has been called "The Court of Bankruptcy in Ireland, of the several in Ireland, of the Landed Estate C of that Court, and of the county Court the city of Glasgow is not one of judicial notice. *In re Henderson*, 22 C. 491. Where the seal is not distinctly

formation cannot without proof be recognized as such by the judicial tribunals of other nations until it has been acknowledged by the sovereign power under which those tribunals are constituted (*City of Lyons v. Bank of*

belonging to the executive
to such acknowledgment
is a fact by other competent
testimony, and the existence of such unacknowledged government or state may, in like manner be proved, the rule being, that if a body of persons assemble together to protect the welfare, and support their own independence, make laws and have Courts of justice, this is evidence of their being a state (*General P. v. 1* citing *Yusuf v. General* 2 C. & P. 224. But the rule in *L. v. Palmer*, 3 Wheat 610, 631, seems limited to the case of a defendant denying piratical intent by pleading the authority of a government having colourable existence and engaged in a revolution. On the general question, the correct rule seems to be the contrary of the statement in *General P.* and a court will look solely to the action of the Executive where the existence of a foreign nation or government is involved (*L. v. Hume* 2 Wheat 611, 631; *L. v. Hume* 4 Cranch 211; *Gibson v. H.* 1 Wheat 243; *Amey v. Hunt* 6 C. 193; *Wallace v. Jux* 12, 13 Pet 115 & 116; *Kenney v. Chambers* 18 How 58 61; *Wheeler v. Sullivan* of *Johore*, (1831) 1 Q. B. 111). In the last mentioned case *Ky. L. J.* vol. 1 p. 161. "The status of a foreign sovereign is a matter of which the Courts of this country take judicial cognizance—this is not a matter which the Courts either assumed to know or to have the means of knowing, without a continuous inquiry as to whether the person cited is or is not in the position of an independent sovereign. Of course the Court will take the best means of informing itself on the subject if there is any kind of doubt, and the matter is not as notorious as the status of some great monarch such as the Emperor of Germany. Here the person cited was the Sultan of *Johore*, and the means which the Judge took of informing himself as to his status was by inquiry at the colonial office." Later on the learned Judge said, "The next point is this. It is his right to immunity, and may be . . . agree, but how is this to be done . . . clear supposing, by way of illustration, that some well known potentate, such as one of the great European Emperors, were to be sued in a Court of this country, and took no kind of notice of the proceeding; it would be the duty of

in Council. See also *Lachmi Narain v. Protop*, 2 A. 1 (17), *Puocani v. Bombay Baroda*, 9 B. 241.

While the Courts will take judicial notice of this existence of foreign governments, the rule must be taken with the qualification that it relates only to such governments as have been recognized by the Home Government. The Courts will not anticipate the action of the government in this respect, and in case of a rebellion or a revolt in a foreign state, they will consider the former state of things as existing until the proper department of the government recognizes the change (*City of Berne v. Baul*, 9 Ves 347; *Taylor v. Barclay*, 2 Sim 213. Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial but a political question, the determination of which by the legislative and executive departments of any government

57. legible, Courts will not take judicial notice of it *Jaker Ah v Ruj Chandra* 10 C L R 169 A registered power of attorney was admitted under this section without proof, the Registering *Bion* 1, 11 C 176 But the abo

Courts can take judicial notice of *Rath Mohun v Arger* 185 Ind Cas 422

Clause VII Courts will judicially recognize the political constitution or frame of their own Government; its essential political elements and public office sharing in its regular administration; and its essential and regular political operations, powers and actions Thus, notice is taken, by all tribunals of the accession of the Chief Executive of the nation or state, under whose authority they act; his powers and privileges (*Elderton's Case*, 2 Ld Raym 950), a d

Gule's Ex'r, 4 Marten 600, and principal officers of .31) In America the Court senator the appointment, ell, 2 Rob (L) 166) Is *Holman v Burrou*, 2 Ld

be taken judicial notice of deputies Great Ex l executive officers to ad O Mart. 196 But the

English doctrine does not extend to this length *Taylor* § 11 So also in

be taken of the signature of a Deputy Commr of Police *Waltchar v* 53 C 718=30 C W N. 713; see also *Tamor v Kaludas*, 4 B L R 0

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he is acting as such *Rampjan v Ahmed*, 5 Ind. Cas 537.

being alike members of the great family d to recognize each other's existence and he usual and appropriate symbols of rationality and sovereignty are the national flag and seal Every sovereign therefore, recognizes, and, of course, the public tribunals and functionaries of sovereigns of state occurred as however, upon a civil war in any country, one part of the nation shall separate itself from the other, and establish for itself an independent government, the newly

public feasts and festivals. *Tyler* 3 :
 facts in the case of the *Wright*
 the fact itself; he merely knows wh
 the period of limitation for a suit expires on a gazetted holiday and the plaint is
 presented on the day the Court opens it is not necessary for the plaint explicitly
 to state that on the day on which the period of limitation expired the Court was
 closed. *Tel. C. Ind. v. M. P. S.* 16 N. L. R. 193-7, Ind. Cas. 926. This clause
 empowers the Court to take judicial notice of any public holidays notified in
 the official gazette. *Id.*

Geographical Division. Courts in
 phical features of the country covered
 the country as a whole, and of the entire
 Courts take judicial notice of political subdivisions of the country as it was made
 by law, and of the state or territory where they hold their sessions, and of the
 judicial districts within it. Courts will take judicial notice of the local divisions
 of the state into counties, cities and towns and of the facts that certain cities are
 in such subdivisions. *S. v. Pennington* 121 Mo. 483, *Rogers v. City* 104
 Cal. 283 (1m), *Dorchester Case* 1 B. & A. 243, *R. v. F. L.* 15 Q. B. D. 827, *R. v.*
St. Maurice 16 Q. B. D. 914. The Court takes judicial notice of the existence,
 extent, and geographical position of the British dominions and of the territory
 of the foreign States. *Halsbury*, Vol. 13, p. 493. In *Cooke v. Wilson*, 1 C. B.
 N. S. 153, *Crowder J.* at p. 161, held that the Court was bound to take notice of
 the existence of the colony of Victoria and *Cresswell J.* at p. 163, that it must
 recognise that the colony was out of England. In *Thurrell v. Dryer*, (1884) 9.
 App. Cas. 41, where the question was whether the words "St. Lawrence" in a
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cognizance of the fact that, assuming these tribes to be independent, they do
 not possess jurisdiction over certain territories. This is a matter which appears
 to me must necessarily be within the cognizance of Her Majesty, because, for
 the protection of her hegemony in the ordinary way, she should know whether
 redress should be applied for to the Sultan of Morocco or to the head of the
 various independent tribes of Soudan. Sound policy appears to me to require

at p. 221 said "The judgment proceeded, not on the question whether
 the Court should give relief or not, or give discovery or not, and with-
 hold relief, but upon the question whether the King's Court should attend to
 the case
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Case, 1821, 4 B & All 243, per Bayley J and Best J) unless such situation is recognised by statute (*R v Holborn Union Guardian*, 6 L & B 715) nor of the particular diocese within which any town is situated (*R v Symson*, 2 L & Raym 1379, *Halsbury* Vol 13 p 1). It is judicial notice that in certain cities referred to in the pleadings do not exist. *Wheeler*, 162 Mass 129 (1867). In

state, without proof of the fact. *Strong*, 42 Ill 148. But in an action for notice of the fact that *Helchester*

was in the county of Somerset (*R v Burrage*, 3 P Wms 139 196, see also *Thorne v Jolson*, (1846) 3 C B 661, *Brunne v Thomson*, (1842) 2 Q B 754, *Humphreys v Buld* (1841) 9 Dowd 1000, *Church v Imp Gas Co*, 7 L J Q B 118. In England the Courts will take judicial notice of the different counties palatine, and counties corporate in that country (*R v S Maurice*, 16 Q B D 993, *Devil's Case*, 1 B & A 218). That a particular colony or place in it, is not, in England need not be proved to an English Court (*Cool v Wilson*, 26 L J C P 14). The Courts take judicial notice of the leading geographical features of the country, for example the existence and general location of im-

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named Dublin in the world, and therefore refused to construe an allegation in the declaration that a bill was drawn in Dublin as meaning drawn in Dublin in Ireland. *Ibid*, see also *Kearney v King*, 2 B & Ald 301. But a statement by the Attorney General on the Instructions of the Home Secretary, as to whether a certain spot in the British channel was within the limits of H M's territorial sovereignty was held binding upon the Court (*The Fargurness* [1927] p 311, of *Engell v Mursman* [1928] A C 433). *Phip Ev 7th Ed 22*. Judges are aware, with the rest of the community, of the existence of the principal lines of railroad which are wholly or in part within the county. The common knowledge includes locality, course and direction of such a railroad. What places are on the line of a railroad, have stations in it, or constitute its termini, or railroad centres, through what other localities it must pass in order to connect two places, what is the distance between two points on a railroad, within what county these points are, and similar facts pertaining to judicially know. But details, to be proved. *Ev § 741*

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Clause X "All Courts of Justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the Government whose laws they administer, or if its recognition or denial of the sovereignty of a foreign power as appearing from the public Acts of the legislature and executive although those Acts are not formally put in evidence nor in accord with the pleadings" (*Jones v United States*, 137 U S 214 (Am)). In England the Courts take notice of the territorial extent of the jurisdiction and sovereignty exercised *de facto* by their own government and the local divisions of the country as parishes, and the like so far as the but not the relative positions of railways further than they may be. The Foreign Jurisdiction Act, 1890 any question as to the existence or foreign country, arising in proceedings in a Court in the British dominions or held under British authority, is to be submitted to the Secretary of State, whose decisions for the purpose of the proceedings is final. "If it be true" said Lord Selborne in *Daniadhar v Deoram*, 1 B 367 at p 404 (P C) "that the Indian Courts might take judicial notice of the territories of the Queen in India, then, if there has been a cession of terri-

try, they must take notice of that, and they must do so independently of the Gazette, which is not part of the case, but only evidence of it."

Clause XI. The Courts take judicial notice of wars with foreign states if a state of war has been declared by the proper authorities. *Dyer v Lord Harman*, 111 N. 202. It is established that the law is as stated in the text, although Lord Esher said during argument, "You will be obliged upon an indictment for a libel to prove that France is now at war with Austria, not as to the war with this country, the Court taking judicial notice of that with reference to our own country." See also *Hill v Lord Harman*, 111 N. 203, *Per v De Boreer*, *Thellus v Caring* 1 Ex. 20, *Harley v Murray*, 11 June March 5, 1908, *A judgment of 1911* (1915) 3 K B 613 Cb, *Re Lane*, (1916) 1 K B 268 T, *Re* § 18. But if no judicial notice has been made the fact of a state of war is one to be proved. *Hill v Lord Harman* 111 N. 203. A war between foreign powers is not judicially noticed. *Dyer v Lord Harman* 111 N. 203. When it is said, however, that the Courts take judicial notice of wars with foreign states, it must be interpreted that the Courts take judicial notice of the act of their own executive with reference to war with a foreign state. The executive recognition is the warrant for the Court. *See v H v Wheat* (1883) 246. It is the determination of a political question by another department of the government which is binding on the Judge. *Jones v United States* 157 U. S. 213 (1901), *Harr Jones* § 107 (a). As regards the commencement of hostilities see *The Fenonia Duncan v Kiser*, 8 Mo. P. C. (N. S.) 111-112, L. R. 3 P. C. 171-176 L. 1 15. Under ss. 6 and 8 of Act II of 1855 the Gazette of India or C. deputed Gazette containing official letters on the subject of hostilities between the British Crown and the

Representative v Pennant's and Oriental Branch Service (1923) A. C. 191-92 L. 1 K B 112-125 L. 1 516. The statement by H. M.'s Commissioner and Consul General for India is sufficient for the Court's taking judicial notice, under s. 7 Evidence Act, of the existence of hostilities between Kaberja, the King Unyoro and Her Majesty the Queen and the protected states of Uganda. *Imperatrix v Juma*, 22 B. 54.

Clause XII. According to English law under the general principle of recognizing domestic officials, notice is taken of the incumbency of other officers to the extent to which the officers, particularly *Fidderlton's Case*, *v Turner*, 6 Q. B. 117, *Wymore* "It lies and authorities

to the incumbents, but whether the incumbent at a given time and place is a specific person depends on the facts, but sometimes on principle."

101 *Wymore* § 206. But in rule is forced and all Courts must take judicial notice of the names of the members and officers of the Court and of their deputies and subordinate officers and assistants, and process, and of all advocates, persons authorized by law to

Act II of 1855, the Court was *Jillunt Chaelerbutty v Sheo*

Nairam, 8 W. R. 276

"law of the road," was not to be considered as inflexible, since, in crowded streets situations and circumstances might frequently arise, where a deviation from what is called the law of the road, would not only be justifiable, but absolutely necessary. Where the defendant was driving on the wrong side of the road, which was of considerable breadth, and the plaintiff's servant, who was on horse back, without any reason crossed over to the side on which the defendant was driving, and on endeavouring to pass, his horse was killed. Lord

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regards rules of road, vide *Leame v Bray*, 3 Ex & 33, *Turley v Thomas* 8 C & P 104

The Court will take judicial notice of the following rules with respect to navigation,—first, that ships and steamboats, on meeting "end on or nearly end on, in such a manner as to involve risk of collision" should port their

In all cases and also on all matters of public history etc Notorious facts of foreign history will be noticed, whether ancient or contemporaneous. The existence of a war in a foreign country, at a given time, will be regarded as a fact of common knowledge. But special historical facts of comparatively slight general importance connected with a particular state and the consequences regarded as commonly known. D

importance will be considered in determining what facts of foreign history minor. Any Court of a nation will know as matters of common knowledge notorious facts in the nation's history. Where these are a direct result of legal action the knowledge of the Court may also be judicial,—as in the case of

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state, what was the tenure of office of the succession, chief magistrates of state, the date of a general or national election need not be established by evidence. *Ibid* § 793. The general history of the great-national parties is a fact of common knowledge. *Ibid* § 799. When in doubt as to any matter to be judicially noticed the Judge may refer for information to appropriate sources. *Philp Ev 4th Ed* p 17. *Taylor Ev 10th Ed* § 21. The Judge may resort to such means of reference as may be at hand, and as he may deem worthy of confidence. *Green Ev* § 295, *Tay Ev* § 21. The provision that the Court may resort for its aid to appropriate books is in advance on the English Law under which though an expert called as a witness, will be allowed to refresh his memory by referring to a professional treatise regarded by him as of authority yet it but see *Willot*

judicial cogniz
of some matter for his Court's knowledge and notice must frequently demand upon him, to which, without some means of reference—or refreshing his memory—might not be able to respond. It does not necessarily his me
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ration concerning matters which have not been referred to in the evidence, in which he is obliged to resort to any source of information which in its nature is calculated to be trustworthy and helpful, always seeking first for that which is most satisfactory; and in cases too concerning matters of law, and in other cases he may use all proper means for satisfying himself in any way that appears to him satisfactory. *For Jones* § 132. In a New York case the opinion shows that the Court had referred to various documents and to Pollard's and Greenly's histories of the Civil War. *Sumner v. Churches* 112 C., 37 N. Y. 174. In the celebrated *Dickens* case *Cut v. Justice* evidently had

light upon the social and political

Sanford 11 How. (U. S.) 333, *For Jones* § 132. Dr. *Wier* illustrates the principle thus: "The Judge may consult works on collateral science or arts, touching the topic at hand. He may draw for instance, on mythology, in order to determine the meaning of similes in an ambiguous writing. He may refer to almanacs (*Pigeon v. Pigeon*, 10 Cr. 112 227), he may appeal to his own memory for the meaning of a word in the vernacular (*For v. Wood* 11 Moo. C. C. 323, *Cornwall v. Gilling* 2 Camp. 25, *Mundy v. Cole* L. R. 71 x 70); he may, as to the meaning of Latin, refer to dictionaries of science of all classes (*For v. Gilling*, 6 C. & P. 186, *Pierce v. Lee* 1 Leon. 242, *Atten v. Drummond* 1 C. & L. 210, *Sutton v. Sutton* 9 C. & L. 25; *Burner v. Atten* 8 Kn. 11; *In re St. Catherine Hospital* 1 Vent. 11). *Stinner v. Brewster* 1 Salk. 281; *Cornwall v. Gilling* 2 Camp. 25. He may determine the meaning of the abbreviations of Christian names and others, and of other common terms, as to a point of

he may consult
241, *Updell v.*
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& P. 650), and *Lord*.

reference as to a rule of
R. 772" *Wharton* F. 11. . . .
called upon to decide as to what particular date in the English calendar a certain date in the Jewish year corresponds with, may resort for its aid to appropriate books or documents of reference, and in such a case an almanac containing the British and Jewish calendars may be referred to. *Quid* Judicial calendar was not compiled expressly for the purpose of showing corresponding dates in the different era, and was not an appropriate document of reference in such a case. *Raghubar v. Sheo Chm* 10 C. 152. In all those and the like cases where the memory of the Judge is at fault, he resorts to such documents or other means of reference as may be at hand, and may deem worthy of confidence

cases of war which were not produced. Cited by *Butler J* in *R v. Holt*, 5 F. R. 416. But in many other cases, the English Courts have themselves made the necessary inquiries, and that, too, without strictly confining their researches to the time of the trial. *Taylor* § 21, *Taylor v. Harlow* 2 Sim. 231; *The Charkieh* 42 L. J. Adm. 17 cited in *Lachin v. Naram v. Hyslop* 2 A. 17, *Chandler v. Grievs*, 2 H. Bl. 666 n. *For v. Lloyd* 1 M. & Cr. 64, *Worsley v. Fisher*, 2 2 Roll follow
v. Bor
Lachin.

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"from producing evidence, it
make a request for it. Up
said to declare the fact noticed, or at least to make the investigation which it

7. deems necessary No doubt, in most instances, the rule of law has the plain consequence of compelling the Judge to declare the dispensation, not to do so would be to err, precisely as under any other rule of law. But it must not be supposed that this is universal.

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Cas 114. In a suit for declaration that a church and its properties were trusts and the plaintiffs were its trustees and for possession of the same from defendants certain documents consisting of printed letters of the Priests of the

dated about 75 years ago were ad-

of reference to prove the history of

the books were admissible to prove facts of public history, they could not be relied upon to prove where certain particular Missionaries were living or when they died. The Court can dispense with evidence only of what may be regarded as notorious facts of public history. *Ambalam v J M Barthe* (1912) 11 W N 152=13 Ind Cas 99. A document may be referred to in connection with ancient facts of a public nature provided it is an approved, public and general history. It is provided by this section:

literature science or art the Court may res.

books of reference. *Lira Channamal v*

the question whether a certain property was a matter of public history within the meaning of this section, and historical works cannot be referred to for the purpose of deciding the question. *Sant Singh v Rulla Ram*, 126 Ind Cas 744=

A I R 1930 Lah 738. "It is to be observed that the section does not say how

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before the suit in which the usage of the institution and its history are described, both being matters relevant to the suit. *Augustine v Medico* 15 M 241. Evidence of the sources of common knowledge, if not its extent may perhaps be obtained by reference to a cyclopædia and the list of text books to be found but detailed information supplied from such sources requires usually to be supplied by experts. *United States v St Albans*, 131 Ind Cas 771=A I R 1931 P. C 189.

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art are relevant facts under s 45

the rule in regard to the admission of expert testimony is thus stated by *Laurie*.
'It is not sufficient to warrant the introduction of expert testimony that the witnesses may know more of the subject of inquiry and may better comprehend and appreciate it, than the jury, but to warrant its introduction, the subject of inquiry must be one relating to some trade, profession, science or art in which

persons instruct

more skill and

generally to have

witnesses, and by

between the parties

such a nature that

reference to them, and draw inferences from them, as witnesses, then there is

occasion
 require
 be mut
 known,
 cations, will be judicially noticed, but they must be of such universal notoriety
 and so generally understood that they may be regarded as forming part of the
 common knowledge of every person *Hurr Jones* § 123 So Mr. Justice Mirkby
 is not correct in his interpretation of this section when he says "What
 perhaps it meant is that, though the parties must obey the law as laid down
 in ss. 45 and 60, the Judge may resort for his own aid to appropriate books
 without restriction." This principle of the
 rule contained in this section *The Corporation*
 of Calcutta, 22 C. W. N. 745. is Court by the
 prosecution in support of A. As regards the
 admissibility of these bo these books
 I see that one or mo Magistrate's
 Court. In my opinion del thereby
 to make these books and all their contents evidence in the case. The use
 of such books by the Court is regulated by sections 57 and 60 of the Evidence
 Act
 ma
 all
 or
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 ded
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 of
 on

uence may be referred to *Hatum v Empress*, 12 C L R 86 A Court, *suo motu*,
 will know whatever every one, as a rule knows about the characteristic proper-
 ties of material substances, in solid, liqui
 Regarding solids, the Court will notice
 familiar,—as that certain substances are
 the movements of gases The Court w
 dynamite are dangerous by reason of their liability to create an explosion So
 also no proof need be offered of the well known qualities of common forms of
 matter in a liquid state
 specified conditions, to exj
 conducted in pipes, and
 should bring out the expli
 knowledge *Chamberlayne*
 established and notoriou
 tribunal The conclusions of such inve
 regarding matters of general interest, are c
 tions of scientific knowledge, about which
 opinion, must be proved, if their truth is
 layne's Ev § 720 The scientific prin

OF SOLID COM IN SCIENCE
 mechanical occupations, these and similar facts, so far as popularly known, will
 be known by the Court upon ordinary principles *Chamberlayne's Ev* § 765.

7. **Facts of Social life** No proof need be offered of facts which are well known incidents of the social life of the community. "*Quicquid agant homines*" said Lord Mansfield, "is the business of Courts, and as usages of society alter, the law must adapt itself to the various situations of mankind." *Barrell v Brooks*, 3 Dougl 371, 373. "It is the duty of Courts judiciously to know what is the general course of the transactions of human life." *Duncan v Little*, 2 Bibb (Ky.) 424, 426; *Chamberlayne v El* § 755

Private Knowledge of the Judge In deciding a case a Judge cannot bring his judgment on his own personal knowledge. *Durga Prasad v Ram Doyal*, 38 C 153. There is a real but elusive line between the Judge's personal knowledge as a private man and his knowledge as a Judge. The latter does not necessarily include the former, as a Judge indeed, he may have to ignore what he knows as a man, and contrariwise. *Wignore* § 2569; *Chamberlayne v El* § 574. That rule was laid down so far back as the year 1406. In arguing a question as to the duty of the Court not to have rendered a certain judgment, counsel put this case: "Sir let us put the case that one man kills another in your presence, guilty is indicted before you and is

report to the King, to give him this case, before causing those to appear by whose hands the King was paid. *Gascoigne C J* said: "Once the King himself asked of me the very case that you have put, and asked me what was the law, and I told him just as you say it, and he was well pleased that the law was so." Year Book, 7 H IV, 41, pl 6 cited in *Wignore Cas* 751, *Wignore* § 2569, *Patridge v Strange*, Plowd 83; *Marriot v Pascal*, 1 Leon 159, 161. But *Mr Haules*, Solicitor General arguing said: "It is said, though a Judge do think in his conscience a person

at the
behavior, and the person
the truth of such incidents is contested between the parties, he should mention

his private knowledge of such incidents to the parties and he should refuse to be the judge in that case unless both the parties, after he so mentions to them his said personal knowledge of that particular incident, state that they have no objection to his continuing as Judge." See also *Hurjuchal v. Shro Dast*, 3 I. A. 259-26 W R 55 P C. Similarly where a case is to be tried by jurors, "the personal knowledge of any juror concerning any probative fact involved in the case under consideration is not to be considered in deciding the case. Such a juror should communicate his information to the Court, and if he is not excused from service and it is deemed proper to his cognizance of such a fact in the trial, he must be sworn as a witness and examined, subject to

But any experience knowledge good prove

fatal. It is common knowledge, also, that a forest tree cut nearly in two at the butt will fall, if a high wind blows against it. If a witness should testify to the contrary to these ordinary phenomena, the common knowledge of the juror derived from his experience in such matters would naturally compel him to discredit that witness. Many illustrations might be given where men are normally and legitimately influenced in considering testimony by their general knowledge and experience. It is utterly impracticable in the administration

of Courts of justice to secure a juror whose mind is totally blank as to questions involved in the ordinary transactions of life. Truere of fact cannot, in the nature of things be divested of general knowledge of practical affairs. The Court cannot do otherwise than to direct them to use such experiences as are common to all men in the decision of questions of fact. It is part of the jury system which cannot be dispensed with." *Per Burnett C J in Rustad v Portland R L & P. Co*, 101 Or. 569 (Am), 11 *Amore* § 2570

judicial notice is standard *O'Donnell*, Ald 303), 1001, L R.

3 Q B 197); *Phip Ev 7th Ed* 25. So a Court will take judicial notice of matters of universal notoriety as general knowledge of daily life. But a Judge cannot use from the Bench under the guise of judicial knowledge that which he knows only as an individual observer. He cannot therefore impart into a case his knowledge of the previous conduct of the accused. *Shamburam v Emperor*, 25 S L R 213-132 Ind C 18 176. It would be unfair to the Railway Company to take judicial notice of thefts on the

Lal, 111 Ind C 18 523-A I R. judicial notice of the fact that there is between the arrival of a registered letter from the Post Office or in other words that a registered letter takes 24 hours longer than an ordinary letter. *Form of Chatterbhuy v Secretary of State*, 99 Ind Cas 622-A I R 1927 All 215. So also judicial notice can be taken of the course of post, the stamp of post-offices on letters, and the fact that post cards are un

them, and *Huth v Hut* repeatedly *Sano v Pun* community be taken ju 186-A I 2 O W N Courts are

Bux 93 Ind Cas 333-A I R 1926 Oudh 352 Courts must take judicial notice of provisions of s 24, Paper Currency Act, without defendant having raised the objection in his defence at all. *Mirza Hidayat v Nga Kyang*, U R R. (1914) 1st Qr 13-24 Ind Cas 721. A registered power of attorney was admitted under s 57 of the Evidence Act without proof as the registering officer is a Court under s 3 of the Act. *Kristo Nath v T F Brown*, 14 C. 176. In *E-*

7. judicial :

*Doms v**Universit*

8 E & B

domestic animals *Aye v Niblett*, (1918)

have also noticed judicially that boys a

Hardwick 32 T L R 159 H L ; *Williams v**Smith*, 17 T L R 235, 423 ; *Sullivan v**Dublin Co*, 39 Tr L T R 126 ; *Phip Ev 7th Ed* p. 25.

Judicial notice of facts transpiring in Court. A Court can take judicial notice of facts transpiring in Court. *Chattira Kumari v. Mohan Bihari*, 121 Ind. Cas. 337 = 1931 Pat 114

§ 2567. Since judicial notice is an expedient for hastening the trial and elimina-

Books referred to by Courts. The following are some of the books which the Courts often resorted to in order to ascertain the matters of history, literature, science, art, etc. —

(1) Directions for Revenue Officers in the North Western Provinces, promulgated by the Lieutenant Governor and prepared probably by Mr. Thompson. *Id.* Rul 29

1 (17)
Forester
Ajmodin

17 B 448

(7) *Buchanan's Journey in Mysore*, *Ibid* pp 56, 57(8) *Todd's Rajasthan*, *Ibid* pp. 56, 57 ; *Moharana v Vadial*, 20 B. 61 (72)

(9)

(10)

(11)

(12)

(13)

(14)

(15)

Ibid 29 (82)

Framji Nanabhai,
443 (444) ; *Ranga-*

7 B H

*sams v*2
12 B H C. R.

(16)

199 (207)

Roman Law. *Jalindra Mohun v Ganendra*: Dictionary *Hormasji v. Poddar*, 12 B H

C R 199 (207).

(20) *Domat*, 2413 *Jalindra v Ganendra*, *supra*.(21) Mr. Prinsep's Table *Forester v. Secretary of State*, 18 W. R 359 (364).(22) *Seaton's letter*. *Ibid*.

(23) Histories, firmans, treatises, and even replies from Foreign office. The *Charkish*, L R 4 A. & E. 59 ; *Phip. Ev 4th Ed* p 17 ; cited in *Lachmi Narain v Ragh Partap*, 2 A-1 (17)

(21) The collection of treatises originally published by Mr Atchison, the Secretary to the Government of India. *Lachmi Narain v. Raja Partap*, 2 A. 1 (17)

(25) Atchison's Treatises. *Lachmi Narain v. Raja Partap*, 2 A. 1 (15).

(26) New Oxford Dictionary. *Dalalhai v. Jimselst*, 21 B. 291.

(27) The work of Grotius, Vattel, Puffendorf, Chalmers, Wheaton, Phillimore and Twiss. *Damodar v. Deoram*, 1 B 367 (P. C); *Lachminarain v. Raja Partap*, 2 A. 1 (23).

(28) Lord Palmerston's speech in the debate on the relinquishment by the British of *India v. Gordon*, 1 B 350.
House of Lords on the

P 357

Munro. *Yenkatanara-*

sinha v. Dandannu, 20 M. 302

(32) Dewan Bahadur Srinivasa Ayyanger's "Progress in the Madras Presidency" *Ibid*

(33) Richardson's Manuk. *Mathen Shuc v Maung Kan Gye*, U. B R. (1897-1900) Vol. II, 112.

(34) Letter's Manual of Buddhist Law *Ibid*

(35) Kin Wun Mingyi's Digest. *Ibid*

(36) *Hagana Dhammathat*, Dr Forchhammer's, *Ibid*

(37) Crokes on Caste and Tribes *Mariam Bibee v. Sheikh Mahmood*, 28 C. L. J. 366

(38) Riekeley's Tribes and Castes in Bengal *Santa v Dadasuvar*, 27 C. W. N. 669

(39) Hunter's Imperial Gazetteer of India *In the matter of the German Steamship Drachenfels*, 27 C 860.

(40) Encyclopaedia Britannica. *Annu Kumaru v Muthupayal*, 27 M. 531-14 M. L. J. 248.

(41) District Gazetteer of Bengal. *Lalu Domo v Duoy*, 13 C. 217-20 C. W. N. 401

(42) Hunter's Statistical : : : : : *Dadasuvar*, 27 C. W. N. 669, *Secretary of Si*

(43) Mandsley's Respons *Empress v Kader Nath Sha*, 28 C 603

(44) Bicknill and Tuke's Psychological Medicine *Ibid*

(45) Simcox's Primitive Civilization *Rama Samu v Nagendra Narain*, 10 M 33.

(46) Notes on Buddhist Law by Jardine. *Ms Me v Ms Shuc*, 16 C W N 529 (P. C)

Anna Kumaru Pillai v Muthupayal, 27 M

Pearl Fisheries and Marine Fauna of the

Fisheries *Ibid*

(50) Rajendra Lal Mitter's Buddha Gaya *Jaspala Gur v Dharam Lal*, 23 C 60

(51) Martin's edition of Buchanan Hamilton's Eastern India *Ibid*

and Custom *Cheru Kuneth v Vengunat*,

of Malabar *Agustine v Medlicot*, 15 M 19 M 31

(54) Dr Lyon's Medical Jurisprudence for India *Fulan Singh v Dhanuvar*, 24 A 415

(55) Medical Gazette *Ibid*

(56) Murphy's Obstet Rep. *Ibid*.

(57) Playfair's Midwifery. *Ibid*.

(58) Treaty with Nawab of Bhopal by the East India Company *Lachmi*

Damodar v Deoram, 1 B 367 (P. C)

abhan v Bas Huabhan, 7 C W. N. 712
oms and ceremonies." *Ramaswami* x

58. (62) Shakespeare's Dictionary *Gajraj Puri v Achubir Puri*, 16 A 191 (P C)
 (63) Fergusson's History of Architecture *Secretary of State v Shunmugaraya* 16 M 693 P C = 20 I A 80
 (64) Houghton's History of Christianity in India *Augustine v Medlicot*, 15 M 241
 (65) Stephen's History of Criminal Law of England. *Queen Empress v Hedar Nasse*, 23 C 604 (608)
 (66) Geographical, Statistical and Historical Account of Orissa by Sir Ling Shyamamand v Rama Kantia, 32 C 6, 13
 (67) 'India Orientalis Christiana' *Augustine v Medlicot, supra.*
 (68) Will's History of Mysore *Ialir v Truamala*, 1 M 213
 (69) Ibbetson's Census Report *Ghulam v Secretary of State*, 6 Lah 269
 (70) Wynyards Settlement Report *Byat v Bhupendra*, 17 A. 456 (P C)

58. No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings.

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admission.

Principle A Court, in general has to try the question on which the parties are at issue not on those on which they are agreed *Burjory, Cursetji v Munckharji*, 5 M 143 (152), *Mo Gowan v Smith* 26 L J Ch 8. An express waiver, made in Court or preparatory to trial, by the party or his attorney, conceding for the purpose of the trial the truth of some alleged fact has the effect of a confession pleading, in that the effect is thereafter to be taken for granted; so that the one party need offer no evidence to prove it, and the other is not allowed to disprove it. This is what is commonly termed a solemn—i. e., ceremonial or formal—or judicial admission, or stipulation. It is, in truth, a substitute for evidence, in that it does away with need for evidence. *Wigmore* § 2538. It waives or dispenses with the production of evidence by conceding for the purposes of litigation that the proposition of fact alleged by the opponent is true. *Wigmore* § 1033. "Agreements of this character, intelligently and deliberately made,—whether made by the parties in person, or by their attorneys or solicitors of record,—are encouraged and favoured. Their purpose generally is to save costs, and to expedite trials, by relieving from rules of practice which in the particular case are deemed mere hindrances, or the dispensation with mere formal proof, or, in the present case, the admission of uncontroverted facts, of the existence of which the parties are fully cognizant." *Peo Brickel J in Prestwood v Watson*, 111 Ala 604 (Am.); *Wigmore* § 2538.

Scope of the section No evidence is required of matters which are admitted for the purpose of the trial. Admissions for the purpose of dispensing with proof at the trial which are called judicial admissions must be distinguished from those tendered at evidence,—the former not being usually receivable in other proceedings and the latter not being usually conclusive. *Phup Li 7th Ed 18*. This section includes judicial admissions including admissions made in the pleadings. The effect which a judicial admission produces is of course an effect showed in common with certain other legal acts. In the first place, a pleading may, by confessing a fact, place it beyond the range either of needing evidence or of permitting dispute, and an omission to plead in denial may have the same consequence. The distinction between a pleading and a judicial admission seems to consist in the circumstances that the latter may be made after issues joined or trial begun, and may thus counteract or diminish the effect of a pleading, that it is not a part of the required statements defining the parties' issues; and that it is therefore not subject to the rules of time.

form, amendment, and the like, which govern the allegations of pleading. *Wigmore* § 2589 Under this section no fact need be proved which the parties at the hearing or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings. Where a plaintiff admitted, in a written statement in a former suit and in question, an agreement set up by the defendant took for consideration not to redeem a mortgage, the defendant in the face of

Maunq Kot

to civil as well as to criminal cases *Bhulan v Emperor*, 31 Ind Crs 233, *Bansilal v Emperor*, 30 Bom L R 646=52 Bom L R 686=A I R 1928 Bom 641 This section has in general no application to divorce cases *Over v Over*, 27 Bom L R 251=A I R 1925 Bom 231=49 B 368 This section normally relates to agreed statements of facts made between both parties to save time and expense at a trial But facts, and no pleading has been put in admission has been made in his pleading, complaint to the contract in suit having no practices of the office is no indication whatsoever to the defendants that the plaintiffs rely on one of the supposed terms of this "office dhara" in support of their claim, or that one of the supposed terms of this "office dhara" is an implied stipulation :

ful consideration, with regard not only of , but with regard to the time at which they were made, their use in the action of which they form the basis, their use *dehors* that action, the change brief by the circumstances making them, including knowledge and those alleged matters of fact evidence against such 272. The admission relating to the progress

must be some other proof of authority to make the admission *Wagstaff v. Wilson*, 4 B & Ad 339

There is another class of judicial admissions, made by the payment of money into Court, upon a rule granted for that purpose. Here, it is obvious, the defendant conclusively admits that he owes the money thus tendered in payment (*Bichun* 558); that it is due (*Bendict*, 5 Bing 28; 285, *Huntington v* claim it in the character in which he sues *Liscombe v. Holmes*, 2 Camp. 441); that the Court has jurisdiction in the matter (*Miller Williams*, 11 Esp. 19 21); that the contract described is rightly set forth, and was duly executed (*Gutteridge v. Smith*, 2 H Bl 374, *Israel v Benjamin*, 3 Campb. 40); that it was broken in the manner and to the extent declared (*Dyer v. Ashton*, 1 B & C. 3), and if it was a case of goods sold by sample, that they agreed with the sample (*Leggett v* money into Court obliged to prove in *Stapleton v. Nouell*, *Walker*, 9 Dowl 21,

58.

may make admissions for the purpose of
by agreement or otherwise, before or at the
admissions may be made by pleadings
226; *Burjoj*).
the client.
to a decree
6 W. R. 132
by reference

needed to be
any further
or contradict
no evidence
Ibid § 2591 A party or his agent

admission of oral evidence contained in the 4th proviso to section 92 of the
Evidence Act *Ibid*. But in the same case *Seshagiri Aiyar J* said: "The rule
of law enunciated in *Stallard v. Pooley*, 6 M. & W. 664, which accepted oral
admissions of every kind as proving documents, has no doubt been departed
from in India [see section 22 of the Evidence Act and sections 59 and 65(b)]
in the nature of

proved.

Different kinds of judicial admissions This section deals with admissions
made voluntarily, or pursuant to a notice

counsel or of shorthand writers, are admissible to controvert the statement
of the Judge. *Reg. v. Pestonjy*, 10 B. H. C. R. 75(81).

facts admitted at the
If it means before the
ready applies to it. If
then, in a civil case, no
the

a plea of not guilty, can
"At the hearing", mea
hearing. Thus where A
first hearing orally asserts payment in full, at the final hearing no evidence of
title or tenancy need be given. *Whitely Stokes*, Vol. II, p. 889. When an

810 Where the defendant admits the signature of his father in the mortgage deed, the plaintiff is relieved under this section from any further responsibility of proving the document. *Lakshichand v Lalchand*, 42 B 352=20 Bom L R 354=15 Ind Cas 351, *Arjun Sahu v Kelai*, 2 Pat 317=71 Ind Cas 150. Where the fact of a prior partition of parties, the same need not be proved. Is not registered will not make the purpose. *Maung Po Kim v Maung Shue* 1 Rang 405=1924 Rang 155.

facts
be proved
need
before the hearing it is
as evidence, and for this purpose
or not Admissions in which
under consideration when the Judge is considering what issues are to be tried

be genuine, unless they are admitted on given to the Court by the admissions of the Civil Procedure Code, at issues are to be tried before the to allow a party to withdraw his
Markby Lc p 51 Each party

been held to preclude any evidence on the point *Unquhart v Butterfield*, 37 Ch D 357, 369, 374 C A, *Ellis v Allen*, (1911) 1 Ch 904, *Plap Ev 7th Ed 15*. Admissions made or by stipulations drawn if not true, which to prepare his case, and provided such party has not been injured by relying on such admissions. *Wallace v Mathews*, 39 Gr 617 (Am). Such admissions will not be allowed to be withdrawn, however if the situation of the parties has been substantially changed, as by the death of a party or of a witness. *Wilson v Bank of Louisiana*, 55 Gr 98 (Am). If a party desires to withdraw admissions of the character under discussion, he should give full and timely notice of his purpose, so that the other party may have reasonable time to supply the proof. *Hargreaves v Redel*, 43 Gr 142, *Ellons v Larkins*, 5 Car & P. 385, *Burn Jones* § 274.

Admission by pleading. "Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability." *Civil Pro Code, Order 8, rule 5*. That rule states what amounts to admission. Defendant must deny not admit the truth if not denied in the written statement or stated to be not admitted, shall be taken to be admitted by the defendant. (*Rule Mullas' Civil Pro Code, note under rule*)

tion of his opponent, or he may state he does not admit the allegation. But an allegation which is not specifically denied, or stated to be not admitted, is treated as admitted. *Bpl v Nunn*, 11 Ch D 751 all 7 Ch D 251, *Green v. Selim*, (1879) 11 Ch D 559; *Collis v Gossle*, 7 Ch D 512. A refusal to admit must be stated as specifically as a denial. *Thorp v. Hollisworth*, 3 Ch.

58 D 637, 640; *Hall v L & N W Ry Co*, 35 L T 849 Leave in a proper case may be given to a party to recall admissions which he has made. *Hollis v Burton*, (1892) 3 Ch 226 C A Where a document is by reference included in

In revision it was contended that the plaintiffs had not proved the notice *Held* that the defendants must be deemed to have admitted notice under order VIII, rule 6, C P Code, and proof was dispensed with under s 58 *Commissioners*

make the suit triable only by the court, however, made over the trial of it who had no jurisdiction to try it, Neither party raised any objection on the ground of jurisdiction and no issue was raised relating to it The trial proceeded on merits and the subordinate Judge passed a decree for partition in favour of the plaintiffs The defendants in their appeal to the District Court raised for the first time the question of jurisdiction on the strength of the market value stated in the plaint The objection having been overruled, they appealed to the High Court Held that as neither party raised any question as to want of jurisdiction arising from the allegation in the plaint, and as they by their conduct and silence treated the market value to be the amount sufficient to give jurisdiction to the Court, they dispensed with proof on the question by their tacit admissions, and thus the principle of law laid down in s 58, came into operation and prevented the result of the statement of the market value in the plaint *Jose Antonio v Francisco*, 12 Bom L R 712 Where the defendants in their written statements admitted that they had executed a deed of mortgage on account of an old

the production of the mortgage deed was unnecessary under the provisions of section 58 of the Evidence Act *Maung Khan v Maung Myat*, 11 Ind Ca 380 Plaintiff sued for redemption alleging that he had sold the land in suit out and out to the defendant for Rs 250 less than 12 years before suit but that at the time of sale a stipulation was made for repurchase by the plaintiff at any time on payment of the purchase money Held that as the plaintiff had admitted in the plaint the factum of an absolute sale in favour of the defendant it was

when a party makes solemn admissions against his interest in a pleading, they should be treated as admitted facts, and he will not be heard to question the correctness of the statements

the pleading On this point the case of *Mc Gowan v Smith*, 26 L J 100 the other referred to, seem conclusive A Court, in general, has to try the

questions on which the parties are at issue, not those on which they are agreed, S. and admissions which have been deliberately
suit, whether in pleading or by agreement,
mission of any evidence contradicting them
that is by reference incorporated
Evidence, 457) The point is not
ments of the parties a plea or
does not directly put in issue

st object of
what is the
In App at
the cause
the plaintiff

or in the written statements tendered in the suit which here contain a full
assertion and admission of the execution of the document A by the defendant
Munchery. But the issues, as they stand, were suggested by the defendant's
counsel. They waive controversy as to the actual execution of the document,
assume it to have been executed, and raise questions only that depend for their
plaintiff is not,
or to put it in evi-
for some purpose

on consider
effect usual
allowed to
But an ad
exists and

that fact subsequent to the date of the admission "Lauson's Presumptive Ev
2nd Ed 237, McLeod v Waleley, 3 C Lord
Tenterden C J said 'I do not think, can
be extended to a publication after its goes
down to its date, but not further"

Distinction between evidentiary admissions and admissions by pleadings.
There is a distinction between evidentiary admissions and admissions by the
pleadings. This section governs admissions by pleadings Sadhu v Naa
Sigg, U B R
sing with proof
evidence, the for

the fullest sense of the term, is another thing,

and involves a totally
the necessity of offer
item in the mass of evi
with which this section
need of any evidence
course of judicial process
evidence by conceding
alleged by the opponent is true Wigmore § 1058

s of husband or wife lose, as a
they are to be used in divorce
establishes a form of fraudulent
her contracts, the contract of
and argument of the parties,

and in actions for dissolution of this contract, that is for divorce, admissions
are closely scrutinized. Although the husband and wife are the parties to the

8. consent of and in the manner prescribed by the State. It necessarily follows that no admissions by either party to the contract, however collusive upon such party, can be conclusive upon the State in a suit for the dissolution of the contract and that such dissolution cannot safely be deemed unless the admission be corroborated by strong proofs. *Burr Jones* § 262. In *Williams v Williams*, 1 Hagg 299, Lord Stowell says that a confession is a species of evidence which though not inadmissible, is to be regarded with great distrust, while in *Mortimer v Mortimer*, 2 Hagg 310, the same learned Judge announces that a confession, though in the support of a charge, is, 2 Hagg 311, a confession perfectly true and conduct ranks among the highest species of evidence. The suit for divorce has been called a triangular proceeding *in genere*, in which the government occupies the

allow of an accused admission

there is nothing to prevent
Criminal Procedure on
admissions on matters
seems to be no reason
his presence at the trial so as to dispense with the attendance of witnesses for
the
But
case

by consent. *Per Patteson J* in *ibid*, *courta*, *Phips* 11. When the attorneys on both sides had agreed that the formal proofs in perjury should be dispensed with, and that part of the prosecutor's evidence admitted, *L Abinger C B* said. 'In a criminal case tried on the crown side of the assizes, I can not allow any admission to be made on the part of the defendant unless it is made at the trial, 8 C & P 575 (1838), *Queen v Kazim Mundle*, Cr 80; *Jeremiah v Vas*, 36 Cr 11. *Queen v Emperor* 26

difference. Furthermore, I am not convinced that s 58 Evidence Act does not apply to justify the action of the Sessions Judge. No doubt in England

an admission by an accused, which falls short of his pleading guilty, is not taken into account and is not binding against him. But section 58 makes no exception in regard to criminal proceedings and while I do not say that it can be availed of to cure a clear contravention of any directions of the Criminal Procedure Code as to the course of a trial yet I think it can apply in a case like this, which relates only to proceedings of an appellate Court." *Bansal v Emperor*, A I R 1928 Bom 211 (24) = 112 Ind Crs 120 = 52 B 686 = 30 Bom L R 646. But admissions made by a pleader appointed to help the accused in his defence are not binding on him to his prejudice. *Per Mulla J in ibid*. This above rule is especially applicable in murder cases. *Sheo Narain v Emperor*, 21 Cr L J 777 = 58 Ind Cas 457. It is not in accordance with the usual practice to accept a plea of guilty in a case where the natural sequence would be a sentence of death. *Hasaruddin v Emperor*, A I R 1928 Cal 775, see also *Emperor v Bhadu*, 19 A 119, *Laxmaya v Emperor*, 19 Bom L R 356, *Emperor v Chua* 11 Bom L R 240. The rule is the same in America. *Vule State v Max* 78 Conn 19, where *Hamerley J* said "It is true that in the trial of capital offences the Court will and should exercise care and discretion in respect to admissions made by the accused or by his Counsel in open Court, and so even a plea of guilty will not ordinarily be accepted." *Wigmore* § 2597.

Proviso. This proviso corresponds to proviso to rule 5 of Order VIII of the Civil Procedure Code. Both under section 58 of the Evidence Act and under Order VIII, rule 5 of the Code of Civil Procedure the trial Court has a discretion to require proof of the due attestation of a statement of admission by the defendant if the statement has not been duly executed. *Munappa v* : : : :
L W 5 = 25 M L T 19 = 19 Ind Crs 278

as the proviso to rule 5 of Order VIII of the Civil Procedure indicates the Court has not to be construed Order 10 of the English Order VIII of the Civil Procedure Code does not contain the proviso. There the rule of pleading is very stringent. According to that rule a defendant who omits to traverse in his defence any allegation of fact in the statement of claim is not allowed to traverse

supported by s 58, proviso of the Evidence Act. *Bhagwan Das v. Shoray*, A I R 1931 Oudh 321 = 14 O L J 463

59. namely, the case in judgment, without injury to the general administration of justice *Greenley on Law in Equity* pp 349, 358, *Greenl Ev* § 206, *Chamberlayne's Ev* § 1210

Future of the Doctrine of Judicial Admissions 'The doctrine of Judicial Admissions' says *Prof Wigmore* "has a large future before it, if Judges will but use it adequately. In the first place the Judge should apply it to all informal as well as formal admissions by counsel during trial. In the next place the Judge should freely call upon counsel to state whether a fact is in good faith disputed, & c should require admissions to be made, where it seems probable that the fact is not actually disputed. By this method, the presentation of evidence will be confined to the dispute. It is easy to see how large a mass of evidence would be eliminated how much time would be saved how much jury would be avoided. And this would be an existing principle. Already in England it is used in the modern practice of settling issues before masters. But it can also be used by the Judge at the trial. *Wigmore* § 2597

Formal Judicial Admissions, conclusive 'The formal judicial admission

party, even in an appellate Court or even on a subsequent trial of the same case, unless formal judicial admission shall have been made for a temporary purpose. *Chamberlayne's Ev* § 1264

CHAPTER IV.

OF ORAL EVIDENCE

Proof of facts by oral evidence

59. All facts, except the contents of documents, may be proved by oral evidence

Oral evidence Oral evidence is evidence which is confined to words spoken by the mouth. *Per Petheram C J in Queen-Empress v Abdul, 7 A 385 (397) F B*. It includes all statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under enquiry. *Vide s 3*. It is what the English lawyers call "testimonial evidence." Testimony is a species of evidence by means of witnesses. The broader term 'evidence' includes that which is given by witnesses or offered by documents. *Vide s 3*. In *People v Kenyon, 5 Park Cr (N Y) 254, 288*, Mr Justice Campbell said 'It may be well to bear in mind that there is marked difference between testimony and evidence. The latter is much more comprehensive than the former—evidence being whether by

produced to a jury from the finding of any issue joined between parties

Testimony in legal as well as in common usage, signifies a statement of facts by witnesses, and to disprove the testimony of a witness is to disprove the "facts testified to by him." *Lurr Jones* § 11

Wordings of the section. This section is not very happily worded. Contents of documents may be proved by oral evidence under certain circumstances that is to say, when such evidence of their contents is admissible as secondary evidence. See section 63 cl 1, section 12, cl 8, *Nat Ev* 239

Contents of a document cannot be proved by oral evidence. It is a cardinal rule of evidence—not one of technicality, but of substance, that, where written documents exist, they shall be produced as being the best evidence of their own contents. *Phonograph Roy Luchmiah* 6 C L R 101=7 I A. 8 This section is based on the "best evidence" rule. *entcaf*

A fourth rule, which governs . . . which requires the best evidence of . . . This rule does not demand the greatest amount of evidence, which can possibly be given of any fact but its design is to prevent the introduction of any, which, from the nature of the case, supposes that better evidence is in the possession of the party. It is adopted for the prevention of fraud; for when it is apparent, that the better evidence is withheld it is fair to presume, that the party had some sinister motive for not producing it, and that, if offered, his design would be frustrated. The rule thus becomes essential to the pure administration of justice. In requiring the production of the best evidence applicable to each particular fact it is meant, that no evidence shall be received, which is merely substitutionary in its nature so long as the original evidence, can be had. The rule excludes only that evidence which itself indicates the existence of moral original sources of information. But where there is no substitution of evidence, but only a selection of the weaker, instead of stronger proofs, or an omission to supply all the proofs capable of . . .

Thus a title by deed must be . . . is within the power of the party, . . . is susceptible, and its non production some matter of apparent doubt of the deed itself may be proved though the other also is at hand. And even the previous examination of a deceased subscribing witness, if admissible on other grounds, may supersede the necessity of calling the survivor. So in proof or disproof of handwriting, it is not necessary to call the supposed writer himself. And, even where it is necessary to prove negatively, that an act was done without

general necessary to call
Ev § 82 In the case of
held it very dangerous
to be proved by the testimony

of witnesses, the court has held . . . Similarly in *Vincent* . . . always (perhaps more . . . rule that . . . what is in writing is . . .

experience has . . . in of witnesses, how- . . . they may be so easily . . . strict enforcement of . . . C II 912, *Sheridan's* . . . *st Imam v Hargobind*, . . . W R II (P C)=2 . . . 1 M I. A 19 (42, 43);

to prove . . . Oral evidence may suffice . . . W R 155; *Shee Sahayee* . . . 79 Oral evidence, if . . . cription. *Mcharbin v* . . . without documentary . . . v *Aluma*, 8 W R 366. . . ased relatives will be . . . admitted in the absence of any registers of births and deaths. *Moheddeen v. Mahomed*, 1 Ind Jur O S 132=1 M H C R. 92. It is not valid reason to

9. disbelieve the evidence of a witness

Rajendur Kishore, 9 W R 125, but see
Goluck Chandra v Raja Sircend Buddadhar, W R (1861) 136 Oral evidence
 agreement; and, if sufficient, will justify
Nund Mohun, 12 W. R 391 A Judge
 value, without a *pattah* and *lobuljat*

to prove the quantity
 misdirects himself in
Dinoo Singh v Doorq
 while to prove an adj
Ram, 1 M H C R 100
 adduce oral
 W R 181
 in the absence

of document may
 in *Guccalur*, 20
 d in ruling that
 is not sufficient to

rabjt, 1 B H C
 writing is admissible

Oral evidence,
 conflicting and who
 decisive conclusion,
 in the case, and w
 both sides about the truth of which there can be no doubt. This alone can be
 the true method of arriving at a correct conclusion *Abdul Halim v Rajah*
Sadat Ali, 108 Ind Cas 817=A I R. 1928 Oudh 155 Statements made by a
 witness at the trial should be altogether rejected when it is in hopeless conflict
 with his previous statements
 P L R. 659=A I R 1925:
 uncorroborated statement of a
 12 years ago and which wa

credit This precaution is nowhere more necessary than in this country It is
 true that there is no precaution of perjury against oral testimony, but it has, I
 believe been sufficiently confirmed by a long course of experience that anything
 can be more dangerous than to act upon such testimony, without testing its

credibility both intrinsically and extrinsically'. Where there is contradiction of
in order to see
I. A. 103 (107);

of the Judicial
facts on the

attention to which they depose, or weakened by the mode in which their
speak, it may
to an extrem
is oral, and un
found is ext. It would be very dangerous to exercise the judicial function,
as if no credit could necessarily be given to witnesses, deposing and so
how necessary however it may be always to sift such evidence with great
minuteness and care. This case was cited with approval in the case of *Emperor*
v. Balgangadhar Tilak, 6 Bom L. R. 321 (330)—28 B. 179, see also *Wise v.*
Sanduloomisso, 11 M. I. A. 187 (183); *Queen v. Elahi Bux*, B. L. R. (F. B.)
482, *Sitap v. Chinnu*, 10 M. I. A. 162, *Edu v. Behan* 11 W. R. 345. 'But
it would be indeed, most dangerous to say that where the probabilities are in
favour of the transaction, we conclude against it, solely because of the general
fallibility of native evidence. Such an argument would go to an extent which
can never be maintained in this or any other Court, for it tends to establish
a rule that all oral evidence must be discarded; and it is most manifest that
however fallible such evidence may be, however carefully to be watched justice

evidence sub-
st be given to
not be rejected
uted without

Nachear, 14 M. I. A. 351, 355. Such rejection if sanctioned, would virtually
smul v. Kalanthal

Bunuar v. Hinnaram 4 W. R. 128 (P. C.) In the words of *Baron Parke* in
Mir Assabullah v. Bibi Imaman, 1 M. I. A. 19—5 W. R. P. C. 26, 'there is no
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870=A. I. R. 1927 Sind 20

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ought to have entered into it
consideration, where the evidence
but a case should not be decided up
which the parties have submitted
consideration that which ha

9. W. R 433 Evidence of witnesses though not independent, but not shaken in cross-examination and accepted by the Judge who heard them and saw their testimony told by 31 (P. C)

to the same transaction, and concur in their statement of a series of particular circumstances, and the order in which they occurred, such coincidence exclude all apprehension of mere chance and accident, and can be accounted for only by one or other of two suppositions, either the testimony is true, or the coincidences are the result of concert and conspiracy If, therefore, the independence of the

limited,
will be c

cited in Nort 53.

witnesses or
Starkie on Di

Test of probability—Sir James F
probability is the guide of life is an obvio

That

extent it generally resembles the common course of human conduct and of physical nature, that it is improbable deviation therefrom, and that it is impossible upon which all language and thought could be in two places at once and that two four; that it is nonsense unless it can be in some way represented to the mind

of this disease or that, and yet to treat with contempt the notion that no one

of witchcraft, and to reject all evidence tendered to prove it? Probably no more difficult question can be asked, and I doubt whether there is any which, if fully solved, would be of great practical importance." *Stephen's General View of Criminal Law of England* pp. 192, 193

Other tests of Probability "Evidence to be believed" said *Vice-Chancellor Van Fleet of New Jersey*, "must not only proceed from the mouth of a credible witness, but it must be credible in itself—such as the common experience and observation of mankind can approve as probable under the circumstances. We have no test of the truth of human knowledge, observation and experience.

to the miraculous, and is outside judicial knowledge, observation and experience.

37 N. J. Eq. 130, 132 But improbable. "A case how unlikely and suspicious so ever, in itself, may be irresistibly proved by the force of testimony," said *Sir John Nichol*, "Evidence may be such as to substantiate a transaction, however improbable; for it may be such that the falsehood of the evidence would be still more improbable than the fact which it seeks to establish." *Soph v. Atkinson*, 1 Add. Ecl. 162, 182. In another case the same learned Judge said "It seems hardly possible, on the mere improbability of a statement, to discredit the evidence of a witness of good

59. 213; *Maharajah Rajender v Sheopursun*, 10 M. I. A. 438 So the doctrine "falsus in uno falsus in omnibus" in this country affords a test of little or no value, a story at p 29

if the evidence adduced on both the matters in issue The parties using such evidence may have brought himself within the penalties of the criminal law, but the Court should not

by that party, or at least against such portion of that evidence as tends to the same It may perhaps also have the further mission for the evidence of his opponents where it happens, not uncommonly, that falsehood and fabrication are employed to support a just cause *Goribulla Karze v Goorodas Roy*, 2 W. R. (Act X) 99, see also *Rameswar v Bharat*, 4 C W N 18 P C, *Casper v Kedarnath*, 5 C W N 858 (861)

Uncontradicted testimony. I "he who tells nothing exceeding the that they should believe him who Johnson "If witnesses come unimpaired in point of general integrity," said Lord Stowell, "if any depose with character of fairness in their particular narrations the facts must be received, or there is an end of all judicial inquiry Human prudence has done its utmost, has done all that it is capable of doing, in giving every 1 Hag Cons 269, judicial proceeding

have no safeguard, and the dress of wrongs, if the unanimity can be overthrown without 535. So "if the tribunal is permitted to discredit or disregard such testimony, *City R Co* 50 Misc (N Y) *Harbison*, 13 Int Rev 118.

performed, if it would obtain your give no right arbitrarily, and without *Harbison*, 13 Int Rev 118.

Disinterested witness "A witness of depraved and abandoned character

rule that when a disinterested witness testifies to
in conflict
be taken as
not be disregarded by Court or jury." *Kavanagh*
v. Wilson, 70 N. Y. 177, 179 (Am.)

of view of the same thing.
a single incident, Courts expect
minute of their testimonies,
basis for discrediting their united testimony to
rather to enhance the credit of the witnesses
Haranand v. Ramgopal, 27 C. 639 (P. C.) = 1 C. W.
"No two witnesses' said Mr Justice Van Buren
in *Lyly v. N. Y. Supp* 636
nating in the execution of a pr
agreed in their description of t
agreement is all that is required *Nana Narain v. Huree Pantee*, Mar-hall 436
(P. C.) It is to be expected that what was
will be differently stated by different
conversation hear or remember all that was
impressions from what they heard, and
of dates or of th
Moore on Fact
to testify is at
contrariety of
v. Maule, 4 Hag
The Louther C
is taken *de recenti facto* may very well speak with greater certainty and specihca-
tion as to the facts than other witnesses who testify at a much later time *The*

untruthful nature of the
presumption in England
here the presumption is,
observations of the Privy
Indian Courts in *Raman*
But however true this may
are more untrustworthy
the fact is to be lamented,
score of this difficulty"

Nort Ev p 55. Differences are commonly reconciled

without resorting to strained and unnatural inferences in aid of either party.

60. *Moore on Facts* § 839 In a *New Jersey Divorce Case*, Chief Justice Beasley said: "To those who know from experience and reflection the laws which regulate the human memory, it does not seem singular that several persons, in speaking of a past transaction, do not each reproduce it in description with the same fulness of detail; but such is not the vulgar notion. Among the ignorant the strongest proof of the truth of testimony derived from several witnesses is the fact that the statement of each is merely identical with that of others. Hence, the exact similarity which we often see in the deposition of corrupt witnesses, whose evidence has been prearranged. But in the testimony of these two persons now before me, there are none of the usual marks of collusion. No two narrations unlike. It certainly has every currency, observed from different sources." *324 (337) (Am)*; see also *Anna v*

Court of New Brunswick
pre-concert between
proves nothing of the
as manufactured, if
witnesses should vary

the account in order to avoid suspicion" *Cornu v Carajuel, R Co*, 20 N
Burns 425, 436

Sometimes, however, discrepancies are so startling as to make it impossible

be detected upon some broad collateral fact, than upon the transaction itself.
Brydges v King, 1 Hag Ecc 256

Oral evidence must be direct. 60. Oral evidence must, in all cases whatever, be direct; that is to say—

if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds:

Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatise if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable:

Provided also that, if oral evidence refers to the existence of S. condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.

Principle The first degree of moral evidence, and that which is most satisfactory to the mind, is afforded by our own senses; this being the direct evidence of the highest nature. Where this cannot be had, as is generally the case in the proof of facts by oral testimony, the law requires the next best evidence; namely, the testimony of those who can speak from their own personal knowledge. It is not requisite that the witness should have personal knowledge of the main fact in controversy, for this may not be provable by direct testimony, but only by inference from other facts shown to exist. But it is requisite that, whatever facts the witness may speak to, he should be confined to those lying in his own knowledge, whether they be things said or done, and should not testify from information given by others, however worthy of credit they may be. For it is found indispensable, as a test of truth and to the proper administration of justice, that every living witness should, if possible, be subjected to the ordeal of cross examination, that it may appear what were his

known, cannot be subjected to this test, nor is it often possible to ascertain through whom, or how many persons the narrative has been transmitted from original witness of the fact. *Greenl. Ev* § 93. "The administration of an oath furnishes some guarantee for the sincerity of the opinion, and the power of

value
F 689.

not a party to the suit is not admissible; because such person was not under oath and the opposite party had no opportunity to cross examine" *Suiff C J.* in *Chapman v Chapman*, 2 Conn 318. *Gresham Hotel Co v Manning*, Ir. R. 1 C L 125, *Fide* notes under § 32 pp. 464—467 *supra*.

or any one of
have received
received some
may be given
recollection of
Recollection, or Memory *Thirdly*, he must communicate this recollection to the tribunal; that is, there must be communication, or Narration, or Relation (for there is no single term entirely appropriate). Now the very notion of taking a human utterance as the basis of belief in the truth of the fact asserted impliedly attributes these three processes to the witness, Perception, Recollection, Narration. Whatever principles, therefore, affect the inference from testimonial assertions must have reference to some one or more of these elements.

Moreover, in the function fulfilled by each of three elements or processes are to be found in its probative value has in some way or reproduced to us in C

perception, or whatever is called) should adequately represent, or correspond to the fact itself as it objectively existed or exists. The strength of the inference depends on the probability of a fairly accurate perception on the part of the witness. Again, the function of Recollection is to retain or recall impressions of observation; and the necessary condition of our trust is that Recollection fairly corresponds with or reproduces the original knowledge or Perception. Finally, the function of Narration (or, communication) is to reproduce and express, for the apprehension of the tribunal the Recollected results—themselves already retained from Perception. Thus, the common aim in the varied

60 problems under this head is to determine whether the story as told represents with fair accuracy the object which the witness once observed and now recalls — *Wigmore's Principle of Judicial Proof* § 147.

Generic Human Traits affecting Testimony But the individual witness' testimony is affected, not merely by the conditions inherent in these three elements of testimony, but also by certain general traits, common to humanity, on which experience has enabled us to generalize. These generalizations affect traits common to large groups of individuals, or to a large class of situations in which any individual may at times find himself. Hence the conditions are studied under two

§ 148

Race "In respect to the three elements of testimony, Perception, Retention, and Recollection have thus

in many sense perceptions than literate peoples having a more complex life

"(2) *Recollection* An occasional particular race or people is all that has the truth that primitive peoples, develop an extra ordinary mnemonic sagas, laws, and revelations by the early witness, attention, and others

"(3) *Narration* (A) As to relative racial differences in the capacity of expression in words, little or no occasion arises for examining this subject in judicial proceedings (B) As to veracity of aliens in general, and of particular races, considerable knowledge has been made available for us (a) The alien in general, by his words, his racial sentiments, and narration both to save himself by falsifying in their favour But

(b)

B) 482, *Sitaj v Channa*, 10 M I A 162, *Edu v. Behan*, 11 W R 345 But *Basheroomssa*, 10 W R 23 B. *Peror v. Balgangadhar*, 23 B. *en v. Elahi Buz*, B L R (F) 345 But *Enquiry and knowledge of his action of his* *ma*, 4 M. I A

he may safe box Durin fruit, and one of its best fruits has been an increasing regard

them as the same classes in
 not their existence among their
 h El pp XXXI, XXXII.
 : "Few people, I think, realize

are the
 others
 Wigmo
 that an

a particular race of people, unlikely to be, in the first place, absolutely incorrect
 as not founded on facts, in the second place, relatively unjust, as assuming a
 superiority of honesty which can only be hypothetical; and in the third place,
 unwise, as tending merely to perpetuate ill feeling and misunderstanding."
 Wigmore's *Principle of Judicial Proof* § 155

testimony,
 We possess
 become less
 keen, and that for recollection the recollection of earlier events becomes more
 active and that of recent events less active (2) Youthful age, it would seem, is
 others In recollec-
 -n that children below
 imagination, partly
 cause of untrained

of *Judicial Proof* § 156 Certain broad rules

defined situation I
 such cases,
 f age Love and
 hatred, ambition and hypocrisy considerations of religion and rank, of social
 position and fortune, are as yet unknown to them, it is impossible that pre-
 conceived opinions, nervous irritation, or long experience, should lead them to
 form erroneous impressions, the mind of the child is but a mirror that reflects
 accurately and clearly what is found before it These are great advantages
 accompanied by certain corresponding drawbacks The greatest is that we can-
 , it uses indeed the same
 ent ideas Further the
 ple The conception of
 uly and ugliness, of dis-
 from in ours, still more

so when facts are in question There is yet another difficulty, the horizon
 of the child being much narrower than ours, a large number of our perceptions
 are outside the frame within which alone the child can perceive We are
 as a rule, too distrustful of the capacity of a child We have rarely found too

60 problems under this head is to determine whether the story as told represents with fair accuracy the object which the witness once observed and now recollects—*Wigmore's Principle of Judicial Proof* § 147.

Generic ..
testimony is

separate heads (1) Generic Human in General, (2) The Testimonial Elements can be taken up under the following (4) Mental Derangement, (5) Moral (Bias); (8) Experience (acquired skill) § 148.

of life

"(2) *Recollection* An occasional study of the memory-capacity of a particular race or people is all that has been thus far vouchsafed to us, except the truism that primitive peoples, depending largely upon unaided memory, develop an extra ordinary mnemonic capacity,—as in the oral transmission of sagas, laws, and revelations by the early Greeks, Hebrews, Scandinavians, and others

"(3) *Narration* (A) As to relative racial differences in the capacity of expression in words, little or no occasion arises for examining this subject in judicial proceedings (B) As to veracity of aliens in general, and of particular races, considerable knowledge has been made available for us (a) The alien in general, by reason of his strangeness to the surroundings, his racial sentiments, and his special dilemmas, has often a temptation both to save himself by falsifying and to save his fellow races by falsifying in their favour. But this

v. *Elahi Buz* B L R (r
Behan, 11 W. R 345 But
any scientific enquiry and
are and whose knowledge of his

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Evidence /
106, as reg
sufficient
predicate o,
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he may sat
box Dur
fruit, and

one of its best fruits has been an increasing regard to truth

on mere differences of error which is relatively truthfulness. But this All of us know persons probative to us. But

we, as knowers of this, must ourselves come before the Court as ordinary witnesses, and how can the tribunal ever be made to believe us and to appreciate the fact as keenly as we do? Moreover, taking as a proved fact this specific trait of veracity or untruthfulness, is it not the crude abstraction of the layman? Are there not varieties of veracity or untruthfulness? Can those varieties be discriminated and defined? Can they perhaps be identified in particular persons? If modern psychoanalysis can furnish such data, they will be useful in valuing testimony. *Wigmore's Principles of Judicial Proof* § 159

Temperament But the elements of Recollection and Narration may be affected by other fixed traits than merely that of mendacity or its opposite ver-

also is concerned in tracing the variety of temperaments and their influence in impeding correct narration. *Wigmore's Principle of Judicial Proof* § 160

three testimonial elements—Per-
ise some aberration from correct-
meant, not merely strong feeling,
perception and conscious reason-

ing *Wigmore's Principles of Judicial Proof*. § 161. The physical basis for this effect of emotion or testimony is explained in the following passage "The effect of desire on belief we are to come to a con-

towards this end
in' As to the way
account 'This in-

fluence of Desire on Belief often operates by simply diverting the attention from counter evidence. The mind is so absolutely preoccupied by certain tendencies, that whatever at all, or, if it does, is immediate resistance offered by the mind dissolve it. But the more often they (i.e., such beliefs) are acted upon, the more completely they become incorporated with the original conation so as to become an integral part of it, hence the support they receive from it is increased. With influences Belief that is to say, is by giving pre-ideational train sely long for, or especially dread, and by determining the order of ideation to follow, not that of experience, but that which answers to and tends to sustain and prolong the feeling, that its force serves to warp belief, causing it to deviate from the intellectual or reasonable type. Feeling, then, acts in part by warping the intellectual element in Belief

"Emotion is a great source of illusion, because it disturbs intellectual operations. It gives a preternatural vividness and persistence to the ideas answering to it, i.e. the ideas which are its excitants or which are otherwise associated with it; hence when the mind is under the temporary sway of any feelings as, e.g., fear, there will be a readiness to interpret objects by help of images or the control of fear will be apt to ever there is any resemblance to
" *Arnold's Psychology Applied*

60.

What
(2)

Emotion are in general the same as described already in dealing with evidence of human traits generally viz., external circumstances pointing to the stimulation of an emotion, conduct or words revealing its interior existence, and a prior or subsequent existence of the emotion. The external circumstances are of a great variety—interest in the cause as a party or beneficiary, relation-ship to a party, occupation, such as

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emotion

on a particular witness' testimony (whether in perception recollect on or narration) remains also as a problem for the future. But under both these heads the books abound with recorded observations of the marked effect of emotion on testimony, and of the various data from which that emotion has been inferred. *Wigmore's Principles of Judicial Proof* § 161

Experience By experience is here meant that succession of mental processes which result in expertness. It signifies the frequent repetition of sensations, perceptions, and recognitions of a particular subject so that by concentration the capacity to recognize grows in completeness and accuracy. The growth of this experience may take place casually, through one's habit of life, or by deliberate purpose to acquire skill, as in devotion to an occupation, or still further by systematic education in an organized body of knowledge, as with a scientist or an artist. Now the influence of experience on capacity to make correct testimonial assertions is double and opposite. It may increase the range and accuracy of his perception and narration and it may decrease them. *Wigmore's Principles of Judicial Proof* § 162

(1) It may and usually does, increase them because it enables them to perceive details and relations of fact not cognizable without such experience. There is literally no limit to the possibilities of enlarging and precisioning the data of judicial proof. 160

topics, to develop a bias or fixed idea affecting the perception on certain topics and to induce in narration an obstinate adherence to conclusions already reached on the particular facts. This tendency of course varies with the individual and the topic but it is always a latent possibility. *Wigmore's Principles of Judicial Proof* § 162

Perception—General The perception of the direct exercise must purport to have existed life and in historical inquiry

M because Y told him
or a book Z asserted fact
ha

M But in such
assertion by
Y or by Z. In
assertion of Y
of inference

separate the two assertions, i.e. that of X (testifying to the assertion by Y or by Z, and that of Y or Z (testifying to the assertion by X). Hence the element of sense perception by X is as a basis of judicial action. If in a book the assertion by Y that

make the assertion, and our further examination is required for Y's assertion
 If Y's assertion is hearsay (in both the
 at we give testimonial consideration to it
 is X's—*Wigmore's Principles of Judicial*

Proof § 163

Senses—General considerations: "The sensation brought to the brain by means of the optic nerve becomes the condition of the representation in consciousness of certain objects distributed in space. We make use of the sensation which the light stimulates in the mechanism of the optic nerve to construct representations concerning the existence, form and condition of

of the individual. The narrowest, smallest, most particular issuing glance is that of the most foolish; and the broadest, most comprehensive and comparing glance, that of the most wise. This is particularly noticeable when the time of observation is short.

visual sensations are the most numerous and the most important. Anybody who has been pushed or beaten, and has felt the blows, will if other circumstances permit and the impulse be strong enough, be convinced that he has seen his assaulter and the manner of the assault. Sometimes people who are shot at will claim to have seen the flight of the ball. It is fortunate that, as a rule such people try to be just in answering to questions which concern this substitution of one sense perception for another.

"Still more considerable importance, It consists in the noticeable interruption, when the stimulus does not, as a rule, give rise to that perception. In a case in Court, there was a shooting in some house and an old servant woman, who was busy sewing in the room, asserted that she had just before the person preceding ones. But I am convinced that the witness told the truth. The steps of the new arrival were perceived subconsciously, the further disturbance of the perception hindered her occupation and finally, when she was frightened by the shot, the upper levels of consciousness were illuminated and the noises which had already reached the subconsciousness passed over the threshold and were consciously perceived.

Criminal Psychology, 1911 § 35 p 187

Mistakes of senses, Illusions "As sensation is the basis of knowledge, the sensory process must be the basis of the correctness of legal procedure. The

0. associations are awakened, they are not ascribed to the sense of smell, but are said to be accidental *Ibid*; *Ibid* § 172.

The sense of Touch. "I combine, for the sake of simplicity, the senses of location, pressure, temperature, etc., under the general expression sense of touch. The problem this sense raises is no easy one, because many witnesses tell of perceptions made in the dark or when they were otherwise unable to see, and because much is perceived by means of this sense in assaults, wounds, and other contracts. In most cases such witnesses have been unable to observe the touched parts of their bodies, so that we have to depend upon this touch sense alone. Full certainty is possible only when sight and touch have worked together and rectified one another." *Ibid*; *Wigmore's Principles of Judicial Proof* § 174

General Theory of Memory and
here be used to mean the initial proc
" *Wigmore's Principles of Judicial Proof*
association of ideas = our recollection
and memory which are only next to perception in legal importance in the
knowledge of the witness. Whether the witness wants to tell the truth is, of
course, a question which depends upon other matters; but whether he can tell

variously organized function
and much more so when every-

gation. We find little instruction
well as our mistakes are thereby in-
" *Wigmore's Principles of Judicial*

Proof § 192

Different
men exhibit
known, this d
promptness of
ment of rapid
forgetfulness,
but approxima
the field of greatest memory. As a rule, it may be presupposed that a memory
which has developed with special vigour in one direction has generally done this

unreliable . . .
memory and can
alarming, and
people have bare

al people do, and which
the important point they
e to describe important

Children

witness in the world. We have
the child's mind to wipe out: . . .
has made a systematic study: . . .
conclusion that the scope of memory is measured by the child's capacity of
concentrating its attention

"That aged persons have, as is well known, a good memory for what is
long past, and a poor one for recent occurrence, is not remarkable. It is to be
explained by the fact that age seems to be accompanied with a decrease of
energy in the brain, so that it no longer assimilates influences, and the imagina-
tion becomes dark and the judgment of facts incorrect. . .

out 1
limit:
matter and partly mechanical, and the educated rarely have the latter kind
because they have developed the former at its expense; high mental power is
seldom combined with good mechanical memory." Hans Gross *Criminal
Psychology*, Wigmore's *Principles of Judicial Proof* § 193.

Narration—General Principles of. The third element forming an essential
part of all testimony is the process of laying before the tribunal the witness's
results of his Perception and his Recollection, i e the process of Narration or
communication. In this element, as in the other two, there are many opportu-
nities for errors fatal to testimonial trustworthiness. As with the elements of Per-
ception and of Recollection so here also, experience has shown that certain dangers
are to be looked for. What these dangers and defects are depends upon the
specific virtue which this
possess. Its office is to:
recollection of the witness,
useful or trivial. Its prin-
reproducing and expressing
the witness's Recollection
then, if his Narration or communication fairly represents and corresponds to his
Recollection, and is intelligible by
value are complete, but not otherwise
in either of these respects, namely, in
or in intelligibility, then its value d
defects occur in the former respect, i e an absence, actual or probable, of this
correspondence between the witness's uttered statement and his conscious
recollection which he ought to be stating. In the other respect, i e intelligibility
to the tribunal of the witness's utterance, comparatively few questions arise
Wigmore § 210

3. Hearsay evidence, meaning of—and why it is discarded. The term "hearsay" is used with reference to that which is written, as well as that which is spoken; and, in its legal sense, it derives its value solely from the facts which it rests also in part on the competence

and seeming exceptions, the general rule of law rejects all hearsay reports of transactions given to a witness

tests enjoined by the law for ascertaining the correctness and completeness of his testimony, namely, that oral testimony should be delivered in the presence

heard, or was misunderstood, or is not accurately remembered, or has been perverted. It is also to be observed, that the persons communicating such evidence are not exposed to the danger of a prosecution for perjury, in which something more than the testimony of one witness is necessary, in order to a conviction, for where the declaration or statement is sworn to have been made by a person who is since dead, it is hardly likely that the testimony is an entire fabrication. To these may be added consi-

incur in order to rebut or explain it, the occasioned, the multiplication of collateral issues for decision by the jury, and the danger of losing sight of the main question and of the justice of the case if this sort of proof were admitted, are considerations of too grave a character to be overlooked by the Court or the Legislature, in determining the question of changing the rule. *Mima Queen v. Hepburn*, 7 Cranch 290, 296, per Marshall C J; *Greenleaf* § 99(a)

Oath. One of the objections against Hearsay evidence is that it is not given on oath by the person who has got personal knowledge of a fact. But the utility of oaths in any shape has been strongly questioned. *Benth Jud Ev Bk 2 ch 8*. The good man, it is sometimes said, will speak the truth without an oath, while the answer has been given without an oath, of mankind are cases of import more solemn and boldly say what which they make

they promise, and careful what they assert, puts them upon exactness in every circumstance, and circumstances are often very material things. Even the good might be too negligent, and the bad would frequently have no concern at all, about their words, if it were not for the solemnity of this religious act.

Bishop Secker, as cited in King on Facts, Best Ev § 59 'Of the two main facts which impair the probative force of an unsworn statement used as hearsay, lack of oath and the absence of cross examination, probably the latter is, at the present time, more important than the former. Indeed the importance of the oath is diminished in its value by the cross examination.' *Chamberlayne's Ev § 2712*

Cross examination and confrontation Another essential requirement of the Hearsay rule, as just examined, is that statements offered in testimony must be subjected to cross-examination. But a process commonly spoken of as confrontation is also often referred to as an additional and accompanying test or as the sole test. The main purpose of confrontation is for facilitating cross-examination. But it also involves a subordinate and incidental advantage, namely, the observation by the tribunal of the demeanour of the witness on the stand, as a minor means of judging the value of his testimony. But this minor advantage is not essential to the essential test; it may be dispensed with when it is, however, the essential object of confrontation, though to note here that, so far as confrontation is concerned, the Hearsay Rule, it is merely another name for confrontation. *Wigmore § 1365* The policy of the

Anglo-Indian system of cross examination as a vital for testing the value of

no statements (unless by special stipulation) it has been proved and supplemented by lengthening experience. Not even the difficulties which are so often found associated with cross examination have availed to nullify its value. It is beyond any doubt the greatest legal engine ever invented for the discovery of truth. A lawyer can do anything with a cross examination,—If he is skilful enough not to impale his own cause upon it. *Wigmore § 1367*

Scope of the section The expression "it must be evidence" in paras 2, 3 and 4 of the section means "the oral evidence must be evidence." *Whitely Stokes Vol II p 889* So also the word "it" after the words "saw" "heard" or "perceived" in paras 2, 3 and 4. *Neelkanto v Juggobandhu, 12 B L R 110* *p 889* The first four paragraphs have

not direct whether the party against whom it is tendered objects or not. *Whitely Stokes Vol II p 889* But it was never intended by this section to exclude circumstantial evidence of a thing which could be seen, heard or felt. *Karali v East India Co 48 C L J 32-111 Ind Cas 793-A I R 1928 Cal 498* So where a crowd has dispersed without taking any action the intention and common object of the circumstances and

section 45 or of

which they are allowed to express their opinion. See ante. The cogency of this section as to the only of the only to which the immediate the exploded technical language hearsay. A who saw, heard etc, must be produced. The fact cannot be proved through the medium of B who did not see himself etc, but is prepared to swear that A told him that he had seen, heard, etc. So with respect to the fourth case, opinion evidence, when such is

30, admissible, this section necessitates the production of the witness who holds the opinion, it excludes the evidence of any witness who can merely say that he has heard another express such opinion. *Nort. Ev.* p 210. This section says that oral evidence must be direct. *Kalmther v. Ma Ma*, 3 Bur. L. J. 172=2 Rang. 400. An act of deposing is a physical act which can always be proved by any one who has heard the statement being made, the fact of deposing might be proved by any one who has seen and heard the witness. *Ganapathi v. Sakharayappa*, A. I. R. 1920 Mad. 187=115 Ind. Cas. 147. Hearsay evidence is inadmissible

Sarup v. Emperor, 7 Lah. L. J. 264=83 Ind. Cas. 22=26 Cr. L. J. 1078=26 P. L. R. 566=A. I. R. 1925 Lah. 299.

Evidence of a person who saw it or heard it. "The witness must say what he had 'seen and heard; he was an '*oyant et voyant*.'" *Thayer, Pre Ev.* 524. Thus a favourite passage, found in several works in the last century, is: "It seems agreed that what another has been heard to say, is no evidence, because

said Hearsay testimony is from the very nature of it attended with all such

rule, and stands or falls according to such other evidential rules as may affect

it. *Greenl. Ev* § 100 But facts except the contents must, in all cases be direct witness that he perceived by his own senses the fact to which he testified " *Steph Intro* p 141 If therefore, A, a witness, had been told something by B, and A were asked what B had told him, the evidence of A would refer to a fact which could be heard, and A is a witness who says he heard it, this section, therefore would not exclude it. *Markby Ev* p 52 A statement made by an accused person immediately after a murder of what the deceased told him is relevant as

Act says that oral evidence must in all cases be direct If a person by merely

about it, he is giving hearsay evidence The man who reads out the document to him would certainly be entitled to give evidence of its contents But another person who reports what is read out to him is giving hearsay evidence, of what would be legitimate secondary evidence were it before the Court *Kalenthir Ammal v Ma Ma*, 81 Ind Cas 175-3 Bur L J 17-1 R 1024 Rang 363

7 W R Cr 2; *Rajoni v Asan*, 2 Cr 25, *Aman Ali v King Emperor*, J 681; *Queen Empress v Nga Ta*, L R 433, *In re Vauthilnqa*, 2 Weir 762 In order to that the com- it is necessary ordance with

s 60 of the Evidence Act *Empress v Arshed Ali*, 13 C L R 125

It is admissible evidence for a witness to re of a family custom, and to state as grounds from deceased persons But, it must be

the expression of tion of hearsay P C A person that except the pe *Ev* p 53 So opinion must be produced A witness cannot be allowed to say that he has heard another express such an opinion *Nort Ev* 240.

this novel section, however, makes any book of science published for sale evidence, if the author be dead, or under any of the circumstances specified in section 32, which render his production impossible or impracticable *Nort Ev* 240 It must be remembered in regard to foreign law that by s 38, certain books are always admissible. *Markby Ev* 53 Under the provisions of the penultimate paragraph of s 57 and of the first proviso of s 60 of the Evidence Act, *Taylor's Medical Jurisprudence* may be referred to *Hatim v Empress*, 12 C L R 86, *Hurry Churn v Empress* 10 C 143, see also *Howe v Howe*, 25 M L J 594 (F B), *Granade v Com of Calcutta* 2 C W N 745-28 C L J 32=46 Ind Cas 593 But in all c *Purno*, 28 C W N 579

delay or expense *Cun Ev* 215.
 Proviso II. Proviso 2 relates to those cases in which secondary evidence is permitted to be given on account of the great inconvenience or impracticability

ons on walls, monuments, surveyors
s or oral testimony *Mortimer v*
Bolton, 2 Camp 108, *R v Fursay*
arholomew v Stephens, 8 C & P
ones v Turlton, 9 M & W 65 But
written characters exist on some
ts removal for production would be

removable it ought to be pr
Wills Cir Ev 212. In *Joi*
production was required
for
"T
in
up his free-hold
power is given to t
a physical impossibility *Nort Ev* 240.

l down the law thus
the case of things fixed
break
So
not

the interpreter must be called to testify to what B said to him. If, however, u
is a party, when admissions
as B's agent, and the ag
understood by the witness) regarded
language

Telephone communications Evidence as to what a person holding a
conversation over the telephone told the witness was said by the person at the

In any case, the doctrine of admissions may be invoked where one of the
If B had sent

of the requirement of personal knowledge is here out of place, and leads to
unpractical quibbles" *Wigmore* § 669

Market value Testimony as to market value on information derived from
daily communications is not objectionable as being based upon hearsay Testi
mony of witnesses based upon such reports may be received *Chamberlayne's*
Ev § 2708

CHAPTER V.

OF DOCUMENTARY EVIDENCE

Documentary evidence There is practically no controversy as to the
meaning of the word document, because a definition of the term is given in this
Act (*vide s 3 supra*) Stephen defines documentary evidence as "documents
produced for the inspection of the Court or the Judge". *Steph on Ev*, Art 1

Documents being inanimate things, necessarily come to the cognizance of the tribunals through the medium of human testimony; for which reason some old authors have denominated them dead proofs (*probatio mortua*), in contradistinction to witnesses, who are said to be living proofs (*probatio viva*). *Best Ev* § 60 "I" and in many respects in trustworthiness, been noticed from the earliest times, The false relations of what never took

consequence, attainment. *Best Ev*, § 60 "I" er" says *Lumpkin J. of Georgia* in "h than the strongest and most retentive memory ever bestowed on mortal man" "The memory of men as to facts is not satisfying to the mind as a writing, in an investigation involving p. *Bunnicarist* ion observed oral evidenc

cases cast upon it, but where the defence is rested upon a written document as a release, there is an essential difference, for its genuineness, on the contrary may be shown by many facts and circumstances very different from mere oral evidence; and, moreover, the witness

Rep 705, 706 (*Am*)

Three distinct questions with regard to documentary evidence. There are three distinct questions which are dealt with in the Act in regard to that kind of evidence which is called documentary. First, there is the question how the

s 59 with ss 61 and 64, the result document must, in general, be 'primary evidence,' but there are otherwise Evidence used to prove the contents of a document which is not 'primary' is called 'secondary' *Markby Ev* pp 56, 57

Proof of contents of documents

61. The contents of documents may be proved either by primary or by secondary evidence.

63

Primary evidence

62. Primary evidence means the document itself produced for the inspection of the Court.

Explanation 1.—Where a document is executed in several parts, each part is primary evidence of the document.

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

Explanation 2.—Where a number of documents are all made by one uniform process, as in the case of printing, lithography, or photography, each is primary evidence of the contents of the rest; but where they are all copies of a common original, they are not primary evidence of the contents of the original

Illustration.

A person
printed at one
evidence of the
the contents of the original

Secondary evidence. **63.** Secondary evidence means and includes—

- (1) certified copies given under the provisions hereinafter contained,*
- (2) copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;
- (3) copies made from or compared with the original;
- (4) counterparts of documents as against the parties who did not execute them;
- (5) oral accounts of the contents of a document given by some person who has himself seen it.

Illustrations

evidence of its contents
that the thing photo

by a copying machine
it is shown that the copy

evidence of the original, although the
compared with the original

(d) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine copy of the original, is secondary evidence of the original.

Scope of the section 61. "This section lays down that the contents of documents may be proved either by primary or by secondary evidence, and I understand the rule to mean that there is no other method allowed by law for

* See s 76, *infra*.

proving the contents of documents. Section 72 defines the meaning of primary evidence; s. 63 describes what constitutes secondary evidence within the meaning of the Act. *Chunandan Prosad*, 7 A. 738. The rule which exacts original evidence shall be received from some other which is withheld. *Per Parke B in Doe d. Welsh v. Langfield*, 16 M. & W. 127; *Doe d. Gilbert v. Ross*, 7 M. & W. 102, 106; *McDonnell v. Evans*, 11 C. B. 930, 942, *per Alford J.*; *Best Ev.* § 89. *Melius (or Salus) est petere fontes quam sectari*.

hearsay evidence. *Best* § 89. All private documents must be produced, and the execution of the same generally be proved, or their absence must be duly accounted for, and their loss supplied by secondary evidence. *Greenl. Ev.* 558.

instrument is to be proved, the primary evidence is the testimony of the subscribing witness, if there be one. Until it is shown that the production of the primary evidence is out of the party's power, no other proof of the fact is in general admitted. All evidence falling short of this in its degree is termed secondary. The question, whether evidence is primary or secondary, has reference to the nature of the case in the abstract, and not to the peculiar circumstances under which the party in the particular cause or trial may be placed. It is a distinction of law, and not of fact; referring only to the quality, and not to the quantity, of the evidence. It carries on its face no indication of its being primary. And yet if there are circumstances which show that it is not ordinarily primary, it is secondary evidence.

can be resorted to. *Greenl. Ev.* § 84. According to the Indian Evidence Act, primary evidence means the document produced for the inspection of the Court (s. 62). Where a document is executed in counterpart, each counterpart, being executed by one or more parties, is primary evidence as against the party or parties by whom it was executed, and as against the other parties. *Fol. II p. 200*. The following are the principles given by *Lord Esher M. R.* in *“Primary” and “secondary”* evidence, which the law requires to be given first, when a proper explanation is given of the absence of that better evidence.

3. is that the rule requiring the production of evidence, but a rule preferring the thing which is produced to not primary evidence. The other objection is that, so far the term is understood to group together all rules exacting a certain quality of evidence when it is available, it groups rules which are in the Attesting unit On to clarify the independent

Scope of section 62 Primary evidence means the document itself produced for the inspection of the Court. The fundamental notion of producing the primary evidence is that the terms of a writing must be proved by producing it and not by offering testimony about them. *Wigmore* § 1232. Where the writing constituting a bilateral transaction is executed by the parties in duplicate or multiplicate, each of these parts is the writing, because by act of the parties each is as much the legal act as another. It can make no difference that one party has signed only the document taken

red to
are, 2 Camp. 220, 221
the counterparts of each other, one of

which is delivered to the opposite party, both be considered as originals, one which is preserved may be received in evidence, the one which was delivered." See also *Doe v Putman*, (1842) 3 Q. B. 600, *Colling v French*, G. B. & C. 398; *Roe v Davis*, 7 East 363. The earlier practice seems to have been to treat the counterpart of a deed as a copy or secondary as may be inferred from utterances of *Best v J.* in *Munn v Godbold*, 3 Bing 292. There the learned Judge said: "Where there are two instruments executed as parts of a deed, one of these parts is more authentic and satisfactory evidence of the contents of the other part than any other draft or copy. It is prepared with more care than the other copy, and the party who produces it, and against whom it is used, by taking and keeping it as a part of the deed, admits its accuracy. The Courts have therefore always required that if one part of a deed be lost, and another part be in existence, it must be produced, but merely as secondary evidence of the part that was lost." *Wigmore* § 1233; see also *Doe v Wainwright*, 1 New & P. S. *Burchell v Clarke*, 2 G. P. D. 68, *Mathews v Smallwood*, (1910) 1 Ch. 777. Formerly a deed was written on parchment commencing from the middle, the other part was written in a similar way, up

primary evidence of the original document. Thus probate of a will of personal

v Hunt, 6 Ch. D.
2 Ch. 330, and will
contained in a will,
only Pl. in Ex. 711

in *Wainwright v. Poolley*,
applies where
165 *R v Hunt*,

Explanation I: The expressions executed "in parts" and in "counterpart", in section 62, refer to the mode in which documents are sometimes executed. It is convenient sometimes that each party to a transaction should have a complete document in his own possession. To effect this, the document is written out as many times over as there are parties, and each document is executed, i. e. signed or sealed as the case may be, by all the parties. No one of these is more the original than the other, and any one of them may be produced as primary

Where there are
by each party both
3 K B 706, 721;

Philip En 7th Ed. 516

paper does not differ from a
an alike, therefore, only be
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d copy
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in a newspaper,
primary evidence
Chandra v Emf
But if it were

y, but only secondary evidence conditions which render the *Ev 242* Where the accused ay 25 of them for posting, one contents of those posted because e nature of duplicate originals me press, they must all be the *Ellenborough L O J* said, *Watson* fetched away 25, by

caused 500 placards to be printed and carried away 25 of them for posting, one of the remainder can be admitted to prove the contents of those posted because every one of those worked off are originals, in the nature of duplicate originals. The reason me press, they must all be the same *R v* *Ellenborough L O J* said, "An order 1 *Watson* fetched away 25, by

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uld be great weight in the
originals, the manuscript
the same press, they must

carbon copy is no more better signed or executed than a letter-press copy—as a fact, the signature is not always reproduced on the carbon as it is in the pre-copy letter which is usually copied after signature. But where a document is executed in counterpart, each party signing only the part by which he is bound,

3.

each counterpart, is the best evidence against the party signing it and his privies. As to the other party it is only secondary evidence. *Roe v. Davis*, 7 East 362.

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Hrishukesh, 19 C L J 546—A L I
abstracted in a judgment is not even
cannot be made use of in lieu of

29 Ind Cas 463—60 M L J. 13—A
evidence of a document which is otherwise
ument is lost *Ma Ague v. Maung San Lank*,

A I R 1929 Rang 181 A register containing copies and copied directly from
the originals is legally admissible in evidence in proof of them *Chandram* v
Sheonath, A I R 1931 Oudh 1

document, which is not prove
ever existed A defamatory l

deposed to such a letter ever having been written by the accused. *Atia v*
copy of the newspaper was not secondary evidence of the original letter *Ramlal*

v *King*

question

largely

not be overruled by the Court of appeal except in a very clear case of mis
carriage *Vistanatha v Bahubai*, A I R 1931 Bom 105—55 M 103

s 78 Copies
: sworn copies
examined copy,

in the sense that the original and the copy have been examined or compared
together by the witness, either in his own act of transcription or by taking some

Evidence Act, and are used chiefly to prove
corporations and companies, by laws and the
copy of a Will is admissible in evidence

is proved. *Theli Kicherla v*

Mad 345 47 M L J. 906; *Bo*

certified copy of a document

conditions and contents of it, b

Koeri, 82 Ind Cas 306. A

ment, in which there may be references to it, is not the secondary evidence

of the contents of the document, especially when it appears that it is itself based on secondary evidence of the document given by a party who had this original with him. *Hira Lal v Ganesh Prasad*, 1 A. 106 P. C = 2 I A 61-11 C L R. 109.

Clause (2).
evidence *In re*
Re Stephens, L. R.
ton 30 Ir L. T.
secondary evidence.
wish to prove wit-
to the first portion of this clau-
So under this clause a copy

13. This clause is applicable to blue prints
as, 212 Ill 89), as well as to carbon copies as it
id of copy than that taken in the copying press
Durr Jones § 209 All that is required under this clause is that the copies must
be made by some mechanical processes which would ensure the accuracy of the

Clause (3) A copy merely as a piece of paper, has no standing as evidence
qualified
as § 1277
as is not
comparison,
or as sometimes, two witnesses, one of whom read the original, while the other
read the copy, or the reverse. But it will save trouble to have the comparison
made by one and the same person
Ev 96, Maung Po v Ma Shu
Kim, 9 C 939 A copy in short,
of a witness. The witness, therefore, must be qualified, and thus the general
principle of witness's qualifications have here certain applications. A general
principle for witness's qualification is that he must speak from personal
it therefore in
own personal
others Upon

copy, is rather in the nature of a rule of preference, requiring first the use of an
immediate copy, if one is available. *Wigmore* § 1274 This view was adopted
by Justice Story in *Winn v Patterson*, 9 Pet 663, 677 where he observed "The

with it, for then it is second remove from the original; or where it is copy of a copy of a record, the record being still in existence by law deemed as high as the original, for then also it is a second remove from the record. But it is quite a different question whether it applies to cases of secondary evidence where the original is lost, or the record of it is not in law deemed as high evidence as the original, or where the copy of a copy is the highest proof in existence. On these points we give no opinion; because this is not in our judgment the case of a mere copy of a copy verified as such, but it is the case of a second copy verified as a true copy of the original." Under section 57 of the Indian Registration Act, (XVI of 1908), all copies of copies given under that section and signed and

admissible for the purpose of proving the

Bhanrao, 78 Ind Crs 865-A I R

2 W R 303, *Smart v Williams*, Comb

ch evidence is thus stated in *Stetson*

v Gulliver, 2 Cush 494, 499 "When the book of the register would be evidence, a certified copy is entitled to have the same effect; there being very little ground to apprehend any mistake from that cause, and upon consideration of the great public inconvenience which would result from having the books of record removed from their proper custody and place of security," *Wigmore* § 1275

According to the orthodox English rule a copy of a copy is not admissible in evidence in as much as in the words of *Alderson B* "there would be no limit to the reception of secondary evidence if that were so. This is but the shadow of the shade" *Ettingham v Roundell*, 2 Moo & Rob 138; see also *Tillard v Shebbe*

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Lochan v Pandit Harinath, 1 Pat 606, *Chinnaji v Dhulkar*, 11 B 320, *Lalsh-*

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the printing of the High Court paper, that before giving the final order for

striking off, it would

A I R 1929 Mad 18

Sanlok v Rameswar,

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Pat 61=5 Pat 777

Clause (4) Execution in counterpart is a method of execution which is

in itself but supplements the other. *Baitha Nath v. Kamini Kant*, 6 C. L. J. 572; *Andrews v. Warral*, R. C. (1916) 1 K. B. 863.

Clause (5). The oral account of the contents of a document given by some person who has merely seen it with his own eyes but is unable to read it is not secondary evidence of the document; the word "seen" in section 63(5) of the

Ghore and others v. Chatrapal Singh, 12 A. L. J. 239-23 Ind. Cas. 11 So where in order to prove a mortgage the only witness called was an illiterate person he cannot be deemed to within section 63(5) of the Evd 537-A I R 1922 All 232

that under this clause only a witness who has seen the document and who could have read the document in its original state is entitled to give oral evidence of it. *Ramji Das v. Mohan Lal*, 71 Ind. Cas. 651-1923 A 411 But in *Pudari Singh v. Brij Mangal*, 73 Ind. Cas. 651 it was held that as regards the letting in of secondary evidence the word "seen" in section 63(5) includes also "read over" in the case of a witness who is illiterate and as such cannot himself read it. If it is read over to him it will satisfy the requirements of the section. In *Mohan Lal v. Ramji Das*, 80 Ind. Cas. 939-23 A L. J. 861, which was an appeal from

v. Chatrapal Singh, supra After hearing the matter very fully argued we have come to the conclusion with great respect to these two Judges, and we are unable to agree the critical words in the section are 'seen it' The result of the decision would be, for example, that a highly educated person knowing the contents of a document in contents and had person who knew that the English memory, could not although, he had

exists The first three sub sections of s 63 refer to copies made from or compared

that if a person has only seen a copy of a document, there are two chances altogether, and therefore evidence given by him could be of a different category to the secondary evidence allowed by law and a person who has seen a copy

3.

evidence of the contents of the
L J 172=84 Ind Cas 175=A I
11 D. C. 174 175

Kalender Ammat, 31 C W N 621 (P C)=541
18=100 Ind Cas 1=29 Bom L R 800
Allahabad High Court reported in 22 A L
13 and 73 Ind Cas 651 are no longer good law
the contents of a document by some person
clause means oral evidence by some person who has seen those contents, that
is who had read the document Evidence that the witness only saw the
document and heard it read
contents are concerned an
oral evidence generally, viz,
evidence of a witness who saw
fact which can be seen on
Raghur, 112 Ind Cas 310.
Statements of persons who
sible in evidence What is required is an oral
judgment or decree by some one who had read

to a document which is
document. *Rati Pal v Uda*

Bhan, 53 Ind Cas 687 A translation of a document is not secondary evidence
Ambalavana v Kuppachi, 4 L W. 330=35 Ind Cas 20; 26 Ind Cas 618;
see also 70 Ind Cas 107 Where in prior proceedings between the parties
one of them admitted the existence and contents of a mortgage deed, such
admission constituted a good secondary evidence within the meaning of this
clause *Bahadur v Madho*, 36 Ind Cas 696 An objection to the admission
of secondary evidence, if not raised at the time it is admitted, cannot be
allowed to be raised in special appeal Where the plaintiff attempted to
prove the contents of certain documents by oral evidence, but the evidence
fell short of what is required
witness was not properly given
the penalty of the dismissal
of the legal adviser who
24 W R 227 *Surrey*

y evidence of the contents of the
63 or under any other section of the
1020 P C 43

EVIDENCE ACT

Oral evidence cannot
of which are disputed
is not merely the
asked whether certain
O Connell, *Am* &
his account books;
the best evidence, must be
24 Bom L R P C 565
have been reduced to writing
66 Ind. Cas 380

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no degrees in the various kinds of such evidence. *Doe v Ross*, 7 M & W.
102; *Hall v Ball*, 10 L J. C P. 285; *Brown v Woodman*, 11 C & P 206;
Jeans v Whedon, 2 M & Rob 486" *Taylor Et* § 550 In *Doe v Ross*, 7 M &
W 102, the question was whether an attested copy of a deed was preferred
in the

evidence "Another
luction of secondary
the law recognises

to the jury, from which back would be a reverse distinction between one case *Merson* 11 and the nature of the evidence itself. If you produce a copy which shows that there was an original or if you give parol evidence of the contents of a deed the evidence itself discloses the existence of the deed. But reverse the case, the existence of an original does not show the existence of any copy, nor does parol evidence of the contents of a deed show the existence of anything except the deed itself. If one species of secondary evidence is to exclude another a party tendering parol evidence of a deed must account for all the contrary evidence that has existed. He may know nothing but the origin and the other side at any trial may defeat him by showing a copy the existence of which he had no means of ascertaining. Fifty copies may be in existence unknown to him, and he would be bound to account for them all. *Wigmore* § 1263. Similarly in *Brown v Woolman* 6 C & P 206 *Parle* 1 and there are no degrees of secondary evidence." See also *Sugden v Lord St Leonards* L R 1 P D 151, *Brown v Brown* 27 L J Q B 173, *Doe v Cole*, 6 C & P 359, *Fisher v Samuda* 1 Cimp 193, *Kensington v Inghish* 9 East 273 279. But in some of the old English cases the rule laid down was otherwise. In *Ludlam's Will* 101 36, *Lord Mansfield* C J said. "If you cannot prove a deed by producing it, you may produce the counterpart if you can produce the counterpart, you may produce a copy, even if you cannot prove it to be true copy if a copy cannot be produced you may go into the parol evidence of the deed." This rule was also adopted by *Lord Hardwicke* L C in *Omtchen v Barker*, 1 Atk 21 (13) and in *Hilliers v Fishers* 2 Atk 27. The English law recognizes no preference. But in America in *Prof Leary* the law recognizes any degrees in the various kinds of secondary evidence and requires the party offering that which is deemed less certain and satisfactory first to show that nothing better is in his power, is a question which is not perfectly settled. On the one hand the affirmative is urged as an equitable extension of the principle which postpones all secondary evidence until the primary is accounted for, and it is said that the same reason which requires the production of a writing if within the power of a party also requires that if the writing is lost, its contents shall be proved by a copy if in existence rather than the memory of a witness who has read it, and that the secondary proof of a lost deed ought to be marshalled into first the counterpart secondly a copy, thirdly the abstract, etc., and, last of all the memory of a witness. On the other hand it is said that the rule is founded on its strength or weakness, and that to carry it to the length of establishing degrees in secondary evidence as fixed rules of law, would often tend to the subversion of justice and always be productive of inconvenience. If for example proof of the existence of an abstract of a deed will exclude oral evidence of its contents the proof may be withheld by the adverse party until the moment of trial and the other side be defeated or the cause be greatly delayed, and the same mischief may be repeated through all the different degrees of evidence. It is therefore insisted that the rule of exclusion ought to be restricted to such evidence only as upon its face discloses the existence of better proof and where the evidence is not of this nature it is to be received notwithstanding it may be shown from other sources that the party might have offered that which was more satisfactory to the jury under all the circumstances. (9) The American doctrine is that if from the nature

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of a document is not the contents of the original *Kalender* Ind Cas 175=41
R. 1924 Rang 363 nunc in *Ma Ma v*
Kalender Ammal, 31 C W N 621 (P C)=54 I A. 61=25 A L J 65=5 Rang
 18=100 Ind Cas 1=29 Bom L R 800 So the two later decisions of the
 Allahabad High Court reported in 23 A. L. J 864=80 Ind Cas. 937=47 A
 13 and 73 Ind Cas 654 are no longer good law The phrase "oral accounts of
 the contents of a document by some person who has himself seen it" in this
 clause means oral evidence by some person who has seen those contents, that
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fact which can
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Bhan, 53 Ind Cas 667 A translation of a document is not secondary evidence
Ambalavan v Kuppachi, 4 L W 330=35 Ind Cas 20; 26 Ind Cas 618;
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Leyfield's Case, 10 Co Rep
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 not be applied so broadly as
 is not a document. The rule is

proved by the paper itself and by that
 The rule was so stated by the Judges on
 (*volume*, 2 Brod & H 236 (1821) The only
 the following classes (each of which is dealt
 document is lost or destroyed. (2) Where it is

64. philosophical and harmonizes better jurisprudence of the age on the subject to curtail and limit the objections to go to the jury to judge of its weight party kept back a more satisfactory have produced and within his knowledge as he had offered, of less certainty, with the jury *Leuts v St Antonio*, 7 Tex 288 (315) (Am) *Wigmore* § 1263

64. Documents must be proved by Proof of documents by primary evidence. primary evidence except in the cases hereinafter mentioned.

Principle A writing is the best evidence of its own contents and must be introduced unless it has been lost or destroyed or its absence is otherwise satisfactorily explained. The reasons are simple long experience. They would be literal copy and the copyist, whether by accident or by inadvertence this contingency wholly disappears when the original is produced. Moreover, the copy will afford the best evidence of its own contents. lack, such features of the document as the copyist may have seen or may have known of, are not available to the opponent by any other means. *Wigmore* § 1179. In *C J* said that though an original may be liable to the mistake of the transcriber or the original, the added risk, almost the certainty, exists, of errors of recollection due to the difficulty of carrying in the memory literally the tenor of the document. *Wigmore* § 1179; see also *Slatterie v Pooley* 6 M & W 664; *Doe v Ross*, 7 M & W 102; *Taylor v Riggs*, 1 Pet 591, 596; *Vincent v Cole*, M & M 237; *Macdonnell v Evans*, 11 C B 942

were the beginnings, in the endeavour to give consistency to the system of evidence before juries. They were never literally enforced,—they were principles and not exact rules, but for a long time they afforded a valuable test. As rules

Bliss, 21 N Y p 219, that "it is a universal rule founded in necessity, that the best evidence of which the nature of the case admits is always receivable."

principle was the rule about the rule was older than the rule. There has been a generalization from the rule, which appears itself, to be traceable to the doctrine of proof. That ent which was set up in the jury, that a jury had been exhibited to hear testimony from a speaker to the contents of a deed without the production of the deed itself. *Thayer Cas Ev* 2nd Ed 778, 779

Scope of the section "The rule is that the best evidence must be used that can be had, first the original; if that cannot be had, you may be let in to prove it any way, and by any circumstances the nature of the case will admit. This extends not only to deeds, but to records, so far I mean as they may be given in evidence to a jury, for in point of proof it is another thing. But for this

the law requires a proper foundation to be laid, and two things are necessary. First, to prove that such a deed once existed, and there is sufficient evidence that such a deed, to a certain intent, did once exist, by the answer that has been read, which I do not rely on as evidence of all the uses of the deed, but as an admission that such a deed and use something of that nature once existed. The next step is to show some ground that the deed is lost or being in his adversary's hands cannot be come at." *Per Lord Chancellor in Whitfield v Fausset* 1 Ves 357. In *Grant v Gould* 2 H Bl p 101, Lord Loughborough said "that all Common namely, the best evidence agree." The rule, as to the rules of common law, but modified to some extent by the registry system established here by Statute. The theory is this that an original deed in its

Gry 30 (1st) "The general rule was, that the contents of a writing of any document or portable article could not be proved without its production or without showing it to be in the possession or power of the prisoner or opposite party, and on notice to him to produce it." *Per Channell B in Regina v Larr* 4 F & L 336. So the contents of every written paper are according to the well established rules of evidence, to be proved by the paper itself, and by that alone if the paper be in existence. *The Queen's Case* (per Abbott C J) 2 B & 284. The reason of the rule is thus stated in *Dr Lifford's Case* 10 Co Rep 62 (a). And therefore every deed ought to approve itself and to be proved by others—approve itself upon its showing forth to the Court in two manners: (1) As to the composition of the words be sufficient in law and the Court shall judge that, (2) that it be not razed or interlined in material points or places, (3) that it may appear to the Court and to the party if it was upon conditional limitation or power of a revocation in the deed. And these are the reasons of the law that deeds pleaded in Court shall be showed forth to the Court. So when the question is as to the effect of a written instrument the instrument itself is primary evidence of its contents. *Per Coleridge J in R v Francis* L R 1 C C R 128 (132). But this rule should not be applied so broadly as to require the production of any thing which is not a document. The rule is

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well established rules of evidence to be proved by the paper itself and by that alone if the paper be in existence. The rule was so stated by the Judges on the occasion of the trial of *Queen v Cowell* 2 Brod & B 256 (18th). The only exception to with below) in the possession. Where it is insisted on by physical ground is of a public reasons of convenience. *Roscoe Cr Ev 10th Ed p 3*

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Cases in which secondary evidence relating to documents may be given

65 Secondary evidence may be given of the existence, condition or contents of a document in the following cases —

- (1) when the original is shown or appears to be in the possession or power—
 - of the person against whom the document is sought to be proved, or
 - of any person out of reach of, or not subject to, the process of the Court, or
 - of any person legally bound to produce it
 and when, after the notice mentioned in section 66, such person does not produce it,
- (b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest,
- (c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot for any other reason not arising from his own default or neglect, produce it in reasonable time,
- (d) when the original is of such a nature as not to be easily moveable,
- (e) when the original is a public document within the meaning of section 74,
- (f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in British India to be given in evidence,
- (g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

In cases (a), (c) and (d) any secondary evidence of the contents of the document is admissible

In case (b), the written admission is admissible

In case (e) or (f), a certified copy of the document but no other kind of secondary evidence, is admissible

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents

Principle The contents of a document must in general be proved by a special kind of evidence, called 'primary evidence' but there are exceptional cases in which it may be proved otherwise. *Malib. Ev. 57* The exceptional cases in which secondary evidence is admissible are contained in this section,

But. "That rule which is the most universal, namely, that the best evidence the nature of the case will admit, shall be produced, decides this objection, for expression for the idea that when you lose the best in your power. The case admits of you possess, if the superior proof has been not mean that men's rights are to be sacrificed and their property lost because they cannot guard against events beyond their control; it only means that, so long as the higher or superior evidence is within your possession or may be reached by you, you shall give no inferior proof in relation to it." *Per Porter J in Thomas v Thomas*, 1 Ld 166, 163; *Higmore* § 1192. The various classes of cases with which the following sections deal are the written or otherwise person, pl or otherwise on the gen

Scope of the section : Section 65 evidences of the contents of a document is inadmissible unless the non production of the original is first accounted for so Krishna of the counting

for of the non production of the original *Dhuanesuar v Harisaran* 6 C 720 = 8 C L R 337 (P C), *Rakhallus v Inba Monce* 1 C L R 155, *Imcerunissa v Abedoonissa*, 23 W R 208, 209 (P C) = 2 I A 97, *Waseer Ali v Kalee Kumar* 11 W R 328, *Gour v Hures hishore*, 10 W R 338, *Ishan v Bhyrab*, 5 W R 21, *Estoorun v Mohun* 21 W R 335, *Roopmunoor v Ramlal* 1 W R 145; *Mafee Zoodcen v Meher th*, 1 W R 213, *Sheoram v Ramlal* 1 W R 248, *Muhammal Abdul v Ibrahim*, 3 B H C R A C J 160. A writing is the best evidence or destroyed. *Clarke & Sall* to little more by the intro accounted for entirely differ

ing, rather than a narrowing rule. It meant that the best evidence of which the nature of the case would permit was receivable. It has been pointed out by *Prof Thayer* that this rule has been the subject of a very peculiar development (*Vide the origin of the rule*) relating to writings only.

to those which relate to *Ev* § 272 this section and thus is a relaxation in criminal than in civil the former, the original registers of births, deaths marriages, etc, must be produced and that copies will not be sufficient. *Fried's Ev 7th Ed* p 318; *Whitely Stokes*, Vol II p 92. The exceptional cases in which secondary evidence

requires stricter proof it was decided that, in copy of a document have been used to the possession of the provides for his Where an original document from a *Soukram Sookul* *pattah* relied on cannot be produced, secondary evidence is admissible, but the contents of the document must be satisfactorily accounted for before a copy can be looked at and before it can be used. *Nolcelal v mubanal v Nandlal*, 2 W R Act X. 241, *Asman v Doorga*, 21 W R 262.

According to this section the loss of the original must be proved not only in a case where the document is being enforced in a suit but also where it is produced

5. merely as a piece of evidence : *Maqbul v. Baidoo*, 122 Ind Cas 751 = 1930 A L J 765 = A I R 1930 All 539 Where a party relies upon the certified copy of a document before any presumption as to genuineness of the original can be made under s 90 it is incumbent on the party trying to rely upon the document to lay the foundation by leading secondary evidence under s 65 *Gaya Prosad v Jaswanti*, 1930 A L J 1003 = A I R 1930 All 550 = 125 Ind Cas 460

A copy of a disputed document can not be taken as evidence without proof that the original is out of the power of the person producing the copy Admitting the ex
Mussamat the correctness of the copy
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had *Choorun v Ukhunlal*, 21 W R 33

of a letter (neither produced nor called involves the giving of secondary evidence satisfying the conditions required to

Pershad v Amanutulla 26 C 53 = 2 C

rents where sought to be proved by entries made by *Patwari* in his list as the result of his enquiry and inspection of receipts Held that the list would merely
 ents of the receipts and that it was inadmissible

rule out *Baduna Ram v Akbar Ali*, 103 Ind

Cas 752 = 9 Lrb L

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only Held that the secondary evidence of the mortgage deed was admissible *Herbert Francis v Mahomed Akbar*, 105 Ind Cas 533 This section provides an alternative to the bond holder in cases where for various reasons production of the original is impossible, but if a bond is in existence production is not dispensed with by

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should not be overruled except in a clear case of miscarriage of justice Production of secondary evidence does not dispense with proof of the execution of the original document : *Chuha Mal v Rahim Baksh*, 71 Ind Cas 563 Where in a suit on bond, loss of bond was alleged and the defendant denied execution

65. *Maung Hmo*, U B R (1897-1901) Vol II, 367, *Sudar Kuar v Chandraiah*, 4 A 330-A W N 1882, 55 *Hualal v Shankar*, 45 B 1170 *Sunni v Sundar*, (1911) 2 M W N 166, *Doramas v D* 87 Ind Cas 332, *Maung Po v Maung Gui*, 101 Ind Cas 193-A I R 1927 R 109 The provisions, made by the Stamp Act for the case of deeds, either unstamped or insufficiently stamped, have no application, when the original deed, which ought to have been stamped has not been produced. It is not permissible to pry penalty or require endorsement by Collector on a copy of unstamped or insufficiently stamped document and to offer the same as secondary evidence of the terms of the original *Venkata v Sri Janganti*, 4 C W N 117; *Aruna Chellum v, Oli gappah*, 4 M H C R 312, *Ragharachari v Rungachari*, 4 Mys L J 147. A distinction must be drawn between the admissibility of the evidence and the manner of proof.

Section 65 and Registration Act, s 49 The admitted existence of an unregistered written deed of relinquishment of one's interest requiring registration precludes the proof of the fact of the relinquishment by any secondary evidence as the primary evidence is itself inadmissible under s 49 *Janardhan v Janardhan* 101 Ind Cas 830-A I R 1927 Nag 214 Where a party comes into Court resting his claim on a written title which the law requires to be to register, and is, in consequence and say, "I can prove my title by have a compulsory Registration ors" *Monmolunes v Bishen Moyee*, *Sheikh Shuraitoolah*, 1 B L R 58-10 W R 51 (F B); *Gongabisan v Tukaram*, 5 N L R 70-3 Ind Cas 224; *Mahomed v Allah Ditta*, 93 Ind Cas 444-27 P L R 268, *Kallam v Nambiar*, 28 M L J 276 Secondary evidence of a document which is not produced but which in a previous suit was found to be inadmissible as being not registered cannot be given in evidence *Nataraja v Ramabhadra*, 28 Ind Cas 853, see also *Kanduru v Adam Sahab*, 25 Ind Cas 661.

Section 19, Limitation Act-Whether acknowledgments lost or destroyed So, to section 20 of the Limitation Act of 1871, writing containing the promise or acknowledgment may be given of the time when it was signed

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which secondary evidence that amongst the ground ice was the loss or destruction to is the evidence thing was in evidence

871 The language of the was necessarily in direct g to the Evidence Act, document generally, if the f 1871 oral evidence of the ble in such a case. The words used are "When

the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed, but oral evidence of its contents shall not be received" One branch of the law of Evidence is that already referred to is contained in 64 and the following section of the Evidence Act and it

determines the cases in which secondary evidence of a document not produced. Another branch of the law is dealt with in the following sections. It deals with the effect of oral communications, may be evidence of a document. The first part of the paragraph before us clearly belongs to the latter branch of the law. And, it would seem the object was to remove any question which might otherwise have arisen whether the rules generally excluding oral evidence as to the effect of documents might not exclude oral evidence, where the date is an essential part of the evidence of the date of the document proceeds 'but oral evidence of its contents shall not be received' These words were introduced with a 'but', and they speak not of secondary evidence but of oral evidence. We do not think they ought to be understood as dealing with an entirely different branch of the law of evidence from the earlier part of the sentence, and as repelling s 65 of the Evidence Act, so far as it relates to acknowledgments. We think the words in question are of the nature of a saving clause, guarding against the supposition that the exclusion of oral evidence further knowledge of the contents of the document is not sufficient secondary evidence.

Wajibun v. Kadir, 13 C 192; see also *Chathu v. Virarayan*, 15 M 191; but see *Ziaunnissa v. Mafudov*, 12 B 263. This controversy has been set at rest by Act IX of 1908,

detailed record of records, an entry in the statement to be sufficient secondary evidence. *Nowroz*, 5 P. W. R.

1914=16 P. L. R. 1915.

CLAUSE (A).

Original in the possession or power of the Adversary. When a document is in the possession of the adverse party or of some one bound to give up possession thereof to him (e.g. his solicitor) (*Irum v. Lever*, 2 F. & F. 269, R. v. *Hunter*, 4 C. (Taplin v. Att. *Sinclair v. Ste* but not a stake *Gow R* 1191).

in this section are

up possession to his personal custody, or the opponent's demand. *Hignore* § 1200. So wherever it is in the party and he refuses to produce it after a *R. v. Watson*, 2 T. R. 201, *Makbul Ali v. Greesh Chunder v. Ramlal*, 1 W. R. C. 579 582. The reason why cases equally with civil *R. v. Eluorthy*, 10 Cox Cr 579 582. The reason why secondary evidence is admissible in such a case is thus given by *Buller J.* in *Att.*

65. *Gen v Le Merchant*, 2 T R, 201 note. "It was likewise said, in support of the motion, that the reason why copies are permitted to be evidence in common

does not produce them is in no fault at all, and for that reason a copy is not admitted. But I do not take that to be the rule; it is not produced upon any

sion of the opponent. It is enough if it is in his power to produce it *Parry v May*, 1 Moo & Rob 280. So "the possession of the plaintiff's attorney is the possession of the plaintiff, though they might perhaps be subpoenaed, it is in a party to the suit, it is in *J in Irwin v Lister* of the jurisdiction of

d When a document of the opponent, very recently, the *R v Hunter*, 4 C & P. 128. before notice served be an excuse, at the time of notice, that he had transferred it *Wigmore* § 1200 *contra*, *Wright v Bunyard*, 2 T. & F 193, 194. Before a secondary evidence is admissible under this section, the opponent's possession of the document in question must be shown somehow, *Knight v Martin*, Gow 103, *Whitford v Tuttle*, 10 Bing 395, *Shape v Laut*, 11 A & E 805. Of this fact very slight evidence will raise a sufficient presumption when the documents exclusively belong to him, or regularly ought to be in his custody according to the course of business *Taylor* § 440; see also *Ajoodha v. Esharee Dyal*, 10 W. R. 219; *Eshubanesuar v. Harisaran*, 8 C 720=8 C L R 337 P C; *Henry v. Leigh*, 3 Camp 502. So where a bankruptcy certificate was proved to have been obtained for the defendant, the Court presumed that it had come into his possession *Henry v. Leigh*, 3 Camp 502; *Robb v Starkey*, 2 C & Kir 143. If papers were last seen in the hands of the defendant, it lies upon him to trace them out of his possession *R v Thistlewood*, 33 How St Tr 757. The rule is the same in criminal cases *Perry v May*, 1 M & R 276; *Langton v Reynolds* 18 Jur, 963. The Adversary's possession may also be proved by the admission of his counsel. *Duncombe v Duncombe*, 8 C & P. 222. A party served with notice cannot evade its effect by subsequently parting with the document. *Knight v. Martin*, Gow. R. 104; *Nott* 246. It would seem that when a party has notice

f the evidence is a Rob, 365 is sufficient proof of the contents of a document when the original is shown or appears to be in the possession or power of the person *Salman v. Hakim Mukdam*, A. I R 1928 All 391. This section lays down that secondary evidence may be given, of the contents of a document when the original is shown or appears to be in the possession or power of the person

against whom the document is sought to be proved. This section does not require that in all cases it must be definitely proved that the document is in possession of the other party against whom it is sought to be proved. If long

its contents can be given: *Duarka Singh v. Ramanand*, 41 A. 592=17 A. L. J. 711=51 Ind. Cas. 275; see also *Mussamat Saleha Dibi v. Oudh Commercial Bank*, 20 I. L. C. 111.

of a notice to produce, unless the original is shown or appears to be in the possession of the person against whom the presumption is drawn. Per Walsh J. in *Mongra v. Ded Ram*, 35 Ind. Cas. 328.

Of any person out of the reach of, or not subject to, etc. This clause is out of secondary notice. *Wiseman*, L. J. P. &

M 109.

According to English law the mere fact of the non-amenable of the possessor to legal process cannot

possible forms of evidence, by a Court before excusing for non production. If the precise whereabouts of the document is unknown, search may be made; if the possessor be ascertained, he may be requested to appear with the document, or he may be requested to deliver the document for the use at the trial, or his deposition may be taken with a copy furnished by him annexed to it. No one or more of these efforts

to make any such In the first group, a nature depending

more or less on the circumstances of the case. *Boyle v. Wiseman*, 10 Exch. 647, *Ward v. Murray*, 1905, 11 Mes. 5, cited Phil. p. 548. In the second

Gan Kim 9 C 939. So also secondary evidence of a document can be admitted without notice to the adverse party, when the person in possession of the document is out of the reach of or not subject to the process of the Court. *Haranand v. Ramgopal*, 27 C 639 (P. C.)=27 I. A. 1=4 C. W. N. 429. Section 86, of the Evidence Act, lays down that if a copy of a foreign judicial record presume it to be genuine other proof, for under may be given of public person is out of reach

5. of, or not subject to the process of the Court. *Harmand v. Ram Gopal*, 2 Bom L R 562. A notarial copy of a foreign will is admissible on proof by experts that the original is not allowed to be removed, and that the local Courts regard such copies as equivalent to originals. *Phip Ev* 7th Ed 527; *Re Von Liend*, (1896) P 148; *Re Lemme*, (1892) P 89, *Enoch v Wylie* 10 H L C 1, but see *Re Broun*, 80 L T. 360, *Permanent Trustee v Fels*, (1918) A C 879.

As regards the meaning of the expression of "any person not subject to the process of the Court" there is some conflict of opinion. According to Mr. Stokes these words are intended to include a person bound to produce the document on account of his position, and who produces it. *Stokes Anglo Indian Code*, V, C & P 737, *Morston v Dawney*, 1 H & C 31. This clause includes that rule of English law which requires a person to produce a document in his possession or control, or as agent acting on the behalf of the party who seeks attendance in Court of the document, or of subpoena duces tecum, and should lawfully refuse to produce it. *Doe v Clifford*, 2 C & K 448, *Dwyer v Collins* (1852) 7 Ex 632. If on the other hand he attends, but without the document, and a subpoena duces tecum has not been served on him or not been duly served, this is a fatal objection to the admission of secondary evidence as the party has not done all that lay in his power to procure the production of the original (*Hibberd v Knight* 2 Ex 11). If the person so refusing is merely agent for another by whose principal does so, the Court upon a

subject is thus briefly
"Secondary evidence is
a stranger to the proceed-
here lawfully refuses to
him either in his own right

the reach of, or not subject to, the process of the Court." So it cannot be said that this clause includes the English rule just mentioned.

209; *Huntingdon v. Mildman*, Cro Jack 217; *Wigmore* § 1211. So "where a person is an utter stranger to a deed, there in pleading he is not compelled to shew it" *Buller Nisi Prius*, 252. So if the person possessing the document is by reason of privilege not compellable to produce, there is the same reason for admitting other evidence of its contents as if its production were physically impossible, because the party who stands in need of the evidence which that document affords is not to suffer from its absence at the trial. *Per Pollock C B* in *Sayer v Glossop*, 2 Exch. 409, 410. Mere disobedience is a notice to produce

what is called a *subpoena duces tecum* i. e., a summons to attend the trial as a witness and bring the documents with him (Vide Order 16, rule 1 of Act V of 1908 = s 179 of the Old Code). The person on whom such a *subpoena duces*

tion, penalty, or forfeiture (Vide s 130 *infra*). So a party will not be required to produce the muniments of title to his estates (Taylor § 158, 1164, section 130 *infra*), nor will his solicitor, to whose care they have been entrusted (Hibbert v Knight, 2 Exch 11; Dos de Gilbert v Ross, 7 M & W. 102; Volant v Soyer, 13 C B 231); and in either case independent secondary evidence of their contents may be given. Per Hill J in R v Leatham, 3 E & L 658, 668; Best v § 216. So it is "a well established rule of law" that the productions of a privileged document is excused. Per Hill J in R v Leatham 3 E & L 658, 668. The principal may of course waive his privilege (Wells v Moore, R, & M 390),

is apprehended that no secondary evidence is admissible under the Indian Evidence Act, if the party in possession of the document withholds it under §§ 130 and 131 of the Act

regards this clause Mr. words 'of any person they stand, there is no of the document, as in hardly believe that

this is what was intended. I think it probable that the word 'not' has been here omitted by mistake, and that the case intended to be dealt with here is the

65.

Under rules of strict interpretation it appears that this clause intends to make a departure from the English rule, which does not allow secondary evidence of any document improperly withheld. It may be that the party calling for the document which has been improperly withheld, has its remedy against the party so withholding the document in separate suit for damage or he may be punished for contempt of Court but such remedy may give very inadequate relief where the party withholding is a pauper and the loss to be suffered for the non production of the document is considerable. Moreover that will give rise to multiplicity of suits. It is also not desirable to deprive a party to produce secondary evidence of a document, simply because a third person refuses to produce the original of the document wilfully or perhaps fraudulently. There may be in addition the danger that the party withholding such document has some legal right to the document.

according to *Prof Wigmore*, the rules of law laid down by *Alderson B.* in *James College v. Gibbs*, 1 Y & C 145 156, where he said "You could not have proved it by secondary evidence unless the document had been in the possession of a party not bound to produce it." (The third person refused to produce it is true, at his

to cover a contingency for which no provision has been made in the Act itself.

When
have been
secondary
203, Lord

is a false copy. But the giving of notice is the contemplated danger. The opponent does not produce the original. *Hall*, 14 East. 274, 276, *Le Blanc J.*

given. . . that he may not be taken
Dudley 62, 64. "The answer to this is, first
to guard against surprising his opponent by warning him of the danger.

secondly, that if here the purpose were, to give the opponent time to discover evidence impeaching or confirming the document, the notice should allow time for such an investigation, yet the law is clear that only time enough to produce the document need be allowed; and thirdly, that if, in fact he is not surprised, it is in law still no excuse for not giving notice.' *Wigmore* § 1202 'The true reason is' says *Prof. Wigmore* "that which is naturally deducible from the proponent's situation. He is required to produce the document if he can; he says that he will not bring it."

with the request. If we translate ly appreciate the significance of the and this notice of demand is necessary, in *Biron Parke's* words, (in *Dyer v Collins*, 7 Exch 639) 'merely to exclude the argument that the party has not

shown that by giving notice to that adversary to produce it, he has used every exertion in his power that the best evidence might be given" So where a document of title which is in possession of a party is not produced by him after notice to produce the same, the party giving notice is entitled to give secondary evidence of the document under s 65(b) and section 68 proviso 2 *Narsidas v Ravi Sankar*, A I R 1931 Bom 33; see also *Abdul v Kishan*, 11 Lah L J 401, *Makhan Lal v Gavinda*, 13 R D 718; *Subrayulu v. Vengama*, A. I. R 1930 Mad 742-123 Ind Crs 197; *Wigmore* § 1202, see also *Maungsan* to ere be 90. age ought to be, denies that he has it, secondary evidence is admissible *Taru Mal v Zulphakar Sha*, 49 P R 1832 The word "produce" only means "procure the production or give it in evidence" *Gaya Prosad v Jaswant*, 1930 A L J. 1003-125 Ind Cas 460-A I R 1930 All, 550

CLAUSE B

Written admission as to the contents of an original document Section 22 lays down that oral admissions as to the contents of a document are not proof of a document even though the original is in existence, and might be but is not produced *Cun Do* 221 The result seems to be this —The written admission may always be proved The oral admission can only be proved in

65. condition mentioned in cl (b) of section 65, be admitted. *Safar Ali v Mohesh*, 23 C L J 122=34 Ind Cas 956 In a suit for redemption of mortgage, the mortgage deed was not produced. Secondary evidence consisted of a document addressed to the mortgagors by the alleged agent of the mortgagee, which proved to be his liability mortgage, rting to be his. It was produced for mortgaged deed under s 65(b), secondly, to save limitation under section 19 of the Limitation Act. Held that the document was no secondary evidence of the existence of the mortgage as it did not fall within the category of writings described in clause (b) of section 65 of the Evidence Act. *Gayraj v Balraj Ali*, 20 Ind Cas 62. This clause has no application where the original document is inadmissible for not being registered or properly stamped. *Dnethi v. Krishnaswami*, 6 M 117; *Sambayya v Ganaayya*, 3 M 308, *Damodar v Attimaram Babaji*, 12 B 443 (446). Where the record of the statement of the accused is not admissible, secondary evidence thereof could not be given. *Queen Empress v Viram*, 9 M 224. In rejecting such evidence, *Parker J* at p 240 observed: "Reference is made by the Sessions Judge to s 65 of the Evidence Act, the words appearing in cl (b) in that section being quoted; but for the reasons above stated, I am of opinion that it was not writing—if the affixing of seal be held to constitute a contents of the previous statements."

CLAUSE (C).

lost or destroyed. The loss or destruction of a document opens the door for the admission of secondary evidence. *Wig's L* 274. This rule is a very old one. In 1611, in *Dr Leyfield's Case*, 10 Co Rep 92 (a)=Wig. Cas 233 in admitting secondary evidence in such contingency, the Court observed: "yet in great and notorious extremities, as by casualty to fire, that all his evidences were burnt in his house, there, if that should appear to the Judges, they may, in favour of him who has to great a loss by fire, suffer him upon the general issue to prove the deed in evidence to the jury by witnesses, that affliction be not extreme whenever equally slowly where."

Anon, Jenkins J In the charters have been lost

2 Keble 546; *Underhill* 8; *Robinson v Davis*, 1 v *Melhuish*, Amb 24 *Villers*, 2 Atk 71, Lord

Wuzer Ali v Kali Coomar, 11 W R 228; *Rajendra v. Behari*, A. L. R. 1932 Pat 157; *Abheraj v. Gaya*, 8 O. W. N 1228. But secondary evidence is admissible where the Court is satisfied that the original is lost or destroyed. *Hurish v Prosunna*, 22 W R 303, *Syed v. Nuseebun* 10 W. R. 24, *Lukhimon v. Koruna*, 3 C L R 509; *Kheller Chunder v Kheller Paul*, 5 C 886=6 C L R 199; *Jaffree Khanum v Imdad*, 2 N W. P 314; *Woomesh Chunder v Sam Sundari*, 7 C. 98=8 C. L. R. 189; *Syed Abbas v Yadeem*, 3 M L A 156;

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evidence is
destroyed

Amerunnisa v. Afadoonnisa, 15 B L R
A. 87; *Sheo Sarun v. Goolkaur* W R.

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Suraj v. Lord St Leonard, 1 P D 151; *Rance v. Hirdyal*, W R (1861) 301;
Ranjit v. Chumtal, 1 N. W P 178; *Bishambhar v. Emperor*, 90 Ind Cis 706=
2 O; *Marakarutti v. Venantutti*, 16
M 67 Cas 660; *Gopi v. Mahanandi*,
12 M 21 L W 227=97 Ind Cas
785=A I R. 1926 Mad 1001; *Tulsi Ram v. Ram Saran*, 23 A L J 109=

known and that fact may be recognised
telegrams are destroyed after three months
secondary evidence is admissible *Bishambhar*
v. Emperor, 2 O W. N 760=90 Ind. Cis 706 If it is found that a
document has been lost evidence may be given and whether proof is sufficient
in a case is a question of fact *Bibi Sugra v. Anqad Gir*, L R 1 A 201.
But a mere assertion of destruction that a document is lost without any
sufficient ground for admitting secondary
evidence is not sufficient. 3 A 539 Where the explanation for the
loss is lost, the regular course is to prove

the loss before tendering secondary evidence *Surat Singh v. Rani*, 59 Ind
Cas 461 In ordinary cases if the witness in whose custody a deed was, should
depose to its loss, unless there is some motive suggested for his being un-
truthful, best evidence should be accepted as sufficient to let in secondary
evidence of the deed *Phirsham v. Ianna* 21 O C 272=48 I A 365 P C

of such
as 1000
insist-
power-
Dayal,

and Cas 399 But the question whether or not sufficient proof of search for,
or loss of, an original document, to lay a ground for admission of secondary
evidence has been given, is, a point proper to be decided by the Judge of first
instance and is treated as depending very much on his discretion and his con-
clusion should not be overruled, except in a clear case of miscarriage *Ma Path*
v. filed a suit on
have been lost and
was not lost but
suppressed as there was an payment of

A L J 265=18 Ind Cas 878

word "instruc-
tion" merely that it
the two come
moment that the
destruction becomes questionable at all (is it when not proved by eye witnesses
of burning or tearing, the inquiry is raised whether the search for it has been

5. sufficient; and, in the next place, the proof of a loss usually carries the implication that the thing not found has ceased to exist, and thus assimilates the case to one of destruction. Thus the great question to which so many Judges have devoted so much pains—the establishment of a test for the sufficiency of proof of loss—includes practically not only the cases, of loss in the narrower

and important document which the party might have an interest in keeping, and for the non-production of which no satisfactory reason is assigned . . . where the loss or destruction of the paper may almost be presumed very slight evidence of its loss or destruction is sufficient" *Per Abbott C J in Brewster v Scuell*, 3 B

never likely to be required for any purpose whatever. In the former case reasonable to exact proof of a very careful search, whereas in the latter very slight evidence tending to show loss or destruction will suffice. *Will Es 2nd Ed* n 208. What is proper search or enquiry must depend on the particular

surrounding circumstances of the particular matter before the Court. A paper of considerable importance, which is not likely to be permitted to perish may call for a much more minute and accurate search than that which may be considered as waste paper, which no body would likely take care of. . . What inquiry will do? I think, in cases of this sort [there the loss was

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where it ought to be found" *Per Pollock*
W 319 329. In the same case *Alderson*
has been a loss, and whether there has
much on the nature of the instrument searched for. If we were speaking of
envelope, in which a letter has been received, and a person said, "I have searched
for it and
with the
party who
to be it
it has been taken
It has been taken
ought to go to
away. A
would be satisfied
itself; and the
contents of this
document by
the original" *R v Morison*, 4 M & S 45, *Gully v Exeter*, 4 Bing 200, 21
C B N S. 747, 750, *R v*
W 269; *R v Gordon*, 25
ully as to exclude every

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suggests and which were made

st. 278; *R. v East Fairley*, 392—1896) Vol II, 347. If circumstances tending to the most rigid enquiry should be made into the reasons for its non production *Johnson v. Aruine, supra*. It follows, properly, that the determination of the sufficiency of the search and in general of the proof of the fact of Court's discretion *Wigmore* § 1191 evidence of the search of the originals, are admitted. Whether or not sufficient proof of search for or loss of, an original document, to lay a ground for the admission of secondary evidence, has been given, is a point proper to be decided by the Judge of the first instance, and is treated as depending very much on his discretion. His conclusions should not be overruled except in a clear case of miscarriage *Haripria Debi v. Rukmini Debi*, 19 C 438—191 A 79 P C. *Chotram v. Ahem Chand*, A I R 1929 Sind 7. In *R v Kent north*, 7 Q B 612, 649, *Denman L C J* said "I think that we collect from *R v Morton*, the only rule, namely, that no general rule exists. The question in every case is, whether there has been evidence enough to satisfy the Court before which the trial is had, that to us the words of *Byrley J* in *R v Denton*, 'a *bonafide*' and diligent search was made for the instrument where it was likely to be found." But this is a question much fitter for the Court which tries than for us. They have to determine whether evidence is satisfactory, whether the search has been made *bona fide* where there has been due diligence, and so on. It is mere waste of time on our part to listen to special pleading on the subject." *Wigmore* § 1191, *Ma Nyeu v. Yauu*, U M R 1897

proof was given of search, cannot be received as secondary evidence. *Meer Usudoolah v. Beeby Imamman*, 5 W R P C 20—10 M I A 19, see also *Roopmanyoores v. Hamalal*, 1 W R 144; *Pandu v. Bapudas*, A. I R 1929 Nag 288

Non production for any other reason. The question whether the non-production is due to any other sufficient reason not arising from his own default or neglect is one of fact and depends mainly on the discretion of the Court, *Gaya Pros d v. Jaswant*, 125 Ind Cas 460—A I R 1930 All 550. The certified copy of a document which is already filed in another Court and cannot be produced without unnecessarily delaying the trial of the suit is admissible under s 65(c) *Jobeda v. Monabali*, 130 Ind Cas 860—A. I R 1930 Cal 479

CLAUSE (D)

When the c

6 M & W 68

also be proved

be produced in Court *Taylor* § 438, see also *R v. Farsen* 6 C & P 81 *Cohen v. Bolton*, 2 Camp 108, *Doe v. C* 8 C & P 728, *Bruce v. Nicolopolo* 1

bringing a notice into Court." A remarkable illustration of this rule was furnished in the case of a man, who fell of the Liverpool goal, on mere Lord Abinger in *Martimer v. McCallan*, must show that the writing cannot be produced in Court. *Jones v. Farleton*, 9 M & W. 675—11 L J, Ex 267. Evidence has been admitted of the inscription

65. on a will or a tomb stone giving the date of death *Smith v Patterson*, 95 Mo 525=8 S W 567; *Bruce v Nicolpolo*, *supra*, *R v O'Connell*, 5 St. Tr N S 241. If there are stone itself may have to be produced; *Davidson*, 13 Q. B. D 265. There is a that the Court may readily asume that they cannot be produced in Court, and as to which secondary evidence may be allowed, such as inscriptions and addresses on travelling trunks. If the produce found is indispensable, it would sign were painted on a house, it would have to be produced, nor can it be for wagons, boxes, tombstone, and the like, on which one's name may be written *Kansas etc Rail v Miller*, 2 Colo 440, *Burrell v North*, 2 Cr & K 679. While Courts, in the administration of the law of evidence, should be careful not to open the door to falsehoods, they should be equally careful not to shut out truth. They should not encumber the law with rules which will involve labour and expense to the parties, and delay the progress without giving any additional safe guard *ited States*, 3 Wall. (U S), 114; *Burr* on a coffin plate, the coffin plate should be produced as it is removable. *R v Fire Wks Cir. Ev 5th Am Ed 212*. says Mr. Taylor "and the ut its removal, secondary that case, as in the case of mural inscriptions, it is not in the power of the party to produce the original" *Alton v. Farmal*, 1 C M & R 227, 291, 292; *Boyle v Wiseman*, 10 Ex R. 647. *Taylor* § 438. Mr *Whitley Stokes* thinks that such a case is not provided for, unless perhaps by the latter part of clause (c). But it can hardly be said that the original cannot be produced in reasonable time when it cannot be produced at all. It seems that the case would fall under paragraph (iii) of clause (a), in as much as it is in the power and possession of a person who is out of the reach and not subject to the process of the Court. *Woodroffe Ev 5th Ed. p 519*. Secondary evidence, of the abstract which by section 32 of the Factory and Workshop Act, 1901 (*Edw 7 C 22*) must be affixed in the factory, can be given as the original cannot be removed. *Owner v Beehive Spinning Co Ltd.* (1914) 1 K B 105=83 L J K B 232, *Mortimer v McCallan*, 6 M & W 53. Under this clause any kind of secondary evidence is admissible.

CLAUSE (E)

When the
record under
this clause In

Lal, 14 C 491. This excep-
Mark Ev 57. In *Hannell v.*
"The admission of copies

practice and besides the documents might be wanted in different places at the

you cannot remove the document in which the writing is made, you are entitled to the next best evidence." *Per Abinger L. C. B in Mortimer v McCallan*, 6 M. & W 53, 59, 11 *ignore* § 1218.

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(1) in the matter of *Adya*, 11 Ind Cas 261.

An entry in a public document such as a settlement record can be proved only by the original
A I R 1923 Lah 150

Radha Nath v Empt
It is doubtful whether

Cham Das,
evidence
L J 659.
from some

record in the Revenue Court is admissible in evidence *Bhaquati v Marjard*,
A I R 1931 Oudh 136-129 Ind Cas 331-7 O W N 1079.

CLAUSE (F).

secondary evidence of the contents
a document of which is certified
is law in force in British India
given in evidence in the first
instance without having been introduced by any other evidence *Hanish v*
Prosunno, 22 W N 200 of which
a certified copy in British
India to be given Cas 50
Hazari Lal v Cas 752
Section 57 of the Evidence Act provides that a copy so given under that
section shall be admissible for the purpose of proving the contents of the
originals, but that clause was not intended to override the provisions of the
Evidence Act.

admissible in evidence *Sansa Rao v Ghani*, 13 C P L R 91 The issue of
a certified copy of income-tax returns to a person not entitled to inspect is
forbidden by s 54 of the Income Tax Act, 1922.

65. This clause only allows certified copies as secondary evidence. But when the original is lost or destroyed any secondary evidence is admissible. *Hunnath v Vajoth*, 6 M 80, *In re Aza and the Breuhildu*, 5 C 583, *Chandresuar v Bisheswar* A I R 1927 P 61=101 Ind Cts 239=5 P 777, *Hiranand v Ram Gopal* L R 27 I A 1=27 C 639 P C; *Ananda v. Secretary of State*, 43 C 973=20 C W. N. 573. Other secondary evidence is also admissible where the document satisfies the condition of the next clause. *Ram Sundar v Chindresuar*, 34 C 293.

CLAUSE (G).

When the original consists of numerous documents. This provision is for the saving of public time. If the point to be ascertained were, for instance, the balance in a long series of accounts in a merchant's books evidently great inconvenience would arise, and much public time will be wasted, if a witness were and to make his examination *Beuling*, 3 Camp 310. He is sworn, and then to give the *Phil Ex* 499 *Taylor* § 462.

where the books and documents are multifarious and voluminous and of a character to render it difficult for the jury to comprehend material facts without the aid of such statements. . . In a trial embracing so many details and occupying so great a length of time as the case at bar, during which a great mass of

it was the only mode of attaining the jury" *Wigmore* § 1230. The principle is that by which the

state of pecuniary accounts or other business transaction is allowed to be shown by a witness's schedule or summary. *Meyer v Sefton*, 2 Stark, 274, 278; *Gardner*

rahaw, 1 De G & Sim 280, of copyright, the material presented in such a way as

to be conveniently compared. *Leurs v Fullerton*, 2 Beav 6, 8; *Maxman v Tegg*, 2 Russ 385, 398, *Wigmore* § 1230. A witness may speak as to the insolvency of a party at a particular time from an inspection of his books. *Meyer v. Sefton*, 2 Stark 274. This exception however, will not enable a witness to state the general contents of a number of letters received by him from one of the parties in the cause, object of the examination be they produced on his mind between the writer and a third party. *Taylor* § 462. 'So a witness' the parties, though he may not be allowed to speak in the general

Lord Kenyon in Roberts v Leach, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

any person who has examined them, and who is skilled in the examination of such documents. In *Ram Sundar v Chandreswar Prosad*, 11 C W N 501=34 C 293, the Court observed "This objection is founded on the fact that the witness who had examined

embodied the results of their examination of the records and registers. The objection made by the learned Counsel for the Appellant is that the Collectorate, under the provisions of the Act, has found as a matter of fact that those documents could not be conveniently

Evidence Act, then the only secondary evidence which could be admitted was the certified copies of the documents in question. We do not agree with the learned Judge. We think the documents were not because the documents were use the fact that

documents. That being so, the general result of the documents examined by the learned Judge, the Record keeper and the clerks who give evidence before the learned Judge, the Abstract of mutation records is admissible under the section. *Sher Mohammed v. 18 Ind Cas 451*. Evidence may be when they consist of numerous *Kanungoes* entertained to assist the use Records, yet it is an abuse of their functions to require them to give oral evidence of the contents of a document such as record of a *Muafi* enquiry which ought to be examined in original by the Court itself. *Gilani v. Mussamat Hussan*, 2 Lah L J 714

66 Secondary evidence of the contents of the documents

Rules as to notice to produce. referred to in section 65, clause (a), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is * [or to his attorney or pleader,] such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case.

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it —

- (1) when the document to be proved is itself a notice;
- (2) when, from the nature of the case, the adverse party must know that he will be required to produce it;

*These words in section 66 were inserted by the Indian Evidence Act Amendment Act (18 of 1872) s. 6

- (3) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;
- (4) when the adverse party or his agent has the original in Court;
- (5) when the adverse party or his agent has admitted the loss of the document;
- (6) when the person in possession of the document is out of reach of, or not subject to, the process of the Court.

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embodies the law of notice, which can be received under section 65, section 34 of Act II of 1855 which section 65 (a), namely, that where the document was out of the reach of the process of the Court. Taking this section with clause (a) of section 65, notice must be given where the document is in (a) the possession or (b) the power of the person against whom it is sought to be possession of a person legally bound to where a person is out of the jurisdiction of, arising

order, cases in which the rule of notice is satisfied, cases in which, by exception, § 1202 Where it is in the hands of the a order to lay the foundation for secondary evidence is reasonable to produce it *Bradford's Case*, Case 24 in Clayton's Rep = Thayer Cas. Ev. p 780 In *Salern v Mehresh Ambler* 247, Lord Hardwick in allowing proof by a copy said: "There be given of the contents of deed in the hands of and does not . . . The rule of the

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proved in itself a notice to quit, . . .
(2) where from the nature of the action the defendant has notice that the plaintiff intends to charge him with possession of the instrument, as for example, in trover of a bill of exchange *Jolley v Taylor*, 1 Camp. 143; *Scott v. Jones*,

P. 113 (3) Where the adverse party
 indolently, as where, after service
 had received paper from the witness
 in fraud of the subpoena. *Leeds v. Cook*, 1 Esp 256, *Nally v. Greenough*, 25
 N. H. 325. (4) Proof that the adverse party or his attorney, has the instrument
 in Court, renders notice to produce it unnecessary. *Dwyer v. Collins*, 7 Lach.
 639 (5) Similarly no notice is necessary where the adverse party or his
 agent admits the loss of the original. In such a case the party will be
 admitted to give secondary evidence of its contents. (6) Similarly if the
 writing is in the control of a third person without the jurisdiction of the Court,
 no resort to legal force is of service. *Greent Ld* § 563(e) The above rules
 are applicable both in civil and criminal cases. It will comparatively seldom
 happen that documents are required to be produced at a criminal trial, and
 1 *Nort Ld* 251 Where
 a letter, which was neither

Each partner should be served with the notice contemplated by s 60 of
 the Evidence Act to produce such accounts and papers as may be in his
 custody. If he omits to produce the books and the books that are proved to
 be at the time in his custody or under his control the presumption recognized
 in illustration (8) to s 111 of the Evidence Act may be applied. *Pulin Bihari*
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dispensing with the notice can operate to make it admissible *Prafulla v.*
Emperor, A I R 1930 Cal 209=50 C. L J 593

Secondary evidence of the Contents 'Secondary evidence of the con-
 tents' means apparently "not of the existence or condition of the documents"
Whitley Stokes, Vol II p 893

Party—Meaning of The word 'party' means not only adversary in the
 cause, but also a stranger 'legally bound to produce' the document *Whitley*
Stokes, Vol II p 893

Such notice to produce as is prescribed by Law According to English
 practice an adversary in the cause is given a notice to produce the document in

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 3 & P 394 But
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drimer, M & M 334, *Byrne v Harvey*, 2 Mo & Rob 89 But as to the time and
 place of the service no precise rule can be laid down, except that it must be such

party desiring to use it, until he has by subpoena duces tecum resorted to the

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hold that in an action of trover for bank notes no notice to produce the same is required. *See* *the* *instrument* These principles apply directly in this case. The form of the pleading, we must had in his possession, found then to be (N. Y) 293; see: Cr. 379 (582)

of papers, (*Jolley v Taylor* 1 Camp. 143); in an action to recover the same, the defendant is bound to produce them. (*Luckett v Clark*, 10 Cox Cr. 379 (582). If the maker of a note or cheque, or the acceptor, in an action, deny by the

D 446) In an action in contract it is held that the pleadings imply notice to the orders and letters constituting the contract. *Zipp v Colchester*, 12 S D 211 (Am). So the rule is the same where the writing is a proper matter of defence and the adverse party must understand that it will come in question (*Kelner v S*).

possession; *Conat*, 30 V.

passing, or delivery is of the same kind with the others which he has disposed of or retained in his possession, he had notice in effect that if practicable to procure it, evidence will be given of their counterfeit character and of having passed them as true. It is notice in law, by which a party is as much bound both in civil and in criminal cases as by notice in effect. Notice in fact is not in form; notice in law is notice in effect, and either is sufficient. *Per Baldern J in I S v Dudley*, 1 Bold W 519, 524 (Am). It seems settled therefore, that on a charge of larceny or of forgery no express notice is necessary; and the principle would also extend to other charges; but the nature of the charge will determine the application of the principle. *Wigmore* § 1205 *R. v. Haworth*, 4 C & P 251, 256. But in an action for arson with intent to defraud the insurer, notice to produce the policy was required. *R. v. Atkinson*, 6 C. & Cr 153, see also *R. v. Elworthy*, 10 Cox Cr. 379 (582). If the maker of a note or cheque, or the acceptor, in an action, deny by the

4 Taunt. 865; *Bucher v. Jarrat*, 3 H. & P. 113. (3) Where the adverse party has obtained possession of the document fraudulently, as where, after service of a subpoena duces tecum, the adverse party had received paper from the witness in fraud of the subpoena. *Leeds v. Cook*, 1 Esp. 256; *Neally v. Greenough*, 25 N. H. 325. (4) Proof that the adverse party or his attorney, has the instrument in Court, renders notice to produce it unnecessary. *Dwyer v. Collins*, 7 Exch. 639. (5) Similarly no notice is necessary where the adverse party or his agent admits the loss of the original. In such a case the party will be admitted to give secondary evidence of its contents. (6) Similarly if the writing is in the control of a third person without the jurisdiction of the Court, no resort to legal force is of service. *Green v. Evans*, 563(e). The above rules are applicable both in civil and criminal cases. It will comparatively seldom happen that documents are required to be produced at a criminal trial, and notice will consequently have but seldom to be issued.

section 63 of the Evidence
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 'la, 26 C 53-2 C W N
 viz Each partner should be served with the notice contemplated by s 66 of
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 be at the the presumption recognized
 in illustration (8) to s 114 of the Evidence Act may be applied *Pudm Bahary*
v Mohendra, 34 C L J 405 Before secondary evidence of any document can
 be given, a notice to *v Ma*
Shue, 2 Rang 397- of a
 letter neither called though
 no objection may be taken to the giving of that evidence, and no subsequent
 dispensing with the notice can operate to make it admissible *Prafulla v.*
Emperor, A I R 1930 Cal 209-50 C. L J 598

Secondary evidence of the Contents "Secondary evidence of the contents" means apparently "not of the existence or condition of the documents," *Whitley Stokes* Vol II p 893

Party—Meaning of The word "party" means not only adversary in the cause, but also a stranger 'legally bound to produce' the document *W hitley Stokes, Vol II = 893*

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o contralict the secondary proof (*Doe d.* 135) or to show that there are attesting *Challias*, 7 C II 413; or to refresh the memory of a witness (*Hill v Ainsworth*, Bristol, 1847); or it seems, for any purpose (*Collins v Garbon*, 2 F. & F. 47, *Doe v. Hodgson*, 12 A & L 135) He is in effect bound by any legal and satisfactory evidence produced on the other side. *Shookram v. Ramlal*, 11 W. R. 248; *Nort Ev* 252

proved is itself a notice. a copy The reason *Slaymaker*, 14 S & R Pa 153, 156 (1m) "Every written

ing" *Wigmore* § 1206, see also *Phillipson v Chase*, 2 Camp 111. But this consideration can well be made in the notice to produce In England,

quit *Ibid* There also this exception in regard to notices to produce, for the

character of because it re of the document 34; *Taylor* red for a ature of a be a mere notice". *Grove v Ware*, 2 Stark 174 A notice of a bill's dishonour was held to be a notice *Ackland v Pearce*, 2 Camp 599 But in case of a ice was re R 261, See also iso notice produce), most Courts from time to time recognize that the case of a notice—notice to quit, notice of dishonour, notices of suit, and the like—is to be governed merely by the general principle namely, where the pleadings by implication give notice to produce the notice, no express notice to produce it is necessary; but otherwise it is required *Wigmore* § 1209

Proviso—para (2)— required to produce it the form of the pleadings, the possession of an in produce need be served upon him *Callan v Freueck*, 6 B & C 398, 399 "Where the nature of the action gives the defendant notice that the plaintiff means to charge him with the possession of such an instrument, there can be no necessity for giving him any other notice" *Per LeBlance J in How v Hall*, 14 East, 274, 277 This principle is accepted in a variety of cases *Wigmore* § 1205 It naturally suggests itself that there are cases in which formal notice to produce would be idle, as in the case of an action for wrongful detention of a document belonging to the plaintiff, although, strictly speaking, such an action would be for the material on which the written character appeared, and it is account that the general

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(*Kelnor v Savage*, 20 Me 199), or the action is brought on a written contract in possession of the defendant which is fully described in the complaint *Dana v Conat*, 30 Vt 246; *Burr Jones* § 223. 'If the note, he is charged with forging, passing, or delivery of the same kind with the others which he has disposed of or retained in his possession, he had notice in effect that if practicable to procure it, evidence will be given of their counterfeit character and of having passed them as true. It is notice in law, by which a party is as much bound both in civil and in criminal cases as by notice in effect. Notice in fact is notice in form, notice in law is notice in effect, and either is sufficient,' *Per Baldwin J in U S v Doebler*, 1 Bold W 519, 524 (Am). It seems settled therefore, that on a charge of larceny or of forgery no express notice is necessary; and the principle would also extend to other charges; but the nature of the charge will determine the application of the principle. *Wigmore* § 1205 *R v Hanorthy*, 4 O & P 254, 256. But in an action for arson with intent to defraud the

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Maun, Po v Ma Shice, 81 Ind Ca 373=A. I. R. 1925 Rang. 7; *Ma Le v Ma Shice* U B R. 1907. 4th Qr Ev 13, but see *Dinonath v Rama Rai*, 6 P. 102-97 Ind Cas 348-1926 P. 512. In another case it is held that in a suit for redemption when the mortgagee is in possession of the mortgage deed, and fails

to produce it, oral evidence is admissible under s 65 (a) read with proviso (2) to section 66 of the Evidence Act. *Mt Amin v. Mt Gurh*, 9 Bur L T. 52-31 Ind. Cas. 692; see also *Bahadur Singh v. Mahadeo Singh*, 36 Ind. Cas 696; *Sahai v. Sheo*, A. W. N. 1888, 117, *Dicarka v. Ramanand*, 11 A 592-51 Ind. Cas 275-17 A. L. J. 711.

No notice to defendants to produce the original was necessary to render secondary evidence admissible, where the defendants, from the nature of the case, were required to produce the original. *Syed D* It is doubtful if a *pro forma* defendant is bound to produce the original, or in the decision of the case is not an adverse party within the meaning of proviso (2). *Durgabati v Jagannath*, A. I R 1929 All 680.

ined fraudulent possession of a document in his third person (who thus is not bound to produce it from the requirement

object of a notice is amounts to a refusal.

Thus in *odium spoliatoris*, a notice need not be given to the adverse party to produce a paper, of which he has fraudulently or forcibly obtained possession, and of a he same to party as once counsel for party

by the adverse means of any taining a deed Mass 284) or *ly v People*, 49

A defendant signed by the he received at the plaintiff, paper produced

did not contain the whole of the letter as written, and that something material had been cut off from the top. It was not necessary for the plaintiff to give notice to produce the other letters. *Robinson v Cutter*, 163 Mass 377, *Burr Jones* § 228.

Proviso,—para (4)—When the adverse party has the original in Court A proof that the adverse party, or for the object of the notice 1 C M & R 38, *Cook v Partridge*, *ibid*) testimony to to produce it

it be likes, at the trial, and this to secure th Taylor § 456 In *Dwyer v Collins*, 7 Ex Ch indorsees against the acceptor of a bill of pleaded, *inter alia*, that the bill was given to prove his plea, and before the Lord Chief Baron, the defendant proceeded to prove his plea, and

Lord Chief Baron, after consulting the Judges ruled that the defendant was not bound to produce the original, and that secondary evidence was admissible.

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In that case Lord Chief Baron Parke said "The next question is whether, the bill being admitted to be in Court, parol evidence was admissible on its non-production, or whether a previous notice to produce was necessary. On principle the answer must depend on the reason why notice to produce is required. If it be to give his opponent notice that such a document will be used by a party to the cause, so that he may be enabled to prepare evidence to explain or confirm it, then no doubt a notice at the trial though the document is not produced is permitted to make use of secondary evidence."

he must do before he can be permitted to make use of secondary evidence. The demand for the production of the document must be true reason, the measure of time necessary to procure the evidence to explain or support it, a very complicated one, depending on the nature of the plaintiff's case and the document itself and its bearing on the cause, and in practice such matters have never been inquired into but only the time with reference to the custody of the document and the residence and convenience of the party to whom notice has been given and the like. We think the plaintiff's alleged principle is not the true one on which notice to produce is required but that it is merely to give a sufficient opportunity to the opposite party to produce it and thereby secure if he pleases the best evidence of its contents, and a request to produce immediately is quite sufficient for that purpose, if it be in the Court. It would be some scandal to the administration of the law if the plaintiff's objection had prevailed. *Wigmore Cas. L. 227*

Proviso para (5)—When the adverse party or his pleader has admitted loss of the document. The rule requiring notice to the opponent proceeds on the assumption that the opponent has possession of the document the object being to show a demand and refusal to produce. So the requirement of notice does not apply on the theory that the document is unnecessary for the document as notice is unnecessary. It follows that where the document is admitted by the opponent to have been destroyed or lost, or even out of his possession, no notice is necessary for it is no longer a case of opponent's possession, but of loss. *Wigmore § 1203*. In such a case the notice could be nugatory. *R v Haworth, 4 C & P 254*. *Foster v Pointer, 9 C & P 718*, *How v Hall 14 East 276*, *Doe v Spill, 3 B & Ad 182*, *Taylor § 455*. A party however cannot under this exception call for a document that has been traced into the hands of the defendant.

Where by the proponent's evidence the document is shown to have been in the hands—as by the presumptive receipt of it, then even taken

by the defendant, while if we take the opponent's denial in express refusal to produce, which equally puts the plaintiff in the position of being equally unable to obtain the document so that notice is unnecessary. *Wigmore § 1203*

Proviso, para (6)—When the person in possession of the document is out of the reach of, or not subject to the process of the Court. Section 60 lays down that secondary evidence may be given of the existence, condition or contents of a document, when the original is shown or appears to be in the possession or power of any person who is out of the reach of, or not subject to, the process of the Court, and when after the notice mentioned in section 60, such person does not produce it. "There is therefore a clear legislative enactment that notice or a reasonable notice, must be given, but that is qualified by s. 60, clause (6) which dispenses with notice. Mr Jackson argues that there must

him at the last moment at the hearing of the suit, would have been nugatory. *Mellus v Vicar Apostolic*, 2 M 295. In *Harmand v Ram Gopal*, 27 C 639 (648) = 3 C W N. 129, Lord Hobhouse said "His proof of the *Silhu* records ions 65 and 66 of the Evidence Act secondary documents, which they are under section 74, when the person in possession of the document is out of the reach of or not subject to the process of the Court, which in the case here" See also *Hurnund v Ram Gopal*, 2 Bom L R 562

will be observed that under such notice is not required, the

ht." This is a relaxation
225 An express waiver of

348 = A I R 1926 Pat 512 = 6 Pat 542
letters were in the possession of parties into claim, but the plaintiff did not take steps. Held that there being no question of the genuineness of the document these steps should have been waived by the Court and the document admitted in evidence under s 66 of the Evidence Act. *Habiram v Hemnath*, 19 C. W. N 1068

67. If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting

Proof of signature and handwriting of person alleged to have signed or written document produced

Principle The introduction in evidence of a writing is not accomplished when the document is produced in Court. There is still a preliminary matter to be attended to before the writing can be received. This is the authentication of the writing or the proof of its genuineness. *McKelvey's Ex* §§ 277 279. Most documents bear a signature, or otherwise purport on their face to be of a certain

and must be supplied by evidence. But a document purports in itself to indicate its authorship, and the perception that this element is nevertheless missing, and must still be supplied, is likely not to occur. There is a natural tendency to forget it. Thus it has constantly to be emphasised by the judicial requirement of evidence to that effect. Thus it is that in the tradition of the common law a wise emphasis has been placed upon the necessity of supplying the logical element of authenticity for writings. The general principle has been enforced that a writing purporting to be of a certain authorship cannot go to the jury as possibly genuine, merely on the strength of this purport; there must be some evidence of the genuineness or execution of it. *Wigmore* § 2100, *Horns voke's Trial*, 25 How St Lr 78, *Prial v Vanbatenburg*, 2 Camp 139. "In the ordinary affairs of men, it is very often assumed, without proof, that he whose name has been affixed to a written instrument placed it there himself. But

7. when signing becomes a matter of legal controversy, it must be established by proof" *Per Bronson C. J in Willson v Beles*, 4 Den 201; 213.

General Principle of Authentication The foundation on which rests the necessity of authentication is not any artificial principle of evidence, but an inherent logical necessity. Thus if as a part of some facts asserted, *Doe's* letter is offered, what is involved in the assumption of the offer is (a) a letter written (b) by *Doe*; thus a letter alone, without the fact that it is *Doe's*, is not receivable, simply because it is not the thing offered. By one of the many rules of Evidence, *Doe's* letter may be admitted. The element of authentication may be, the element of assumed in all. This logical element the importance of proving it, exists wherever any personal connection with a corporeal object is assumed in the offer. The necessity of authentication, therefore applies equally well to chattels—to a knife, a horse, a coat, etc., whenever it is asserted to be connected with a person. This process of authenticating chattels is ordinarily referred to as identifying them, but the two ideas are distinct, and different principles of evidence are applied. Identification presupposes that two objects, apparently different, have been referred to and the issue is whether they are in fact one and identical, not separate objects.

act, i.e. the presence or absence of M at the time or place (if those are known) when the document was made (b) [in the document itself. These will be (1) the handwriting (written), the style of handtyping (2) the ink or other script medium, (3) the paper and other inscribed material, (4) the seal, (5) the contents, (6) the other marks.

class of evidence (III) The retrospective to the making or not external. (a) Internal found, e.g. a dead man's library, yet the document may have been placed there by a falsifier (2) a postal stamp or post mark or other mark indicating that an official has acted upon the document at some time and place, but this mark may have been falsely used.

(3) Sundry marks indicating action by some one subsequent to the original marking of the burnt cloth, indicating an attempt to destroy by fire. (b) External evidence will include (1) all subsequent separate conduct by the alleged maker, indicating a consciousness of its genuineness or the reverse, (2) All subsequent separate conduct by third persons having a similar import—*Wigmore* § 2131, *Wigmore's Principles of Judicial Proof* § 52

Scope of the section of a document, there is what it purports to be? I point is dealt with in Evidence Act governs *v. Gudarkoori* 82 Ind C 306. The nature of the evidence will depend to a large extent on the nature of the document. If it is a mere memorandum such as the entry in a diary mentioned in s 32 (b) it must be proved that the diary was really that of the person whose statements it is said to contain. If it is a letter it must be shown who wrote it, or at any rate who signed it for a signature to a document turns the whole document into a statement by the person who who executed it. *Mishra* *Ev* necessary under this section.

This section does not require to be produced. Nor does the Act require the writer of a document to be examined as a witness. *Abdool Ali v. Abdool Rahman* 21 W R 429. The proof of hand writing and signature under this section must be by any of the recognised modes of proof and amongst others by statements admissible under s 32 of the Evidence Act. *Ibdulla v. Gunnabai*, 11 B 690. The execution of a document cannot be deemed proved as it is required by the Evidence Act merely because it is proved in the sense of the definition of 'proved'. That definition of the word 'proved' must be read along with s 67 of the Act until it is proved that the signature purporting to be that of the executant is in the hand writing of the executant the Court cannot proceed to consider whether the execution is proved. In other words section 67 makes proof of execution of a document something more difficult than proof of matter other than the execution of a document. *Salark v. Jit Tun Bano* 107 Ind Cas 564—A I R 1928 A 303. But it was never intended by s 67 of the Evidence Act that direct evidence of hand writing was always necessary but that section merely stated with reference to needs what was the universal rule in all cases the new rule either to or felt

the fact of execution of the document was properly proved. *Karali v. The Dist Indian Railway* 48 C L J 32=111 Ind Cas 492=A I R 1918 Cal 498, *Barindia v. E*, 14 C W N 1209 1210

and of proof is required for it must nevertheless be shown signature denoting execution who professed to execute it. A

Court is not bound to treat the registration endorsement as conclusive proof of the fact of execution. If there are suspicious circumstances attending the execution of the document such endorsement cannot be resorted to for the purpose of holding that the execution has been proved. *Jogannath v. Dhuraja* 5 O L J 191=48 Ind Cas 279. Under this section a document can be proved by any

When a register is produced in order to prove the execution of the document in it must be proved by oral

testimony that the register was in fact a register of attendance kept for the on a stated date. *Mishra v. J*

said 'There is no evidence as to who wrote down the names which appear on the page in question. It is suggested that the names or signatures were written

57. out by the persons themselves under the date which appears at the heading of the paper. But no witness has been produced to identify these signatures. The learned Sessions Judge has considered that the mere fact that a person's name appears on such a document is proof that he signed it. It is obvious that when this register was produced it was necessary to show by oral testimony that it was the purpose of recording the names of the persons and giving over their names. The signatures were in fact those of the persons.

satisfaction of the Judge to be genuine. As no witness was called to testify to this document in any way whatsoever, it is obvious that these essential requirements were not attempted to be fulfilled. The document accordingly is not admissible in evidence in the absence of oral proof of its nature and authorship and even if it were admitted it does not prove the presence of the petitioners at the time of the execution of their signatures. A witness if the writer of the certificate is not a witness. *Peter v Mahomed* 22 Ind Cas 654.

654. The ordinary method of proving handwritings are (1) by calling as a witness a person who wrote the document or saw it written or who is qualified to express an opinion as to the handwriting by virtue of section 47 of the Evidence Act, (2) by a comparison of the handwriting as provided in section 73 of the Evidence Act, and (3) by admission of the person against whom the document is tendered. A document does not prove itself nor is an unproved signature proof of its having been written by the person whose signature it purports to bear. *Pet Mookerjee J in Sarojini v Hari Das* 26 C W N 113 at p 119, see also *Gunga Pershad v Indrajit* 23 W R 390 P C. To prove the execution of a bill of sale executed in their favour by the plaintiffs' father the defendant called a Kazi who deposed that the vendor came before him accompanied by a witness who was then registered.

On special appeal was sufficient direct evidence under section 67. *2 v Manah Cland* 27 Ind Cas 866, *Lahiri v Bala*, 77 Ind Cas 798-18 N L R 85.

and some other person writes his name. *Mark* Ex p 60. All that is required is that the signature must be by a person who is conscious of his act, a mere mechanical movement of the hand is not sufficient. *Kalee Sura v Hobbs* 21 W R C R. *Sw* 11 r 93. document, *Re* considered as *Roberts* 339, O L J 406, is a mere symbol. *Most universal* Some and sometimes both orally makes a mark. *John v Gainsford* 31 W R C R. *In bonis Redding* 2 53 Ind Cas 131-7. *130 W 770* A mark who does it often.

ratnam 2 C W N 612-25 C. use of pen and ink is not necessary. *Tr* 93. In that case Sir Cresswell held that a mark made by the instrument or some other instrument may make a difference that a fac simile of the whole name was impressed on the Will instead of a mere mark or cross. The mark made by the instrument or stamp was intended to stand for and represent the signature of the testator. In the case where it was held that sealing was not signing, the seals were affixed by way of a signature. So execution of a document can be made by affixing a mark on it. *Taylor v Den* 3 D & P 223, *Baker v Denning*, 11 Ad & L 24, *Donel v Brough*, 11

(1891) A C 435 Where the alleged executant of a deed (who was a marksman) denied execution and all the attesting witnesses are dead or for some other reason not available, proof of the handwriting of the attesting witness and of his identity is sufficient proof of execution. This is founded on the rule that on proof of his handwriting every thing must be presumed to have been rightly done, and a fraud must not be imputed without some evidence on that behalf. *Ponnu Suman Kalyansundara* A I R, 1930 Mad 770=125 Ind Cr. 231

known
from
the
well

had been furnished But as there can seldom be a sole person knowing the

(the case)

multiple

knowing

the same facts are often persons hostilely interested who thus have a motive for fabrication; and if it were once laid down as a general rule of law, that the contents of a letter might be taken as evidencing its authenticity, too many would be found to take fraudulent advantage of this rule. Accordingly, it seems generally conceded that the mere contents of a written communication, purporting to be a particular person's are of themselves not sufficient evidence of genuineness. Only in special circumstances, where the contents reveal a knowledge or other trait particularly referable to a single person, could the contents alone suffice. II

of a particular

, (a) an illiterate's

letter *Ibid.*

Illiterate's letter, typewriting It ought to be conceded that where there is no direct testimony to the act of execution or sending by an illiterate, the evidence to be drawn from the contents should in some situations, be allowed to suffice to go to the jury. The case of an amanuensis using a type writing machine prevents a similar impossibility, whenever the signature (as sometimes happens) is also type written or stamped and it would seem that a similar necessity justifies a resort to evidence from contents. If there were a serious possibility of abuse this step would not be advisable. But in fact there is also a danger of abuse in the opposite direction for the difficulty of authenticating such a document is sometimes taken advantage of by those who wish to be able to disavow their authorship. Today however in view of the scientific development of the study of documents by microscopy and other arts the authorship of type written documents can often be traced with certainty to the specific machine used, so that this mode of authentication does not then in principle differ from that of using the handwriting. *Wignone* § 2149

Printed matter—news paper Vide notes under s 81 *infra*

68 If a document is required by law to be attested, it shall not be used as evidence until one attesting

Proof of execution of
document required by
law to be attested

witness at least has been called for the
purpose of proving its execution, if there be
an attesting witness alive, and subject to the

process of the Court and capable of giving evidence.

"Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with, the provisions of the

58. Indian Registration Act, 1908, unless its execution by the person by whom it purports to have been executed is specifically denied*

The general notion of
be called before another
of that particular witness
to obtain knowledge of the matter more accurately than any other person. His
opportunities of knowledge, it must be supposed, have been not only better than
those of others, but so much better that it would be a palpable risk of injustice to
proceed in the trial without endeavouring to obtain him. Moreover, such a rule
should be applied only where the class of witnesses thus preferred can be
designated with
call him must

in question, he
the one thing
can contribute
by the law by
the partisan interests of either side may fail to furnish *Wigmore* § 186.

History of the rule "As regards the requirement" says *Professor James Bradley Thayer* that the proof of the execution of an attested document must
be by the witnesses if they can be had, this, also, has a clear and very old origin.
Such persons belonged to that very ancient class of transaction or business
witnesses, running far back into the old Germanic law who were once the only
sort of witnesses that could be compelled to come before Court. Their allowing
themselves to be called in and set down as attesting witnesses was understood

Proof by witnesses
ly to know the fact
ght be, he could not,
as, unless he had
It was a part of
witnesses formally

allowed their names to be written into deeds in large numbers. When jury trial,
or rather proof by jury, as it originally was, came in, the old proof by witnesses
was joined with it, when the execution of the deed was denied, and the same
process that summoned the twelve, summoned also these witnesses. The phrase
of the precept to the sheriff was *summoned duodecim* (etc, etc,) *cum aliis*. The
presence of these witnesses was at first as necessary as that of the jury. Great
delays and embarrassments attended such a requirement where the number of
witnesses in

Accordingly
necessary,
After another

longer a nec
century, in 1562-63, process against all kinds of
them to come in, not with the jury or as

witnesses could not in one way or the other
to come in. As regards ordinary witnesses to the jury, compulsory process
seems not have been introduced until 1562-63. Since 1513, the
attendance of
not be got,
long period
whether a de
denied it. Ha

any that can be stated in a Court of Justice" *Thayer's Prel. Tr. L.* pp. 502, 503

Reason and Policy of the old Rule

Strictly speaking there is no sufficient

Lord Ellenborough (in *R v*

and ratiocinative system of

1700 &c So on this point

is great Judges Not being

able to make a departure from long tradition, insufficient and inconsistent reasons for enforcing the rule have been laid down in support of it The rule

is thus stated by Lord Ellenborough L C J in *R v Harringworth*, 4 M & S.

350 "In as much as they are pledged witnesses the knowledge they have upon the subject is essential, and if it can be procured must be forthcoming"

See also *Barnes v Trompousky*, 7 T R 26 In *Gerapulo v Wieler* 10 C B

because 'he is the witness agreed

v Garth, 8 Exch 803 Pollock C B

to prove the execution of a deed

for this reason, that by an imperative rule of law the parties are supposed to

have agreed in *terro* that the deed shall not be given in evidence without his

execution' Relying

(of the rule) is not (as in

evidence, but that he

o speak to the circum-

ed for the purpose of

dispensing with proof at the trial, but cannot be broken" But the difficulty

about this reason is that no such agreement

attestation is required by law Moreover

not apply between others than the parties to the deed

fact Further more this assumes that the opponent charged as obligor or

maker is a party to the document—which, if the execution is denied is an

assumption of the very point in issue *Wigmore* § 1208, *Fransworth v Briggs*,

6 N H 561, 565 *contra Chamberlayne v Ey* § 487 Some of the Judges

assigned the reason

attesting witness as

Porter, 4 Esp 241, 1

principle that there

of what took place in *Le Blance J* in *Chil v Dunning* 1 East 51 where he

reason is reiterated by *Le Blance J* in *Chil v Dunning* 1 East 51 where he

said 'A fact may be known to the

ledge or recollection of the obligor, and

knowledge of the subscribing witness rel

Athurst J in *Abbot v Plumbe* 1 Dougl 440

are numerous First it is inconsistent with the rule itself, for the rule applies

even where fraud duress and time are not in issue, and even where the maker

himself is competent as a witness Again, the attester is in practice not usually

a person who knows anything about the circumstances preceding the document's

execution, or knows more than any other person who by being present

could be a qualified witness Finally if the witness does possess special

knowledge about some affirmative issue, the opponent is the proper person

to call the witness, if he desires him So this rule has no justification in its

original broad form *Wigmore* § 1208 'Has the rule, then, a justification in

policy? It certainly has none in its original broad form But in most jurisdictions

it has by statute been limited to documents required by law to be attested, and

in this shape it seems to be entirely justifiable In the first place the attestation

is in such cases required by law as a special precaution against forgery, thus

the attestation itself must in any case be proved as an element in the validity

of the document, and there seems to be no special hardship in obtaining the

86. witness rather than in obtaining evidence of his signature. In the next place such documents are, in most jurisdictions, wills of deceased persons and deeds of illiterate persons, for such documents the maker himself being either deceased or not acquainted with writings, the attester's testimony is almost inevitably the most desirable and most trustworthy source of information as to the fact of execution, more over it is in such cases that the defences of fraud and undue influence are most likely to be made and here also the attester's testimony is likely to be of use and ought to be obtained if possible." *Higmore* § 1288

Reason of the departure from the old rule and principle underlying the section. "We do not purpose to meddle with execution required either by the Legislature, we think it deserving of serious consideration whether execution of written documents may not in ot

was executed. But it is notorious that in practice the attesting witness in the majority of instances knows nothing of the transaction, the instrument having been prepared by a clerk, servant, or a neighbour is called in to attest it. A del to which no parol testimony is not admitted to contradict or vary the terms of

of the document is not the real matter in dispute and where there are no concomitant circumstances to be inquired into is often attended with difficulty and expense and sometimes leads to the defeat of justice. Cases have occurred where, in tracing a title, numerous witnesses from distant parts have been rendered necessary to prove the formal execution of deeds though their execution was not really in dispute by a single witness, which it was thought the party alleging title the adversary's case it was not supposed

received, and the party requiring it of the document is not really in to be limited to any particular witness to prove the execution. When genuineness is in dispute, the party producing it will be sure to call the attesting witness and the absence of the latter would throw the greatest discredit on the instrument. We therefore recommend that except in cases where the evidence of attestation is requisite to the validity of the instrument an attesting witness need not be called. *Common Law Procedure Commission, Second Report* (1853) p 23, *Higmore Cas* Ex p 246

Attestation of documents—calling of witnesses. No document can be used if not by

when the genuineness of the document has to be proved. *Mahabji*, 61 A 1 sections have no direct bearing on the question as to whether the attestation was according to law. *Balkrishna v Narain Sha* 13 N L R 21. Section 72 lays down that an attested document not required by law to be attested may be proved as if it was unattested. Section 68 is applicable to cases where a document is required by law to be attested. *Kumar v Ghugi* 103 Ind Cas 57. To prove wills required by law to be attested an attesting witness attesting witness alive, and subject to giving evidence. *Tulsi Singh v Jadar*, 82 Ind Cas 306. Where all is sufficient to prove the hand written by other evidence. (*Fido* s 69)

but execution of a document will be sufficiently proved when it is admitted by the party himself who has executed the document (*Vide s 70*). So also where a document is thirty years old, the Court may in its discretion presume the genuineness and due execution as well as attestation of the document (*Vide s 71*). The Court shall presume also that every document called for and not

does not recollect it, its execution may be proved by other evidence. Vide s.

Scope of section 68 The object of placing more than one attestation upon document whether at any party's voluntary instance or by requirement of law, ordinarily not to demand the combined testimony, of all at the trial, but merely provide by way of caution a number of witnesses, so that the contingencies death, removal of residence and the like, may be guarded against, and one witness at least may be available. But a main object in Statutes requiring execution with two or more witnesses is to afford a secondary evidence in case the primary evidence is lost. *Indal C J said* "The law looks primarily to the attestation of the testator and not to the presence of three witnesses."

should be in the nature of guards or securities, to protect him in the execution of his Will against force or fraud or undue influence. The proof of the Will by the three witnesses supposing it should afterwards come in contest only is an incidental and secondary benefit, derived from the mode of attestation. It is well settled that in an action at law it is sufficient to call only one of the subscribing witnesses if he can speak to the observance of all that is required by the statute." *Doe v Lees* 7 C & P 574. In *Bullen v Michel*, 4 Dow 297, 331, Lord Eldon said "They usually call one witness leaving it to the other side, if they think proper, to call the other witnesses." According to English

Wignmore § 1304, see also *Ogle v Cook* 1 Ves Sr 177 *Grayson v Atkinson*,
2 Ves Sr 454, 460, *Binfield v Lambert* 1 Dick 337, *Bird v Butler*, 1 D ck
337; *Powel v Cleaver*, 2 Bro C C 449 501, *Fitzherbest v Fitzherbest*, 4 Br
C C 231 *Carrington v Payne* 5 Ves Jr 401, 411 *Bootle v Blundell* 19 Ves
Jr 494, *Winchelsea v Wanchope* 2 Russ 411, *Tatham v Wright*, 3 Russ &
Myl 1 8, 16 According to section 68 of the Evidence Act, to prove the execu-
tion of a document required by law to
witnesses must be called to prove

in the Punjab which requires *balz* entry to be attested at all *manuwar tam v*
Ghugi, 108 Ind Cas 57—A 1 R 1928 Lah 148 A mortgage deed signed by
the markaman was attested by three witnesses. In a suit on mortgage its
execution was not specifically denied but the plaintiff sought to prove the same.
Two of the attesting witnesses having been dead the third was called, but he
deposed that he attested the deed in the absence of the executant. It appeared
however that the Sub Regi
also spoken
Held that un-
the execution of the mortgage was not specifically denied. *Yatub Khan v*
Gulhar Khan, 52 B. 219—30 Bom L R 565—111 Ind Cas. 237—A 1 R. 1923

68. Bom 267 An account book is not a document which is required by law to be attested and this section has no application to a case in which such account book is produced in evidence. *Emperor v Narboda Prosad*, A I R 1930 All 38. There is no law which requires the attestation of a sale deed so far as the Punjab is concerned. This section has therefore no application to sale deed in that province. *Moharaja of Ferozpur v Anath Ram*, A I R 1929 Lah 1. One of the three attesting witnesses being alive the plaintiff called one witness and when he resailed the plaintiff proceeded to prove the document by other evidence. *Held* there was a full compliance with the provisions of s 68 and 71. *Hinsor Ali v Gurudas Kapah*, A I R 1927 Cal 188=33 C W N 243=49 C J 16. Where no attempt is made to prove a mortgage deed either by calling in an attesting witness or even by putting any question to the scribe of the deed who was examined as a witness regarding the attesting witnesses or attestation the document cannot be used as evidence. *Jinan v Dilip Singh*, A I R 1929 All 389=27 A L J 538. The amendment by Act 31 of 1926, is a provision relating to procedural law and not a substantive law and therefore must be taken to be retrospective in operation. *Thayammal v Muthu Kumar Sivan*, A I R 1929 Mad 81. Where the executant of a mortgage deed, the writer of the deed and the attesting witnesses have all died, having regard to the new definition of attesting in s 3 of P. A. Act, and to the varied mode of proving registered document as amended by s 63 Evidence Act it is sufficient to satisfy the Court that the execution which was not specifically denied was so probable that a prudent man ought under the circumstances of the case to act upon the supposition that it was so executed. *Parun*. To satisfy the requirement of this section put his mark in the mortgage deed. 12 A L J 1114. Sections 63 to 71 of in which the fact of execution may and have no direct bearing on the question as to whether the attestation was according to law. The sections proceed on the assumption that the attesting witnesses referred to are attesting witnesses within the meaning of the law requiring the document to be attested. If the fact that there are any valid attesting witnesses is denied, it has to be proved like any other disputed fact. If the execution is admitted no other proof of mere execution is required, and if the document on its face purports to have been attested by the required number of attesting witnesses and if it is not denied that the question of valid attestation does not arise, then the maxim *omnia præsuntur* however it is denied that the attestation, relying on the deed as an attested deed must is not admitted. Even if due attestation is not denied, but evidence on the subject is given the Court cannot ignore the evidence. There can be no due attestation without execution, and the fact of execution is of no mortgage deed is concerned. L. R 21. By the terms of this section when a document cannot be used as evidence at all as a document either requiring attestation or in fact attested, but this does not prevent it from being used in evidence as something else or for any other purpose. Section 69 is subject to the limitation viz., that if the documents were tendered in some other proceeding for the purpose of proving the handwriting of the scribe, it could not be objected to upon the ground that no attesting witness being called to prove it it could not be used in evidence at all. *Moti Chand v* 121=44 Ind C 15=96. The law is imperative and does not on the face of it cases provided in ss 69, 70 and 71 of the Indian Evidence Act. Other *Chandra Paul*, 30 C L J 443=27 C W N 131=63 Ind Cal 56. Other evidence under s 71 cannot be admitted where the provisions of s 61 have not been complied with. *Banarsi v Gopinath*, A I R 1931 All 411. *Prabu v Venkata*, A L R 1932 Mad 148=34 L W 663. Where a mortgagor admits having signed the mortgage sought to be enforced but couples it with a denial of the presence of the attesters at the time of signing the mortgage the mortgagor must prove the execution of the mortgage by calling at least one attesting witness to prove the attestation. *Aryun Chandra v Hailash Chandra*, 36 C L J

58. be present ~~the~~ witnesses and see it signed by the testator. And the principle was given effect to in the *House of Lords in Buddell v Spilsbury*, 10 Cl & F 340. There the Lord ~~the~~ party who sees the witness he is an ~~the~~ by two witnesses required by section 59 of the Transfer of Property Act is attestation of the actual fact of the execution *Shamu Patter v. Abdul Kadir*, 16 C. W. N. 1009 P C. The witnesses must see and be conscious of the act done and be able to prove it by their own evidence, they must be both mentally and bodily present, for if not, they might mind. *Per Dr Lushington in Hudson v* (1864) 3 S & J. 578, *Sir Gorell Barr*

In my view, at the end of the transaction

W. 404; see also *Sharp v* 44=10 Bom. L R 943; *Da* 256; *Sashubhusan v Chana* 364 (P. C.) Again in the *ca Phillips*, 4 E & B 450=24 ment was not merely to sub- execution, but included al some disinterested person capable of giving evidence as to what took place These cases contemplate as a requisite of a good attestation that the document must have been executed in the presence of an attesting witness, who sub- scribed his name to the instrument in token of this circumstance *Sarungigur Begam v. Boroda Kant*, 37 C 526=11 C L J 563=14 C W. N 791; see also *Ganga Parshad v. Ishri Pershad*, 45 C 748=27 C L J 548; *Deonaram v. Kakur*, 24 A 319 (F. B.), *Prankrishna v. Jadunath*, 2 C W. N 603, *Gurindra v. Bejoy*, 26 C 246=3 C W N 81; *Dinomona v Banbhary*, 7 C. W N. 160, *Sashubhusan v Chandra Peshkar*, 4 C L J 41=33C 861

tion,
defend
case o

soning appears to be based on good sense, of justice, equity and good conscience.

according to which the Indian Courts are bound to decide *Per Mookerjee J in Surungigur Begum v Boroda Kant Mitter*, 11 C. L. J. 563 (572)=37 C 326=14 C. W. N. 374.

Presence, meaning of—Signature of a *Purdanashin* lady—how to be attested. S.

ed. *Saradil's Law D*

Presence of *Rari* & *Li*

Witnessed *A's* execution

Dictionary *de* *testat*

a written instrument, to

also *Bay v. Hilt*, (1

instrument be deemed to have been executed in the presence of a witness. It may be generally stated as the result of the decisions, that presence involves two ideas, namely, mental cognition of the act, and physical contiguity; in other words, the person in whose presence the act is done must be able mentally to know what is being done and what is done in the presence of a person, must take place in phys

intelligible rule as to

trated by a referee

to what extent judic

subject, *Cass v. Dill*, 1 Bro C C 93, it was held that when the testatrix sat in her carriage, opposite to the window of the attorney's office, in which the Will was attested, the

the room the two witnesses

who attested the codicil, the curtains at the foot of the bed were however drawn

Sir Herbert Jen

hold, if necessary

have attested in

that the testator,

The principle deducible from the

according to the custom of the country,

before male witnesses a document w

sively proved to have been executed b

be deemed to have been attested by

purdah, and who before attestation, satisfied themselves that there was no fraud,

and that the document had been actually executed by the lady screened off

from their gaze *Sarrurtygur Begum v Baroda Kant*, 37 C 520—11 O L J,

563 This view has also been adopted by *Brett J* in the case of *Harmongal*

v Ganour Singh, 13 C W N 40 and by *Stephen and Chatterjee JJ* in *Ira*

Prosad v. Gunga Prosad, 14 C. W N 165 A mortgage deed was taken for

execution behind the *purdah* to a *purdanashin* lady Her son came from behind

the *purda* and said that it had been signed by her The witnesses thereupon

affixed their signatures to the document, though none of them saw her sign it

Held that there was no valid execution of the document as it was not attested as

required by section 59 of the Transfer of Property Act *Rai Ganga Pershad v*

Ishra Pershad, 22 C W N. 697—18 O 748—31 M L J 547 P C; see also

Ihra Rai v Ram Hari, 5 Pat 58 (P C)—89 Ind Cas 659—A I R 1925 P C

417—45 Ind Cas 691, *Padarnath v*

991 P C=37 A 471; *Rai Rali*

not necessary that the attesting witne

sign the document. *Kasidanbi v. Ga*

W N

It is

lady

Requisites of valid attestation The object of attestation is that some person should verify that the deed was signed voluntarily, *Sarrurtygur v. Baroda Kant*, 37 C 520—11 C. L J. 563—11 O W. N. 971. The attesting

18. witnesses must subscribe with the intention, that the subscription made should be a complete attestation of the Will, and evidence is admissible to show whether such was the intention or not. *In bonis Wilson*, 1 P. & D. 269, *In bonis Sharman*, 1 P. & D. 661, *Griffiths v Griffiths*, 2 P. & D. 300, *In bonis Murphy*, 1 R. 8 Eq. 300; *Robert v Phillips*, 4 E. & B. 450, *In the goods of Streatley* (1891) P. 172. The witness execution of the document as an nature to be attested, by which Rob 712; *Ewon v Franklin*, D. Phiffs v *Hale*, 3 P. & D. 166; *In bonis Dilles*, 3 P. & D. 164, *Leonard v Leonard*, (1902) P. 243. Where a witness, put in his signature without any intention of attesting, it is not a valid attestation. *In bonis Smith*, 15 P. D. 2, *In bonis Murphy*, 1 R. 8 Eq. 300, *In bonis Sharman*, 1 P. & D. 661. The attesting - Pearson. that the of the Dunn, 1 in any witness Hanman (1843) 1 Rob. 757, *Roberts v Phillips*, 4 E. & B. 450, *Savitra v F. A. Sar* 19 C. P. mu R. 6 (1) 11 C. L. K. 359. Generally, any competent witness may attest; thus marksmen, (*Re-Enyon*, 3 P. & D. 92) and infants if of years of discretion, may be attesting witnesses. *Phup Ev 7th Ed* 501. A party to a deed or his agent cannot attest it. *Seal v. Calridge*, 7 Q. B. D. 516, *Peace v Brookes*, (1895) 2 Q. B. 415.

Attest
his signatu
v. Krishna,
Ind. Cas.
145; *Dhar*
Ayyasame
Abinash v 1

attesting witness must be shown or presumed. *Radra v Abdul* 35 A. 201.

purpose and in whatever manner, is as a

41 M. 535, *Dinomoyee v Bonbehary*,
48 C. 61. Where the name of the
under a separate heading styled "scribe" apart from the signature of the
only other person who signed as
signature of the scribe was not, as
as attestation. *Abinash v Dasa*
v. *Ajodhya* 20 C. W. N. 699-34.

mda v Ramoomal, A. I. R. 1927 Sindu
853-A. I. R. 1925 Oudh. 734 A
behalf of the mortgagor cannot be a

competent attesting
Cas. 720; *Paban*
Sristidhar v Ra
case, the scribe of
name at the end c
Held, that such

the meaning of this section *Bahadur v. Bahadur*, 5 N. L. R. 3-1 Ind. Cas. 173; but see *Ravi Sahu v. Gauri Sahu*, 39 Ind. Cas. 153. Where a person who has signed a deed as a scribe subsequently witnesses the onus of proving this assertion is on him. *Ravi Sahu*, 4 Pat. L. J. 311-53 Ind. Cas. 73. In any case a scribe wherever he writes the document as an attesting witness unless he actually puts so in the document.

§ 405-21 Bom. L. R. 136-65 Ind. Cas. 616. A scribe who executes a document for and on behalf of the executant is not a person who "sees what passes" or "sees it executed" when he himself does the very thing to which he subsequently signing as a witness he professes to be a witness. *Srinivas v. Lakshmaiah*, 63 Ind. Cas. 507.

Attestation by a Sub Registrar. The registration of his Will by a testator and his signature to a certificate of admission of execution, testified by the signature of the Sub Registrar, and of a witness is a sufficient attestation to satisfy the requirements of section 63 of the Succession Act. *Imarendra v. Kashi*, admits his names on the Will as witnesses to the admission of the testator, such attestation is sufficient to satisfy the requirements of s. 63 of the Succession Act. *Atiya v. Nagendra*, 11 C. 429; *Sarada v. Triguna*, 1 Pat. 360; *Rajendra v. Menota*, 1 Pat. L. R. 267; *Herosundara v. Chantler*, 6 C. 17-6 C. L. R. 303; *In re Roymonce*, 1 C. 150; *Horendra v. Chandra*, 16 C. 19; *Mohammad v. Ali Haidar* 12 O. L. J. 1-23 Bom. L. R. 339. But a Sub Registrar's attestation cannot be taken to be a good proof that he affixed his seal or signature in the presence of the executant. *Abmah v. Dasarath*, 32 C. W. N. 1228, but see *Radha v. Nripendra*, 17 C. L. J. 118.

Personal acknowledgment. "What is the plain meaning" asked *Dr. Lushington* in *Hudson v. Parler*, (1944) 1 Rob. 11 at p. 25 of acknowledging

of *Blake v. Blake*, (1882) 7 P. & D. 102 at p. 107 *Jessel M. R.* observed "What is in law a sufficient acknowledgment under the statute? What I take to be the law is correct in the fact that the witnesses to the will should be present at the time the testator should

68. them to sign their names, that amounts to an acknowledgment of his signature, if the Court is satisfied that the signature of the testator was on the Will at the time' In *Blake v Blake*, (1882) 7 P. & D 110 *Jessel V R* considered the cases of *Guillim v Guillim*, and *Beckett v Howe*, and observed 'I cannot find one word in the judgment of *Guillim v Guillim*, to show that *Sir C Cresswell* was of opinion that if the witnesses were saying he had signed would be sufficient out the interpretation put upon it by new doctrine laid down in that *c Parker, supra* The existence of any such doctrine rests entirely upon the state-

ords to that effect,
this is my signature

Daintice v Fesolo,

(1898) 13 P. D 102 at p 103, *Cotton L J* took a similar view Similarly in *Holt v Genge* (1842) 3 Curt 160 at p 172 *Sir H J Fust* said: "The production of a will by the testator, it having his name upon it, and a request to witnesses to attest it would be a sufficient acknowledgment" In *The Goods of Thompson*

is produc

have an

the page

of his signature by the testator". See also *Balmulund v Bhagandas*, 13 Bom L. R 209-19 Ind Crs 401; *Manicbas v Hermusji*, 1 B 457; *Hurro Sundari v Chunder Kant*, 6 C 17, *Nitya Gopal v Nagendra Nath*, 11 C 49, *Amarendra v Kashi Nath*, 27 C 169 Attestation in the presence of a testator on acknowledgment of signature or exec

Chand v. Mohanand, 6 C L J 453,

Sobair v Sari, 19 C W N 1297-29 In

has been added by the Transfer of Pro

Since the passing of that Act attestation

a personal acknowle

passing of that Act,

before the attesting

sufficient, *Vide Sha*

P. C, *Saheda v Raj*

(P. C) = A. I R 1

263, *Ranu v Laxmanrao*, 33 B 44.

Act, the law was the same
the acknowledgment of

the donor Such attestation was held to be not valid attestation *Vide*
Amarappa v. Raghava, 44 B 231; *Saheda v Rajah Ram*, 11 A L J. 757-21 Ind.
Cas 83, *In re Velutapalatti Peda*, 9 M L T 57-8 Ind Cas 887; *Baynath v*
Biraja, 2 Pat. 52(61). These rulings are also no longer good law.

of

been duly accounted for. *Suamudin Singh v. Kant Fatima*, 11 Ind. Cas
Where only one attester proved a mortgage bond attested by more than two
witnesses and when its due execution was not denied, held that having regard

to s. 63, the document may be taken as properly proved. *Nunl Kishore v. Ance Lam*, 29 C. 25-6, 62 W. N. 195. It is not correct to apply an Act which was passed subsequent to the trial of a case to the procedure in the case. Provision to s. 63 of the Evidence Act was held inapplicable to a case disposed of before it took effect. *Jamun v. G. J.*, 131 Ind. C. 557-1931 A. L. J. 312-A. I. R. 1931 All. 411. A mortgage bond purported to be executed by three persons who were all dead at the time of the suit. The signature of each of them was represented by an irregular scribble such as might be made by an illiterate person, and against each of these marks there was a statement that it was the mark of one of the executants, the name being given in each case. These statements were proved to have been written by a deceased professional bond-writer who wrote the whole document in the ordinary course of his business. The two attesting witnesses also were dead and the signature of each of them was satisfactorily proved to be in his handwriting. Held that there was sufficient proof of the execution of the bond, and that the statement in writing of the deceased bond-writer was relevant under s. 32 (2) of the Evidence Act. *Huti v. Manakchand*, 11 N. L. R. 9-27 Ind. C. 506. Where the only living witness of a document was illiterate and on being examined denied its execution. Held, that the document could be proved by other evidence. *Bairi Prashad v. Gramthar*, 26

So long as there is one such witness as has been called. The fact that, when called, he will prove hostile, does not excuse the plaintiff of his duty. *Tulsi Singh v. Gopal Singh*, 1 Pat. L. J. 369. Sections 63 and 69 read together were intended to lay down how a document

It was not the intention of the legislature that an attesting witness or some other witness should have to prove further that the document was in fact signed by the mortgagor in the

Munna Lal, 11 A. L. J.

15 A. L. J. 164-39

signatures of
, and that of
ption of its
gh v. Hukam

Singh, 15 A. L. J. 167-39 A. 112-38 Ind. C. 501. It is not necessary that two attesting witnesses should be called when two are alive nor that even assuming that one only need be called, he should at least be made to prove

Venkata v.

Mere proof
f a document
ment is one

that the document was executed in the presence of two attesting witnesses
Perumal Chattrar v. Raghava Chattrar, 11 L. W. 563. Where evidence of the

3. execution of a deed is available which, if tendered would satisfy the requirements of s 68 of the Evidence Act, the Court is justified in refusing to draw the presumption under s 90 of that Act nor can such presumption be invoked in favour of the deed nor would such presumption be justified in favour of the authority of a person to sign for an illiterate executant *Raghubar v Sanual* 8 O L J 23=61 Ind Cas 125 Where the only living attesting witness to a mortgage deed who had to be and was called by the mortgagee to depose to a execution and attes the mortgage, was got at by the the clear evidence he gave in the attestation Held that the sworn evidence given by the witness in examination in chief can be acted upon by the Court *Thannem v Bommaderara*, 11 L W. 344=(1911) M W N 747

The death of attesting witness legal evidence not by hearsay found must be proved to the satisfaction of the Court by diligent and honest search A it can be compelled to attend the Court to give his evidence *Asoomah v S R. Chettu*, 13 Bur L T 114=61 Ind Cas 637

To prove a deed of gift the production of a witness who identified the donor and also the attesting witnesses when the deed was being registered and who was known personally to the Sub Registrar together with an entry in favour of the donee in the village records in succession to the donor, is sufficient *Partab Bahadur v Ramdas*, 60 Ind

it is open to the parties to as a matter of fact see the v *Mon Mohini*, 67 Ind Cas 87 T1 satisfies the requirement of section 68

other is, it cannot be inferred that the back the other and that there his evidence *Chinnarayan v Moulaz Zahurul*, A I R

fact cannot be raised for the first time in second appeal *Erulandi Thevan v Subramania Iyer*, 97 Ind Cas 611=1926 M W. N 559 Evidence of attesters to mortgage deed is, indispensable unless it is impossible to produce them *Karimulla v. Gudar Kocri*, A I R 1925 All 56.

Required by law to be attested The term "required by law to be attested" means required by law of the country where the property is situate *Elizabeth May Toomey v Bhupendra Nath Bose*, 7 Pat. 520=111 Ind Cas 57=A I R 1928 Pat. 304 In that case *Dawson Miller C J* said. "It was next contended that the indenture of 20th June 1926 was not properly proved as neither of the attesting witnesses to Mr. Macrae's signature had been called, nor

in this country. The court was divided. The majority held that the signature of his signature required attested the document in Whatever conflicting apply to contracts in relation to law where the *lex loci contractus* and the *lex loci rei sitae* or, as Professor Dicey calls it, *lex situs* differ it seems to be generally agreed by *Story*, *Dacey Westlake* and other text-writers that in so far as the formalities of alienation or conveyances are concerned the law applicable is that of the country where

the land is situated in, (see, *Dict. of Conflict of Laws*, ch. 21 and Appendix Note 17).
The law of the land is the law of the place where the land is situated.

It is a well-known principle of law that the law of the land is the law of the place where the land is situated. Thus as to conveyances or Wills of land the local nature of the thing requires them to be carried into execution according to the law here. So also in *Intestates v. Farth*, 5 B & C 451, 132 A.C. 1 said: "The rule as to the law of the domicile has never been any that the law of England, law of a foreign country." The law of a foreign country. In *Waterhouse* When the law of a foreign the property of a debtor situated

of the law is to be applied, and it does not therefore apply. *Sanatin v. Dina Nath*, 20 C 222-3 C.W.N. 224

An unattested personal covenant to as containing a Deposit in the Receipt Co. includes it. *Madras Deposit in the Receipt Co.* is impossible to view the question of the execution with reference to the covenant to pay as severable from the execution of the document in so far as it creates a security. *Virappa v. Chinna Juthu*, 3 M.L.T. 175-17 M.L.J. 213-20 M. 251, but see *Venkata v. Venkata*, 51 M. 163-1 I.R. 1931 Mad 110-60 M.L.J. 50

In order to prove a sale deed, it is not necessary, under this section to examine a marginal by law to be attested is not a document application to a case in which such account book is produced in evidence. *Emperor v. Narbada*, 51 A. 551-121 Ind. Cas. 879-A I.R. 1930 All. 34

This section only applies to cases where a document is required to be attested in the manner provided by law and it can not be admitted in evidence unless one of the attesting witnesses is examined. *Mathura Prasad v. Chhedi Lal*, 13 A.L.J. 553-29 Ind. Cas. 363

The provision of this section does not apply to the Will of a Mahomedan, and so an admission by the defendant, in a suit by the testator, was held to be relevant in a later suit to prove the Will. *Najban Bibi v. Sayad Raja*, 1 O.C. 468

Waiver of objection. Where no objection was taken to the admissibility of a mortgage deed in the Court of first instance on the ground that the deed was not attested, it is not competent to object to its admission in a subsequent suit. *Kalithra*, 13 M.L.J. 143

Effect of document not properly attested. A document which is inoperative not being properly attested can not take effect.

164 (F.B.)-11 A.L.J. 141-18 Ind. L.J. 133-36 Ind. Cas. 903, *Prannath v. Andra*, 44 C. 388 (P.C.); *Official Receiver v. Hemchand v. Malloo*, 10 N.L.R. 81; 18 S.L.R. 789 *Narayan v. Lakshmandas*,

only one witness is amount contained *Pulaka Vetti v.*

Thiruthapalli, 32 M. 410 (F.B.) (*Madras Deposit and Benefit Co. v. Oonamalat*, 18 M. 29, overruled); *Sada Kavur v. Rudepally*, 30 M. 281, *Ram Narain v.*

8.

; *Sonathun v. Dinonath*, 26 C. 222; *Dhand v. Jafaladdi v. Mohar*, 26 C. 78; *Dulham v. Behari*, M., 43 M. L. J. 475; *Mathura v. Cheddi*, 13 A. 100; *Cher v. Clara Ruxton*, 4 C. L. J. 510; *Quah Chang*

Transfer of property Amendment Act (XXVII of 1926) whether retrospective. The Transfer of Property (Amendment) Act (XXVII of 1926) was

and *Roy JJ.* held, (1) that in view of the definition of the word "attested" in

adequate, but it was held by a Full Bench in the Allahabad High Court in *Gurja Nandan Kaluar v. Hanuman Das*, A. I. R. 1927 All 1-49 A. 25 (F. B.) and this was followed by a Bench in *Sajer Paramanick*, A. I. R. 1927 Bom 100. The Bombay High Court in *Matulal* decided on the ground that Act of 1926, made the decision in that case, made the

alone, there would have been no doubt whatever on the question. That amendment was, however, inserted in this Act in the middle of a large number of amendments relating to the military and air force and s. 1 of that Act was enacted at the same time which prescribes as follows.—

"The repeal of any Act shall not affect the validity, in any proceedings before any court, of anything already done or suffered, or any proceeding in respect thereof, or any debt, penalty, obligation, liability, claim or demand or any indemnity already granted, or the proof of any past act or thing."

When the legislature determined that that should not affect the validity, invalidity, effect or consequences of anything already done or suffered, or any proceeding in respect thereof. It would therefore,

Act and under which portions of over 100 Acts are repealed, and amongst these are s. 3 and 4 of Act 10 of 1927. By repealing s. 1 of Act 10 of 1927 that Act would have its retrospective effect restored, but in Act 12 of 1927, the saving clause contained in Act 10 of 1927 is repeated almost verbatim. This saving clause, therefore, enacts that the repeal of s. 3 and 4 of Act 10 of 1927, which would have made that Act retrospective, is not to have that effect, for Act 12 of 1927 cannot restore, therefore, of this legislation of 'attested' is not to have retrospective rights or any act done in the 1 not valid when executed for want of proper attestation the subsequent legislation will not make it valid. But the view expressed by their Lordships in this case

in a subsequent Full

A I R 1929 Mad 1-55

decision was —

"Whether Acts 27 of 1926, 10 of 1927 and 13 of 1927 are retrospective in their nature so as to apply to documents executed on a date prior to their coming into force?"

Courts—*Frotter C J* on behalf of the Full Bench answered the question as follows. The Acts are retrospective. We should have thought that Acts 27 of 1926 and 10 of 1927 showed a clear intention that they were to be regarded as retrospective. The Acts of 1927 preclude further discussion."

772=109 Ind Cas 469=A I R 1928
v *Swami*, 30 L W 677=A I R 1929
Mad 881=57 M L J 588, *Dargawati v Jagannath*, 27 A L J 1391=118 Ind
Cas 662=A I R 1929 A 680

Proviso So far as any rule of pleading requires that the execution of a document named in the declaration must be expressly traversed, the failure to plead in denial must, under such a rule, be equivalent to a confession of the allegation of execution in the declaration, and thus the execution is not an issue on the trial, and the present rule does not apply. *Wigmore* § 1295, Vide also order VIII, r 5, C P Code. The words, "specifically denied" mean specifically denied by the party against whom it is sought to be used. In *Cook v Transwell*, 3 Launc, 450, *Gibbs C J* said "In cases where 'non est

part of the deed, he must do it by the attesting witnesses in the common way" See also *Gillett v Abbott*, 7 A. & L 783. Proper reading of the proviso to s. 63

69. is that if
required
deed the
document
the deed

an attesting witness *Radha v Deoki*, A I R 1932 All 320 = 1932 A L J 207; but see *Ramdayal v Sulab*, 14 R D 494. If the validity of a mortgage be specifically denied, in the sense that the document did not effect a mortgage in law, then it must be proved by the mortgagee that the mortgage deed was attested at least by two witnesses. *Lachman v Surendra*, A I R 1932 All 527 (F B) = 1932 A L J 653

69. If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting and that the signature of the person executing the document is in the handwriting of that person.

Principle
attesting or
is unavailable
to the orthodox form of preferred witness rule, the attestation must even be used in preference to other testimony." *Wigmore* § 1505. The reason is that the attestation is in effect the extra-judicial statement of the attester to the fact of due execution, admitted under the hearsay exception and being admissible so far as concerns the H

instrument relative to its
have subscribed his name in
attestation comes in by way
Lossee v Lossee, 2 Hill 600
as a written declaration of
event of his death, or absence, yields a reluctant credit by way of necessary
substitute for his oath. *Mr. Hill's Note on the case*; *Wigmore* § 1505. So this
extra-judicial statement, expressed or implied, is always, when the attester is
unavailable, admissible by exception to the Hearsay rule. The question there
is, not merely whether it is admissible, but whether it is preferred to any other
attester is personally
that extent disposed
could now be made
Is it, then further,
a part of the rule of preference that, before thus going to other testimony,
the attester's
singular and
signature

over testimony on the stand under cross-examination is an extraordinary
measure, assuming for such a statement a value not at all to be attributable
ordinarily to such statements. Nevertheless, such a preference unquestionably
existed as a part of orthodox common law rule in England. *Wigmore* § 1300.
But this section requires that the signature of the maker also, as well as that of
the attester must be proved. This contention means in effect that another
witness to the maker's signature must be called, for (as has just been noted)
the attestation is the attester's testimony to the fact of execution, and the placing
of the signature by the purporting maker. If, then, it is necessary to call a
second witness to the maker's signature, this must be on the supposition that
the testimony of the attestation, taken alone, does not go far enough in its
implied or expressed statements. This is indeed the ground upon which in
part the above contention has been rested. It argues first, that the attestation,

while asserting execution by a person of a certain name, does not sufficiently identify that person with the party in the case. It argues further more, from the point of view of policy, that a person might be bribed to make a false

attestor's M 520 that it proof the defendant with the note what is the effect which, with the greatest degree of latitude can

which desc utine A B

stop further and show that the defendant is A B of C in the county of York, or in some manner establish that he is the person by whom the note appears to be executed. Now what does the subscribing witness in this particular case attest? Why, that this instrument was duly executed by a person of the name of Francis Musgrave. There may be many persons of that name and if you do not show

instrument, you ve It is not a instrument executed . . . why? Because it is an essential part of the issue, which you are bound to prove, that the instrument was executed by the defendant in the suit. It seems to me, therefore on principle, that you must give some evidence of the identity of the defendant with the party who has signed the instrument."

Wigmore § 1513 But "where handwriting. In this case one is beyond the reach of the process which could be obtained was

on-residents, (m)] and in instrument

Durr Jones § 329

Attestor's Hearsay Statement—How admissible

Upon the general principle statement cannot be used ng testimony in person.

he did not see executed by the to trustworthiness seem to be four (1) The occasion is a formal one, and the statement requires a writing; and there is commonly a radical disinclination to take part in a false transaction of such a sort (2) The concoction of a false document will either fix an innocent party with a false obligation or will divert legitimate heirs of their rights, and there is a natural repugnance to giving assistance in such a wrong (3) The making of a false attestation, whether or not it is in criminal law a forgery or a perjury, is popularly supposed to be such, and the attestor would probably be at least an accomplice in a forgery, so that substantive sanction deterring from a crime would probably operate to prevent a false attestation (4) The attestor knows that he is liable at any time to be called upon in Court to substantiate his attestation, and not only in his falsity likely there to be exposed by the opponent's witnesses, but he will there be obliged either to commit perjury by swearing to the fact of execution or to his falseness, of recanting and confessing if circumstances which easily to the Hearsay rule. *Wigmore* § 1508.

Scope of the section By the strict rule of the common law the primary or best evidence to prove the execution of a deed or other writing required by law to be attested is generally the testimony of subscribing witnesses, if available

or if not, then proof of his handwriting under discussion was declared by universal as that can be stated (Maule & S 325) yet it has several qualifications and exceptions. The rule does not apply if the subscribing witness is dead (*Adam v Kerr*, 1 Bos & P 360), or can not be found (*Falmouth v Roberts* 9 M & W. 467=11 L J Ex. 180, *Parker v Hoskins*, 2 Taunt 223; *Birt v Walker*, 4 Barn & Ald 697), or is without the jurisdiction of the Court (*Prince v Blackburn*, 2 East, 250; *Glubb v Edward*, the rule formal and ignorth, 4

acts in secondary evidence, it is equally well received as a rule of law produced at a trial

dead or cannot be of being produce writing; and the of the instrumen

it must be proved that "no such attesting witness can be found" in other words, before a party can rely on exhaust all process of the Court 16, rule 10, C P C for the arre-property. *Shahzadi Begam v Cas* 756=A I R 1928 Pat 356 (who was a marks-man) denies dead or for some other reason no attesting witness one attesting dispute as charge the A. I. R 1 writing of o A mor execution.

he denies execution, the Court of fact can consider it *Laturia v. Kamalja*, 1924 Nag 367. Sections 68 and 69 of the Evidence Act read together were intended to lay down how a document which was required by law to be attested, if the provisions of the sections of evidence to intention of the legislature that an should have to prove further that a mortgagor in the presence of at least *Munna Lal*, 14 A. L. J. 1011=39 comes to a finding as to a document having been legally proved within the meaning of this section, it cannot be legally interfered with by the appellate Court, specially when no objection was taken to the admissibility of the document at the time of the hearing *Monch Konda v. Achu Appalacram*, 22

witness is
Churany
 reference to
 proving the attestation of at least one attesting witness when all the attesting
 witnesses are dead, are sufficiently complied with by proof of the handwriting
 of the scribe and by the fact that some of the attesting witnesses signed by the
 pen of the scribe *Krishna Jiva Bhanth, 31 A 615-10 A L J 217 All*

as the document had been admitted by one of the executants in certain other
 document tendered in evidence and proved *Hell*, that the evidence adduced
 did not comply with the requirements of s 69 of the Evidence Act and the
 document could not be taken to have been proved *Gobandhan v Hari Lal,*
11 A L J, 379-19 Ind Cas 121-20 A 361 In England, it is recognized
 that there is a distinction between proof of the handwriting of a person and
 presumptive and other evidence that a document had been executed The Indian
 Law does not appear to allow a party to rely on presumptive or other evidence

the attesting witnesses had been duly accounted for *Suamudin v Haniz,*
11 Ind Cas 225, see also Amerumal v Kiphara, 11 L W 563 This section
 no doubt requires proof that the signature of the executant is in his handwriting,
 but this fact may be proved indirectly by a contemporaneous admission of
 execution made by an executant or by other relevant facts, such as his subsequent
 conduct, just as well as by the evidence of a witness who directly swears to his
 signature Such an admission recorded by the Sub-Registrar in his registration
 endorsement can be accepted in evidence as proof of execution *Ayudha v*
Jagannath, 20 O C 18-38 Ind Cas 605 In the expression "it must be proved
 that the attestation of one attesting witness at least is in his handwriting"
 "handwriting" could probably be held to include, in the case of marks man,
 his mark *Whitley Stokes, Vol II p 694, see also Pran Krishna v Jadunath,*
2 C W N 603

absence of the witness beyond the jurisdiction of the Court (*Mills v Trust,*
11 Johns (N. Y.) 121), or his absence in a distant part of the country, are not
 sufficient *McIord v Johnson, 4 Bibb (Ky) 531* The absence of the witness
 is sufficiently accounted for if, after diligent enquiry, he cannot be found
Clark v Sanderson, 3 Binn, Pa (192); Cunliffe v Sefton, 2 Dist, 182, Crosby v
Percy, 1 Taunt 364, Dudley v Summer, 5 Mass 438, Morgan v Morgan,
11 Bing 359, Evans v Curtis, 2 Car & P 296, Bright v Doe, A & D
22; Whitelock v Musgrove, 1 C & M 511 What is due diligence must, of
 course, depend somewhat upon the circumstances of each case The proof
 should show satisfactorily that a reasonable, honest and diligent inquiry has
 been made After such proof is given, the decision of the question depends
 to a considerable extent upon the so
Burton 11 Johns (N. Y.) 64 Such
Trust, 3 J
 witness, if
Jackson v
 treated as

What is sufficient proof of the search for an absent witness, in order to admit
 secondary evidence of the signature, depends somewhat upon circumstances.
 Where the witness has a fixed residence within the country the rule should be
 more strict than where the defendant had no fixed residence, was a labouring
 man, or a person of low
 condition, or a person
 to use
 words that
 282
 party,

or that sue
be enforce
Thannesa
must be pi

, the rule will not
ies § 529; see al a
attesting witness
d Crs. 637.

Witness' name unknown, through loss or illegibility of Document. 'It is clear that where the very name of the attester cannot be ascertained, the attester is unavailable for the purpose of furnishing his testimony. This situation occurs where the document is lost; here the proponet is exempt from producing the attester [*Keeling v Ball*, Perke Add Cas 88; *Re Phibbs* (1917) p 93]; unless of course the name has otherwise before trial become known to the proponet, for in that case his ti the document before him, might document did or did not once exist

exists" Wigmore § 1314 The known but the person cannot
Giles, 1 E & B 642.

Causes of unavailability—Illness—Failure of Memory etc When the attester is at the time of trial so ill or so infirm from age that it is impracticable, without his production attendance in Court, *Taunt. 16, contra* *Harrison v Bh* far as it involves a mental disability organic in its nature, and analogous to insanity, should

tion purely as to the identity
Wigmore § § 1315, 1316.

If the attester
admissible The
interest. *Suave*
has since become
because it speaks as

70. The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.

Admission of execution by party to attested document

Principle For the purposes of proof, a judicial admission of the opponent — i e an express agreement for the purposes of the trial—has the same effect as a

name. Wigmore § 1296

Scope of the relate to admission § 894. The term party in the course by the admission of *Budha v Serican*,

evidently distinguished from the execution by witnesses, which is known as "attestation." *Jhama v Decluz*, 2 N. L. R 10 (16). Section 70 of the Indian Evidence Act lays down that the admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against

Now the question is as to what is meant by "admission" on these terms the consent to the contents of the document, no this, there he admits that he can be taken to mean that he assents by him, but he may have been compelled to do so, he admits execution of the document, but he is taken to admit that he is the author of the Transfer of Property Act, 1882, 1296-1337-76 Ind. 7 C W N 263 So section 70

of the 12th
attestation
transfer of

enira v Nital, 7 C W N. 1
Satishchandra Mitra v
Woolhoffs said "that
admission on that even when
of execution or signing
has the meaning of it"

Ind Cas 984, *Pabau Khan v Badal*,
Nanhi, 64 Ind Cas 11-19 A L J 855
3 Pat 817-74 Ind Cas 100-1923 P
C L J 114-74 Ind Cas 178, *Aung Rhi v Ma Aung*, 1 Rang 557, *Nageswar*
v Bachu, 4 Pat L J 511-53 Ind Cas 79; *Priyanath v Bissessar*, 1 C.
W N 603, *Dhruva Lal v Shambu*, 47 Ind Cas 9 But in a recent
case the Judicial Committee of the Privy Council has held that this section
1 *Hira Bibi v Ram Hari*, 30 C W
A L J 815-52 I A 362-20 W
1144-42 C L J 148-98 Ind Cas
R 1925 P C 203 This section applies
Ala Po Gu v Ma Min Thu 5 Rang

ad to the
the Indian
law to be

444-44
mat
all,

Unandia v Harilash Chandra, 36 C L J 373 The admission by a mortgagor
of the execution of a mortgaged deed before the Court does away with the necessity
of proving its execution but not with the necessity of such attestation as is
required by law *Pandurang v Balaji*, 14 C P L R 42 Under this section,
sufficient proof as against the
proposition that the document

4 Pat L J 511, *Nibaran v Ram Chandra*, 22 C W N 445-44 Ind Cas 984
document cannot be
proof of its execution
178-38 C L J 114,

for his purposes, it is also (so far as he is concerned) genuine for the proponent's purposes. The execution thus not being disputable, the rule requiring the attesting witness to prove it does not apply. *Ilignore* § 1297

Proof when attesting witness denies the execution

71. If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.

Principle The notion of the rule of Preference for the attesting witness is that of the general desirability, in furtherance of truth, of obtaining his knowledge on the subject. What may be the tenor of witness's testimony, remains of the side.

by evidence the execution, the present rule says nothing about the consequences—whatever any other rule may say. The present rule's force is absolutely spent when witness is produced for examination. So the attester's positive denial of the facts of execution, contradicting the statements implied or expressed in his attestation leave the proponent still free to prove by other testimony, if he can, the facts of due execution, a permission demanded not only by principle but also by policy in as much as the proponent might otherwise be defeated of his rights by a corrupt attester. *Ilignore* § 1302

Scope of the section The party seeking to prove an instrument may examine his witness as to the acts of execution performed, the date, the place,

15 Pick Mass 534 If a party, who calls a witness to prove a particular fact, be disappointed in the result of the testimony, it is competent for him to prove the fact by other testimony. 3 Stark Et 1692 If the subscribing witness fails to establish attestation, of law, not testimony

534 In other words, the execution of the instrument, even though it be a Will may be established by competent evidence against the positive testimony of the subscribing witnesses. *Matter of Gottrel*, 95 N Y 329 The party who would establish a deed must lay his ground work by the production of the subscribing witnesses if the execution of it, they fail to establish the positive rule of the law, is not to be established by other evidence.

attestation or not. *Nort Ev* 254 When in a mortgage suit it was found that one of the attestors was dead and the other either denied or did not recollect the execution of the document, the execution of the same can be proved by other evidence. *Lakshman v Gokhul*, 1 Pat 54—(1922) Pat 415—70 Ind Cas 298 A statement of the attesting witnesses to a mortgage deed that they signed the blank paper and not the completed deed is sufficient to attract the operation of this section and entitles the mortgagee to prove execution by evidence other than that of the attesting witnesses. *Dinabandhu v Sanatan*, 48 Ind Cas 624 "If one of two or more attesting witnesses being called, denies or does not recollect the execution of the document it is not very clear whether other evidence can be given to prove it, if there be another attesting witness alive, subject to the process of the Court and capable of giving evidence,

71. who is not produced? *Field L 7th Ed 227*. It is not intended by enacting this section to depart from the rule of English law that the evidence of the other witnesses should not be introduced unless the absence of the other attesting witnesses is satisfactorily explained in the case where one of the two attesting witnesses has been called and has denied execution. *Ayemanti v Mahammad*, 49 C L J 347 = A I R 1929 Cal 44. So other evidence under s. 71 cannot be admitted where provision of s 68 have not been complied with. *Banuar v Gopi*, A I R 1931 All 411 = 1931 A L J 342.

given false testimony
all which was attested by
four witnesses, two of whom had died and the other two deposed practically in favour of the objector, *Mookerjee v Breachcraft JJ* observed. This however, does not compel the Court to pronounce against the Will. It was ruled in the case of *Nubo Kishore Dass v Joy Doorga Dass*, 23 W R 189, that the mere fact that attesting witnesses to a Will have repudiated their signatures, does not invalidate the Will, if it can be proved by evidence of a reliable

consideration the circumstances of the case and judge from them collectively whether the requirements of the statute were complied with; in other words, the Court may, of the case evidence is of Court and the Will.

also *Re Suet*, (1891) P 400; *Re Orens*, 29 L R Ir 451. So, the test of a document is not necessarily at the n *v. Anjumanunnissa*, 48 Ind Crs 53. 19 Ves. Jr 494, 507, Lord Eldon said

namely, that the party did not execute it." *Per Lord Kenyon, C J* in *Ley v Ballord*, 3 Esp 173 note "The attesting witness's testimony is not indeed conclusive for the party may go on to prove him untrue-worthy and may call other witnesses to prove th *v Harringworth*, 4 M. & Glascock, Skinn 413; *Austin* N P 264, *Richie v Oatfield*, *v. Bradbury*, Buller N P 26. hands, it was objected he if you call one v he prove against you him to call other *Wignore* § 1202. absence of recollection evidence *Sheik K Balram v Kamali* 347 = A I R 1929 Cal 441. See also *Coles v Coles*, L R 1 P. 70; *Doyle v*

v. Hodson, L. R. 1 P. 362; *Dayman v. Dayman*, 71 L. T. 693, *Pillington v. Gray*, (1899) A. C. 401; *Goodison v. Goodison* (1913) 1 Ir R. 219. Where the attesting witness denies attestation and the other attestors are dead, what is required under s. 71 is only proof of the presence of attesting witnesses. *Lalla v. Lalla*, 74 Ind. Cas. 969. *Sankar v. Sankar Dayal*, 1533 P. 5; *Phip. Ev.* 502. Where the only living attesting witness of a document was illiterate and on being examined denied execution. Held, that the document could be proved by other evidence. *Balraj Prasad v. Gambhir*, 29 Ind. Cas. 500. At the time of its execution, the witness is considered hostile by the party taking his stand on the document, does not relieve him from the duty of examining him as a witness. *Gobinda v. Pulin*, 31 C. W. N. 215. *Tula Singh v. Gopal Singh*, 1 P. L. J. 369. If he denies the execution, other oral evidence is admissible to prove execution. *Basdeo v. Rashbehari*, 104 Ind. Cas. 441; *Lakshman v. Gopal*, 1 Pat. 151; *Sriji Mukhi v. Monmohi*, 1425-103. An attesting witness is not bound to call a hostile attesting witness. *Belbin v. Steele*, 1 S. & T. 118; *Phip. Ev.* 502.

obviously cannot excuse, for it cannot be ascertained except after production to testify.—When it appears after such production, other principles come into play, (a) the witness may adopt his attesting signature as record of past recollection, and upon the faith of it verify the facts of execution as thus known to him be otherwise of execution; by other qualified persons. *Wigmore* § 1315. The first question is, may not the attesting witness, though not actually recollecting the circumstances, adopt his signature as his testimony on the faith had he not witnessed the execution. *Id.* s. 159.

circumstances of the execution prove the facts of execution by other witnesses. Because it could never have recited, when attending the will, not because a requisites of the law, but because they would most likely prove or disprove them, and

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71. *Lindley L*
 sion, in a sh: :
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 where such
 disproved. The maxim only comes into operation where there is no proof one way or the other, but where it is more probable that what was intended to be done was done as it ought to have been done to render it valid, rather than that it was done in some other manner which would defeat the intention proved to exist, and would render what is proved to have been done of no effect." See also *Cooper v Beckett*, 3 Curt 618=4 Moo P C 419, *Wright v Sanderson*, (1884) 9 P & D 149, *Lloyd v Roberts* (1859) 13 Moo P C 158. The presumption applies with more or less force according to the circumstances of each case. *Vennico* (1890) 15 P. & D 170 (184) probate and if the Will has been duly executed, *provis* *Hemangini*, 4 C W N 204, *Anna Cholim v Ramaswamy*, 30 M L J (P C)=20 (1907) 7 P & D 103 *Holker L J* been in doubt sign, the fact the Court to come to the conclusion that they *Blake v Knight*, 3 Curt 547, *In re* the recollection *Woolmer v* *Daly*, 2 L J 773 the same day required by law to be attested. One of the attesting witnesses to a mortgage bond deposed that he was present, saw the execution and became an attesting witness, the other witness B stated that at the request of the mortgagor, he became an attesting witness but had no recollection of any other circumstances in connection with the execution of the document. On the same day, when the document was executed, the executant who, in his that the infer laid down in 38 C L J 1. principle applicable to cases of this character *Jogendra Nath v Nital Charan*, 7 C W N 391, by the Allahabad *Nar* *Manlal* 39 A 109, *Ultam Singh v Hulum Singh* 39 A. 102. *Sh* by the Madras High Court in of the upon the face of the signature of the testator at the foot, as also the subscription. It was ruled by *Dr Lushington*, that, in the absence or death of witness prima facie the presumption is that the testator signed in the joint presence of the two persons and they applied by the Allahabad High reference was made to *Wright* followed, as based on sound mentioned before. Reference may in *Blake v Blake*, 7 P. D. 102; *Harris v. Peterell*, (1962) P 205. No doubt (1915) 1 P 211, the que stances, and cases are con inference by reason of were not in contemplation of

Proof of document not required by law to be attested.

72. An attested document not required by law to be attested may be proved as if it was unattested.

Principle and Scope. This section embodies section 37 of Act II of 1855. For a long time it was held that when a document was attested, one at least of the attesting witnesses must be produced. *Doe v. Dumford*, 2 M & S 62. In *Warrel v. Ferrour*, 2 Camp 282, 284, Lord Ellenborough said that "it did not depend on the nature of the deed to be proved, it must depend upon the possibility of procuring the attendance of the attesting witness, not upon the testimony he is likely to give." See also *Higgs v. Dixon*, 2 Stark 180; *Street v. Bartlett*, 5 C B 542. But as this worked great hardships to suitors the Common Law Procedure Act 1854 (17 & 18 Vict C 125, s 26) and the Indian Evidence Act of 1855, introduced the present reasonable practice. *Nort. L.* 255. These Acts restricted the rule to documents required by law to be attested. *Re Riche*, L R 12 Ch D 35. In England the Common Law Procedure Act, has been replaced by Stat 28 & 29 Vict C, Ss 1, 7. So now in England, an attested document, to the validity of which attestation is not by law necessary may be proved by admission or otherwise as if there were no attesting witnesses. This rule is applicable also to Ireland. *R v. Mallon*, 12 Ir C L R 55. This

Identity of Party and document. In order to prove a document the identity of the writer or marksmen with the defendant or other person alleged to have signed the document, may have to be given. *Phip Ev 7th Ed 504*. In *Neuson v. Luster* 17 Ill 175, *Trumbell J* said "I have no hesitation in holding that proof of the handwriting of the grantor to a deed furnishes altogether more satisfactory evidence of its execution than would proof of the handwriting of the subscribing witness." The identity of the party may be proved by showing that he had spoken of the (P 613) or by proof of similar especially if the name be uncor. B 881, *Simpson v. Dismore*, 9 M & W 47; *Phip Ev 7th Ed p 504*. The identity of the document, whether attested or not, may also have to be shown, e.g. when the defendant, pursuant to notice, produced a document which the plaintiff denied to be the contract in question, parol evidence was received to determine the point. *Fraude v. Hobbs*, 1 F & F. 612; *Phip Ed 7th Ev 504*.

73. In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person, may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

•[This section applies also, with any necessary modifications, to finger impression.]

* This paragraph was added to s. 73 by the Indian Evidence Act, 1899 (5 of 1899).

73

Principle In proving a document of evidence offer them-selves, first testimony b or some circumstance of the kind of hand second mode there is :

(f) "and on a trial, based on comparison, . . ."

tribunal directly :

Wignone § 1996

to afford a fairly trustworthy inference, must of course be genuine, and also be numerous and representative enough to serve as an adequate basis for inference to the general style *Ibid*

Scope of the Section . By section 45, handwriting and signature of a person can be proved by an expert Section 47 admits the opinion of any person, acquired to be written In addition

under ss 45 and 47,

with an undisputed one

in dispute it to be compared by the party to be genuine comparison is the more satisfactory. If it be proved genuine to the satisfaction of the Judge, with whom the *Ridgway*, 1 F & F. 270, the comparison *Times* 223) A party may under purpose of comparison (*Doe v Wil* be less satisfactory, as a person writing with the very view of defeating a comparison. *Cobell v. Administrator*, could only be made between the disputed & the original But the present

Nott Ev.

doubted in

have declared

admission

comparison with the

standard must be proved

"The difference between letters which have been received in correspondence, - *proven* . . . witness's hand" it was argued in *Mudd v. Suckermont*, 2 P & D

in a condition still

selected or even

Best Ev § 238

in *Mudd v. Suckermore*, (1836) 2 P. D. O. 20, the inconvenience of collateral issues already exists where a witness speaks to the genuineness of handwriting from an impression derived from a letter he has received. The correctness of this knowledge depends on the genuineness of that letter, and even where he says he saw the party write, his knowledge depends on the issue whether or not he did see the party write. As to the second objection Mr. Best says "It is not always easy to obtain fair specimens, and should such be produced, it would be competent to the opposite party to encounter them with true ones." Best on Ev § 238. Concerning the third objection, Mr. Best says "It does not seem satisfactory logic to protect a jury which can rely on availing themselves of that means for the investigation of truth because other juries might, from want of education, be disqualified from so doing; if some men are blind, that is no reason why all others should have their eyes put out." Best on Ev § 238. This last argument against jurors loses all its force in India in as much as no civil cases are tried here by jurors and a few important criminal cases only are tried with the help of

are literate
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witness on the other, it has been pointed out in the latter case the characteristics of the standard are indistinct, shadowy and uncertain, while in the former they appear in

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cause) "has been that the standard writing must be one used in and connected with the case. But how can this be held necessary when we look at the object of the standard. It is of no consequence what the writing you compare is; all you want is a genuine handwriting, and it is as respects the nature of the evidence not material what instrument it is, nor whether the paper be blank in all except the signature, nor whether the writing be connected with the case or not."

In England the controversy was set at rest by the enactment of Stat 17 & 18 which allow comparison of hands by juries as well as under this act, first, that any writings, the not of the jury, but of the

4 F. & F 490).

Muk, 4 C & P

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Russell, 3 F & I

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3. them, the jury may compare them as well as any body else and any two people may think differently" *Per Yates J. in Bqookband v Woodley*, Peake N. P. 21 Note Similarly in *Doe v. Suckermore*, 11 A & E 749, *Denman L C J* said "If the proved document and the controverted are both in Court, and the witnesses speak to their resemblance or difference from immediate observation, they seem to perform a task for the jury which every one of them, even though illiterate, might well perform for himself" So it is clear that on principle, comparison by a lay witness should not be allowed, even in the presence of the tribunal. But this rule does not apply in the case of an expert witness, because "he does what possibly the jury may be incompetent to do" *Ibid*; *Higmore* § 1997 The question of comparison of signature is distinct from question of admissibility *Khyruddin v Emperor*, 53 C 372=92 Ind. Cas 412=27 Cr. L J 266=A I R 1926 Cal 139 The word "purports" in this section does not limit the scope of the section to such documents only as are signed or contain some intrinsic statements of the identity by a party to be in the handwriting of . . . proof be compared with other writing : satisfaction of the Court to have been made or written by that person *Iccra Raghava v. Soura Aiyanger*, 35 M L J 608=41 Ind. Cas 688=24 M L T 477. In delivering the judgment in the case the Court observed "This case turns solely on the Evidence Act. . . . *Kumar v Empe Batchelor JJ* it are inclined to the scope of the statement of th is necessary to writing In used is "alleges the two words the two must l

ascribed by the prosecution to a particular

person, then the regard to the ad disputed writing, have been written or made by the accused *Emperor v. Ganpat Balkrishna*, 14 Bom L R 310=15 Ind Cas 649=13 Cr. L J 505 But in *Barindra Kumar v Emperor*, 37 C 467=14 C W N. 1114 at p 1138, *Jenkins C J* said "In applying the provisions of section 73 of the Evidence Act it is important not to lose sight of its exact terms It does not sanction the comp which the shall be attributed, purport to must stat specifically paragraph of contras son In Sessions : with the submission not an vrr learned & section, ha out having . think this . . . times as a mode of proof hazardous and inconclusive, and especially when it is made by one not conversant with the subject and without such guidance as

might be derived from the arguments of counsel and the evidence of experts. In *Sreenivthy Phoolan Bibee v. Gobind Chunder Roy*, 22 W. R. 272, it was said by the Court that 'a comparison of signature is a mode of ascertaining the truth which ought to be used with very great care and caution.' In this case no expert has been called to assist the Court, and not because no expert was available; there is, it is well known a Government expert as to handwriting and certain of the documents in this case bear a stamp which shows that they have been submitted to him. It is true that the opinions of experts on handwriting meet with their full share of disparagement at times, but at any rate there is this use in their employment that the appearances on which they rely are disclosed, and can thus be supported or criticised, whereas an opinion formed by the Court is not so. And

C. 516,
see also
30 Nag.
is one
or other
not be
proof alone,
and Cas 741;

for the purpose of comparison of handwriting under this section it is his duty, under section 298 of the Criminal Procedure Code to find whether these documents are admitted or proved. The record of the case should contain a note of such finding. *Queen-Empress v. Tulsi*, Rat. Un Cr C 491; *Queen-Empress v. Lal Singh*, Rat. Un Cr C 152. But in a trial by jury, where the Judge allowed certain documents to go upon the record, which were not proved under the requirements of s 73 of the Evidence Act, for the purpose of comparison with the disputed handwriting, held that there was no such irregularity of procedure as to warrant an interference in revision. Whether the documents were proved or not, it was for the jury to decide. *Queen-Empress*

98. The Court has
genuine signature

to come to a conclusion. *Gondu v. Tularam*, A I R 1930 Nag 27.

English law and origin of the rule except when the witness wrote the its nature comparison;—it being the comparing the writing in question some previous knowledge (*Doe v. Sukermore*, 5 A & E 731, per Patteson J), the law until the year 1851, did not allow the witness, or even the jury except under certain special circumstances, actually to compare two writings with each other, in order to ascertain whether both were written by the same person. *Taylor* excluding proof of the hand-writing by The first was the case of a document tent for the Court and jury to compare the in the case for other purposes, and which were admitted or proved to be in the handwriting of the supposed writer. *Best*, Ex § 239, *Griffith v. Williams*, 1 C & J 47; *Doe d Perry v. Newton*, 5 A & E 514. The case of *Perry v. Newton*, *supra*, decided by the Court of King's Bench in 1836, is always cited as the leading case to support this exception, although the exception did not arise in the case at all. On the trial of an

jury, that they might compare them with the signature in the will. The letters were not in evidence for any other purpose. The Judge refused to allow them to be put in, and on appeal the full Court sustained the ruling. *Lord Denman*

3. C. J. said: "This is a point on which we ought not to raise any doubt... The comparison is unavoidable. There being two documents in the cause, one of which is known to be in the handwriting of a party, the other alleged, but denied to be so, no human power can prevent the jury from comparing them with a view to the question of genuineness; and therefore it is best for the

persons acquainted with the handwriting of the supposed writer, either by having seen him write or by having held correspondence with him, the law, acting on the maxim *lex non cogit impossibilia*, allows other ancient documents, which are proved to have been treated and regularly preserved as authentic, to be compared with the disputed one" *Best on Ev.* § 240; *Roe v. Raulings*, 7 East. 282 (n); *Doe v. Taiter*, R & M. 141; *Doe v. Davies*, 10 Q. B. 314; *Moorewood v. Wood*, 14 East. 327; *Barr. v. Harper*, 1 Holt 420; *Brune v. Raulings*, 7 East. 282; *Crauford and Lindsay Peerages*, 2 H. L. C 537; *Solita v. Yarrow*, M & R. 183, *Bromage v. Rice*, 7 C & P. 548. With these exceptions comparison was not allowed in England. *Macpherson v. Thoyles*, Peake N. P. 29; *Brookford v. Woodby*, 9 Peak. N P 30; *Garrels v. Alexander*, 4 Esp. 29; *Brookford v. Woodley*, 9 Peak N P. 30, *Gancols v. Abuandro*, 1 E-p. 37. In *Engleton v. Kingston*, I never heard of those who had never seen evidence in .. equestly received

of the jury to prove comparison of metropolis the jury are composed... conclusions from such evidence. For my part, I have always been inclined to admit it, and shall do so in this case." See also *Rivett v. Braham*, 4 Term. R. 497, *King v. Cator*, 4 Esp 117

The subject at last came before the Court of King's Bench in the well known case of *Mudd v. Suckermore*, 5 Ad. & E. 703. In that case the Court dismissed the case years after dissenting "Compari- ion of the ; and such submitted

those manu- calling on reception of ch compari-

sons were not allowed in India *Annigurubila v. Kristnasami*, 1 M. H. S. C. R. 457.

In 1865, Stat. 28 & 29 Vict. C. 19, was passed, section 8 of which runs as follows: "comparison of a disputed writing with any writing proved to the satisfaction of the Judge to be genuine, shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same may be submitted to the Court and jury as evidence of genuineness, or otherwise, of the writing in dispute" Section 1 of the same Act provides that the above enactment, in common with certain other clauses relating to evidence,—shall apply to all Courts of Judicature, as well criminal as all others, and to all persons having, by law or by consent of parties, authority to hear, receive, and examine evidence, whether in England or in Ireland" *Taylor* § 1869 The Indian Evidence Act found place on the Statute Book in 1872.

Comparison of writing etc., meaning of All evidence of handwriting, except where it is a comparison of handwriting.

ness entertains, mind, derived from some previous knowledge of the hand *Woodward J in Travis v Brown* 43 Pa St 12 (Am) But this is not what is properly known as comparison of handwriting "By comparison is meant," says *Starkie* "a comparison by the juxtaposition of two writings, in order by such comparison, to ascertain whether both were written by the same person" *Starkie* *Ev Part IV* p 654 "Comparison of handwriting is where other witnesses prove a paper to

mind, as an external visible and tangible object is distinct from a mental impression or memory. It is the distinction between what is objective and what is subjective *Woodward J in Travis v Brown*, 43 Pa St 12

The genuineness of the standard Wherever proof of handwriting by evidence that the standard of comparison is obvious Under the rule of a disputed writing the opinion of the Court to be given as to the genuineness

out by the collateral evidence used as a

the person write the same, 13 S W R 330 (Am) certainly), should be given to a jury In a case of perjury

record, is presumed to be genuine, and may be used as a standard without further proof *Saunders v Dawson*, 2 Mart 203 (Am) "When the identity of anything is fully and certainly established, you may compare other things with it which are doubtful, to ascertain whether they belong to the same class or not, but when both are doubtful and uncertain, comparison is not only useless as to any certain result, but clearly dangerous, and more likely to bewilder than to instruct the jury." *Per Coulter J in Dupas v Place*, 7 Pa St 423 (Am) A document to be admissible against an accused person should be proved to be a document

3. in the handwriting of an accused person by comparison with an admitted or proved specimen of his handwriting, in the light of the testimony of expert witness *Pulmbehari v King Emperor*, 16 C. W. N 1105=16 Ind Cas. 257, *Queen-Empress v. Tulsaji*, Rat. Un Cr. C. 491.

are secondary evidence *Ibid* But it is held in *Massachusetts* that magnified photographic copies of the signature in dispute and of admitted genuine signatures of the same person are admissible in evidence when accompanied by competent preliminary proof that the copies are accurate in all respects except as they are capable" and *Herrick* / "of affording some

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accuracy of the copies produced by the art of the photographer, we are unable to perceive any valid objection to the use of such proposed representations of original and genuine signatures as evidence competent to be considered and weighed by a jury" *Marcy v Barney*, 16 Gray, 160 Letter press copies might under some circumstances be useful as well as the originals, or in default of them *Wigmore* § 2019.

Any person whose handwriting is in question may be required by the Judge to write in his own hand any be compared with the document in question *Doed Devine v Wilson*, 10 Moo P C 501, 503; *Cobbett v. Kilmister*, 4 F. & F. 490; *Taylor* § 1871 To prove the handwriting of a person in a particular document a party may ask the Court to have the handwriting of that person to be taken in Court for the purpose of comparison The result of the comparison of an issue arising in the case and is quite of the question of admissibility or otherwise of the handwriting in the province of the jury and not of the Judge *Khytruddin v Emperor*, 42 C L J 504

J. 79; Basant v Emperor, 6 P 304=104 Ind. Cas 626, *Emperor v. ...*, 46 ML 715=69 Ind Cas 374.

Comparison of handwriting—Value of A comparison of handwriting is at all times as a mode of proof hazardous and inconclusive, and especially when it is made by one not conversant with the subject and without such guidance as might be derived from the arguments of counsel and the evidence of experts. *Sarajm v. Hari Das*, 26 C W. N 75, *Balakram v Md Said*, 77 Ind Cas. 872. In *Phoode Bibee v. Gobind Chunder Roy*, 22 W. R 272, it was said by the Court that the truth which ought to be ascertained by the comparison of writings has consequently been deemed a mode of ascertaining truth which ought to be

used with very great caution (*Nabin Krishna v Basih Lal*, 10 C 1047 (1051), and 2-10 W. R. P C 16), specially comparison. *R v. Silverlock*, 516; *Das v. Suchermore*, 11 A & 4 M 1 A 67-7 B L R 216-1-20 I A 95; *Ambika Charan Galstun v Sonatun*, 78 Ind. R 529, *Ibdulla v Gannu*, 11 B an v *Gurish*, 9 W. R 150. dissimilarity of signatures, a particular signature is not the signature, yet resemblance genuine *Sarojini v Hari Das*, 26 C W. N. 113-31 C L J 373, *Batahu v Parmeswar*, 61 Ind Cas, there is room for suspicion that ally written in the character of a person's signature is generally of uniform appearance, and the character of a person's signature is thus a facsimile that one is a perfect match to the other in every respect. There is generally diversity in the marks of the pen, the size of the letter, the level of the signature and space it occupies, that stands as a guard over the genuine signature and *Sarojini v Hari Das*, supra, see also *Colledge J* in test of genuineness ought to be some other specimen or specimens but to the general character of the writing which is impressed on or position, as for instance the writer sitting up or reclining or the paper being placed upon a harder or softer substance, or on a place more or less inclined—nay, the material as pen, ink etc., being different at different times are amply sufficient to account for the letters being made variously at the different times by the same individual. Independently, however, of anything of this sort few individuals, it is apprehended, write so uniformly that dissimilar formations of particular letters are grounds for concluding them not to have been made by the same person" *Galstun v Sonatun*, 78 Ind Cas 668-A I. R 1925 Cal 485

PUBLIC DOCUMENTS.

74. The following documents are public

Public documents,

documents.—

(1) documents forming the acts or records of the acts—

- (i) of the sovereign authority,
- (ii) of official bodies and tribunals, and
- (iii) of public officers, legislative, judicial and executive, whether of British India, or of any other part of Her Majesty's dominions, or of a foreign country,

(2) public records kept in British India of private documents.

74.

Scope of the section This is important because certain documents are distinguished from It is not always easy to determine a private document. In *Sturla v Freccia*, 11 App Cas. 623, the question arose as regards the meaning of the word "public documents". In delivering the

in this case. Now, it should be said that I do not think an entry in books of a manor is public in the sense that it concerns all the people interested in the manor. And an entry probably in a corporate book concerning a corporate matter, or something in which all the corporation is concerned, would be 'public' within that sense. But it must be a public document, and it must be made by a public officer. I understand a public document there to mean a document that is made for the purpose of the public making use of it, and being able to refer to it. It is meant to be where there is a judicial or quasi-judicial case with the Bishop acting under the law, he is said to be quasi-judicial. He is not, but I think the very object of it must be the purpose of being kept public, so that it can be used by the public. The term 'public' is used in the paper of the law.

Royal proclamations, and all other acts of State. *Pouell Ev* 248. In this connection it should be borne in mind that the term 'public' as applied to documents is used in English law to mean the statements contained in a form of testimony, either by a person, or of the facts stated in a document, which are kept in some

strangers must be kept in a register of abduction document persons of Evidence.

only in the second sense. All descriptions of public documents have a characteristic, that they are kept in some special custody and provable by means of a copy without production of the original. *Wills Ev*, 2nd Ed 407. A public document is one prepared by a public servant in the discharge of his public official duty. The mere fact that it is kept in an office does not lead to the inference that it is a public document. *Madhab Din v. Karar Singh*, 107 Ind.

Cas 618=A. I. R. 1928 Lah. 640; see also 105 Ind. Cas. 353=A. I. R. 1928 Nag.
93. Where a letter received from the Comptroller of the Military Accounts in
reply to the warrant of attachment acknowledging the same was relied on to
prove knowledge of the judgment-debtor as regards the existence of the decree,
held, that the letter was a public document under s. 71 of the Evidence Act and
that the same did not require proof. *Sheikh Idlu v. Hua Lal*, A. I. R. 1928
Oudh. 488. If the law requires that . . . Revenue . . .
record, such pedigree in the Revenue : . . . A. I. R.
1928 Lah. 211=103 Ind. Cas. 182. Da. . . 98 Ind.
Cas. 471=A. I. R. 1927 All. 52. C . . . Deputy
Collector under s. 40, Bengal Tenancy . . . 1926
Pat. 436=95 Ind. Cas. 966. Registers . . . Act,
. . . registers
. . . 5 Ind. Cas. 955; 69 Ind. Cas.
. . . and death nor purchase slips
Caa 82. . . 22 C. W. N. 822; 17 Ind.

Acts or Records of the Acts In

any other officer furnishes for the information of the Public Prosecutor? It is true that the police officer acts in performance of a statutory duty, but section 74 makes no distinction between such acts and other official acts." When a Civil Surgeon reports to a Magistrate as to the age of a person, he is merely giving his expert capacity for the use of such a document. 1 Luck 733-108 In re in the prep betw L J notification that was not an 'act' or 'record of act' of a public officer, the meaning of this section Velayudam v Emperor, 1929 M. W. 11, 11 Ind. Cas 509-30 Cr L. J. 483.

Statutes and state papers. Statements and recitals of public officers, contained in public statutes; Royal proclamations (*R. v. Sutton*, 11 H. 4, 2, 1772).

74.

Radcliffe v. Union Ins. Co, 7 Jones, 38; *Talbot v. Seeman*, 1 Cranch, 1, 37, 39; or Parliamentary Journals as to all matters properly before either house are public documents. *Phil. Ev. 7th Ed. 324.*

ada Mahomed v. Danie
and written statement
certified copy of the
document whereas the

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nature, that they can be proved by copies to the same extent as records, and are subject generally to the same rule of evidence. Indeed, henceforth, for the sake of convenience, the general term 'records' shall be used to include all the documents just mentioned. The record of another Court may be proved by a copy. *Chief Baron Gilbert*: "Records, to which every man has a right, and which are transferred from place to place to be preserved, and to be produced in evidence."

or accounted for like any other document. *Bayley v. Wylie*, 6 Esp. 200. although in strictness of records for all Courts, the removal was by

Case, 5 C.
proceedin
Writs of

be proved by actual production, though after their return, they become matters of record, and are consequently provable by copies B N P. 231 With respect to writs of summons under the Rules of the Supreme Court, they may be lost, by copies by the be lost, by se documents they relate.

R. v. Scott, L. R. 2 Q. B. 415-46 L. J. M. C. 259. The pleadings in an action

forth; and so much so that a party cannot be admitted to plead that the things record, as long solute verity." by a decision, as v. *Gannon*,

the identity of the person who gave the deposition. *Brayaballav v. Akhoy*, 30 C W N 954-93 Ind Cas 15 Proceedings of a Court of Justice may be

75. Private documents. 75. All other documents are private.

Private documents classed as Public & Private : as to their document *Phip* documents are private documents contract, memorandum, of the private document Jones § 201. An abstract statement prepared by a patwari even though his on papers in his possession and filed in a suit is only a private document. *Sheo Das v Sheo Dayal*, A I R 1930 All 712=128 Ind Cas 770

76. Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificates shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies.

Explanation. Any officer who, by the ordinary course of official duty, is authorised to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section.

document has a right There is no in British ular cases
Field v Le 7th Ed 232. In England, the right to inspect public documents varies inspect many section saves refuse to show 257, Taylor clude all such in the ground
of state policy Bom L R 236 of the judgment the document" looked from ou a judgment in a criminal case *Ladd v Emperor*, A I R 1931 All 201=202 A L J. 405 As take copies, vide the Procedure Code (Act Administrator General 1913), the Oudh Land Revenue Act (XVII of 1867), etc
not to inspect and the Criminal of 1903), the Act (VII of

It might have been supposed that, for the lawful custodian of documents in official custody, an authority could be in office, to furnish copies that should be must be the lawful custodian of the particular of course exist at the time of certifying whose office had expired properly certified nom. this custody, however enau.

him to speak, not merely to the correctness of the copy, but also to the existence and genuineness of the original. The great obstacle, to the use of a register as evidence of a record of private deed, was the registrar's inability to speak to the genuineness of the deed, and special means to qualify him in this respect had to be provided. This obstacle does not exist for an official record, for it is originally prepared and thereafter preserved in the office, and although it may

document, within the meaning of s 71 of the Indian Evidence Act. Any person is entitled to inspect the same and to obtain certified copies thereof under this section, for the protection of interest for the N. 125-31 C. 92; *Rez v* 84 Ind Cas 487; see also *Bank of Bombay v* *of Bengal* a public *Jointab*, 8 C. W. R. 38 Ch. D. *uar v Taxal*, allows certified

inspect public documents is, however, assumed, in s 76 of the Evidence Act. It may be inferred that the Legislature intended to recognize the right generally for all persons, who can show that they have an interest for the protection of which it is

Lah 605.

77 Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies

Proof of documents by production of certified copies

additional wear and tear upon the document. Wigmore § 1215. The usual mode of proving the record of another Court is by production of a certified copy. But the copy is not produced in such cases because it is better evidence than the original, it is received only on the ground of convenience, as a substitute for the original record. The reception of a copy avoids the inconvenience of removing the original record from place to place. *Bullow v Thomas*, 19 Gratt 14, 18. For reasons similar to those applicable to judicial records, documents belonging to any public office need not be proved, but may be otherwise proved. Their removal for production in evidence would delay, and hinder the official use of the files, would make it impossible for other persons to consult

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rate. It contains particulars of the area and of the land in respect of which the rate is due. It is a public document within s 74 of the Evidence Act. The *porchas* distributed to the cultivators are also public documents. If produced in original the *jamabandis* do not require to be further proved. The contents of the *jamabandi* could also be proved by the production of certified copies furnished as provided by ss 76 and 77 of the Evidence Act. *Umrao Singh v Ram Singh*, L R 3 A 386 (Rev)—1 U P L R (B R) 26, see also *Ram Lal v, Ghasiram*, 71 Ind Cas 825.

Proof of other official documents

78 The following public documents may be proved as follows—

- (1) Acts, orders or notifications of the Executive Government of British India in any of its departments, or of any Local Government or any department of any Local Government,—
by the records of the departments, certified by the heads of those departments respectively,
or by any document purporting to be printed by order of any such Government
- (2) The proceedings of the Legislatures,—
by the journals of those bodies respectively, or by published Acts or abstracts, or by copies purporting to be printed by order of Government
- (3) Proclamations, orders or regulations issued by Her Majesty or by the Privy Council, or by any department of Her Majesty's Government,—
by copies or extracts contained in the London Gazette, or purporting to be printed by the Queen's Printer
- (4) The Acts of the Executive or the proceedings of the Legislature of a foreign country,—
by journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign, or by a recognition thereof in some public Act of the Governor-General of India Council
- (5) The proceedings of a municipal body in British India —
by a copy of such proceedings certified by the legal keeper thereof, or by a printed book purporting to be published by the authority of such body
- (6) Public documents of any other class in a foreign country,—
by the original, or by a copy certified by the legal keeper thereof, with a certificate under the seal of a notary public, or of a British Consul or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country

18. Official Printed copies. There is no reason why an officer may not, be authorised to give printed copies as well as written copies, nor has there been any objection to this. It can not be said that it is not the duty of an officer. An officer is; but the official printer's authority though a general one, is express rather than implied. The objections that have been made in connection with the use of printed copies have chiefly had their source, not so much in a doubt of any of those principles, as in the difficulty of being an official one. Printed copies of the reason for their correctness is thus stated by *Tilgham C. J.* in *Biddis v. Jones*, 6 Binn. 326: "Confidential persons have been selected to compare the copies with the original rolls and superintend the printing." The most frequent application of the principle, however is, to the evidencing of the statute law domestic and foreign. Upon the theory of Judicial Notice, no evidence of domestic law need be offered.

P. L. R. 1909.

Clause (1)
because such the
act of Parliament

far, then, on the proceedings of the Legislature are relevant to be proved, the journal is admissible. If the proceeding, for example, consists in the receipt or acceptance of a report or a petition, the statement of the fact of its receipt may be inadmissible; but the fact, of its receipt may be relevant, and therefore may be evidence. Under this clause, the text of an Act may be taken to be the authorized text of the Act. See *Cas. 316; Subramania v. Shanmugam, A. I. R. 1930, 100 Ind. Cas 409.* As regards the value of Hansa's report, *Vide The Englishman v. Lajpat Rai*, 37 C. 760-14 C. W. N. 713.

authoritative men. In the same case *Butler J.* added: "the gazette, which is published by the authority of the King or which has passed through His Majesty's hands." In the same case also Lord Kenyon *L. C. J.* observed: "That the gazette is evidence of many

acts of State is
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acts of state, II

admitted that the

Cockburn, 5 Esp 234; *Vanoneson v. Dorwick*, 2 Camp. 44; *R. v. Gardner*, 2
Camp. 513; *Att. Gen v. Theakstone*, 8 Price 93; *Bradley v. Arthur*, 4 B. &
C. 301.

Clause (4) Depositions in a foreign Court are public documents *Hara-
n nd v. Ramgopal*, 4 G. W. N. 429=27 G. 639 P. C.; see also *In re Rudolph
Stalman*, 15 C. W. N. 1053.

Na Cas. 643.

Clause (6).

such as was in

ment, is no suffi

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purports to testify. Such evidence can be manufactured without any great
difficulty and the Courts must be on their guard against its acceptance unless
under proper tests

(1897-1901) Vol

the Native State o

Shamsher v. Moh.

this clause are ver

is the Political Agent or the Government of India. *Krishnabai*, 28 Bom. L. R. 1225=50 B. 716=A. I. R. 1927 Bom. 11.

PRESUMPTIONS AS TO DOCUMENTS.

79. The Court shall presume every document purporting

to be a certificate, certified copy or other
document, which is by law declared to be
admissible as evidence of any particular fact
and which purports to be duly certified by

any officer in British India or by any officer in any Native State
in alliance with her Majesty, who is duly authorized thereto by
the Governor General in Council, to be genuine :

Provided that such document is substantially in the form
and purports to be executed in the manner directed by law in
that behalf.

The Court shall also presume that any officer by whom any
such document purports to be signed or certified, held, when he
signed it the official character which he claims in such paper.

Presumptions as to documents. Section 79 to 90 deal with certain pre-
sumptions as to documents. All these presumptions are based on the ancient
and well known maxim *omnia praesumuntur rite esse acta*. (All acts are pre-
sumed to have been done rightly and regularly). *Co. Litt. Cb: 332*. The rule is
applicable to public and official acts as well as to ancient deeds and private

9. acts Where the acts are of an official nature or require the concurrence of official persons, a presumption arises in favour of their execution. In these cases the ordinary rule is *omnia præsuntur rite et solemniter esse acta donec probetur in contrarium* (Co Litt 232. *Van Omeron v. Douich*, 2 Camp 44; *Doe v. Evans* 1 Cr. & M 46)—everything is presumed to be rightly and duly performed until the contrary is shown. Per *Stony J. in Bank of United States v. Dandridge*, 12 Wheaton (U. S) R 69, 70; *Davies v. Pratt*, 17 C B 183; *Broom's Legal Maxims* 723 Upon the same principle proceeds the rule that deeds, wills and other attested documents which are more than thirty years old, and are produced from the proper custody, prove themselves and the testimony of the subscribing witnesses may be dispensed with, although of course it is

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6 Bom L R 750, *Raghunath v. Holi* 1 A I, 191 (1903) The presumption mentioned in this clause is rebuttal, a *presumptio juris et de jure* (1974) = 3 Cr L J 32 The word "construed in more rigorous of the *Muhammad* 110 P L R 1902; *Ramien v. Verappa*, 11 M L T 69 —, there is no a fact," a presumption is option left to the Court, given to disprove it, and t evidence if he can Sections 19 to 20 contain the principal plea r regards documents Of course certain presumptions as regards documents may also be raised under section 114 [*Vide s. 114 (ills 1)*]

to do it *Harris* presumption that his duty Per *Coleridge J in R. son v. Roberts*, does not arise to official acts and latter deals with former, taking t the acts until the to office may be Berryman v Wise, 4 T R, 366; *R v. Geraun*, 1 Leach 515, *R v. Veielst*, 3 Camp 432, *Marshall v. Lamb*, 5 Q. B 115, *Phar v. Briscoe* 11 O R 46

suspected that some one personated G, and that his signature is not to be sent to Chambers for the original examination, otherwise the copy so attested

and delivered, must be received and relied on " The same rule is applicable to certificates and other documents as well Certificates and other documents

signature and the seal (where a
Field *Ex 7th Ed* 141 So if a duly
 of a lease in official custody, had
 have been necessary of the signatures or handwriting of those Commissioners
 officers signing it, such a
 wing an official act done by
 produced from proper custody

having been made competent evidence
 necessarily dispensed with, such
 to a copy *Com v Richardson*, 142
 raising this presumption is that such

ed by law in that behalf The
 to prove the certificate of registra
 ed under this section *Muhammad*
v Soharā 71 Ind Cas 805 But this presumption does not arise where sanction
 under s 196 Cr Pro Code is signed by the Deputy Secretary instead of by the
 Chief Secretary as required by that section *Md O.ullah v Ben*, 36 C L J
 180-26 C W N 818-56 C 135 It is doubtful whether this section is
 applicable to copies given before the passing of the Indian Evidence Act *Julir*
Ali v Rajchunder, 10 C L R 469 (476)

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 f all peace officers justices
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characters without producing their appointments Similarly in *Mo Gohey v*
Alston 2 M & W 206 *Baron Parle* said The rule is that all public officers

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been made by the proper officer

80. Whenever any document is produced before any Court,
 purporting to be a record or memorandum of
 the evidence, or of any part of the evidence,
 given by a witness in a judicial proceeding or
 before any officer authorized by law to take

Presumption as to
 documents produced
 as records of evidence

80. such evidence or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid, the Court shall presume—

that the document is genuine; that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken.

es sanction to the maxim *omnia pro-*

regular. *Lawson Pre. Ec. Rule 10.*
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Ev 261.

Scope of the section. The statement as to which this section says that certain presumptions in accordance with the kind of evidence, case of certain operate to render

omits to claim
so, does not arise
copy should also
in a specified proceeding.

106-33 C. W. N. 1191-119 Ind. Cas. 192-A I R. 1959 Cal. 617 (F. B.)

deposition preclude the presumption that the copy is a true copy. *Sorajju v. Mata Din*, 7 O. L. J. 542-60 Ind. Cas. 437.

if recording depositions
P. Code and in criminal
of Order 18, runs as
evidence of each witness
the Court, by or in the
evidence of the Judge,
ut in that of a narrative,
e of the Judge to the
same, and shall sign it
down in a language

different from that in which it is given, and the witness does not understand

0. witness in the presence of the accused and the accused may have an opportunity, 12 Bur L T 167=14 Emperor, 12 Bur L T 167=14 506; see also *Ngat Sam v K. E. U* the Criminal Pro Code does not shall be taken and attested by the Magistrate in the presence of the accused What it provides is that the deposition, if so taken and attested, may be put in evidence in the Sessions trial Therefore, that the deposition was taken and

Lah 632=125 Ind Cas 892=31 P L R 472=A. L R 1930 Lah 714

Confession of accused taken in accordance with law A confession by an accused recorded by a Magistrate is admissible under this section, even though the Magistrate who recorded it, ultimately came to the conclusion that he had no jurisdiction to try the case *Emperor v Banko Behary*, 10 C P L R Cr 16 If, when a document is tendered in evidence at a trial purporting to be a confession of the accused, it is found to contain the memorandum required by s 164(3), a presumption arises under this section that all the necessary formalities purporting to have been performed have in fact been performed and the document is admissible in evidence without further proof If, however the memorandum does not appear or is defective the document is inadmissible

such a defect would be curable If the explanation had not in fact been the statement could not be held to have been duly made and s 533 cannot be

Cas 257=23 Cr. L J 673, *Queen Empress v Sundar Singh*, 14 A 261 Confessional statement Section 80 of the Evidence

So far the pre- respect of the document purporting to be a confession of the accused. *San Bai v Crown*, 1 L R 310 (F. B.), see also magistrate during the course red by s 164, cannot be made. *Emperor v Radhe*, made under

7 C. W. N. 9

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A Magistrate

whether a confession

Section 80 of the Evidence Act, expressly provides for proof of the document, distinguishing it from a record of evidence as well as s. 533 Criminal Procedure Code. *Lalu v Empress*, 2 P. R. 1894 Cr. S.

Dying declarations. A dying declaration is not admissible in evidence without proof that the deceased actually made the declaration. Even if it bears a Magistrate's attestation it is not admissible under s. 80 where the Magistrate was not the committing Magistrate. The person who took the statement should be subject to cross-examination as to the dying man's state of mind when he made it, and as to other circumstances. *Reg v. Fata Aduji*, 11 B H C 247, see also *Hasim v. Empress*, 9 P R 1900 Cr. = P L R 1900 p. 49. When a dying declaration has appended to it a deponent and declared to be recorded the statement, s. 80 of circumstances under which it is stated to have been taken are true, the investigation by the Magistrate being a judicial proceeding. *In re Karrupan Samban*, 16 Cr. L. J. 759 = 31 Ind Cas 359.

Previous admission. Before a previous admission can be used against a party it must be put to him and an opportunity afforded to him to explain it if it is capable of explanation. *Mariam v Nagina*, 12 Lah L J 161.

81. The Court shall presume the genuineness of every

document purporting to be the London Gazette or the Gazette of India, or the Government Gazette of any Local Government, or of any colony, dependency or possession of the British Crown, or to be

Presumption as to Gazettes, newspapers, private Acts of Parliament and other documents

a newspaper or journal, or to be a copy of a private Act of Parliament printed by the Queen's Printer, and of every document purporting to be a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law and is produced from proper custody.

Principle. The intolerable inconvenience of having to prove the genuineness of printed matter purporting to be published by the Government has led to

porting pub-
consciently

superintend
the printing. The object of this provision was to furnish the people with authentic copies; and from their nature, printed copies of this kind, either of public, or private laws, are as much to be depended on as the exemplification verified by an officer who is the keeper of the record. I am for admitting the printed copies authorized by the Legislature, either of this or any other state, whether the law be public or private. But the question whether the copy of a Government Gazette or any other publication can be treated as evidence of the contents of the original is not one relating to proof of documents but to the

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"It is contended that under section 81 of the Evidence Act, the Court is bound

include a presumption

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to public documents, but it is very doubtful whether the language of the section supports it. It the punctuation may be taken to throw any light on the word 'journal' is against the

'newspaper or journal' question further, as I am of opinion that the presumption of the genuineness of a newspaper does not incl. published by the person by w the English Law. According

tion of a was publi d of the accused In

Gathercole v. Miall, 15 M & W 319; *Parke B* was of opinion that as the defend- ant had been proved by t

publisher of the paper, to the one produced in defendant. According to section 7 of Act XXV of 1867, the production of an

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statement *Beva Sarup v Emperor*, 88 Ind Cas 22=7 Lah L J 261=26 P L R 566=26 Cr L J 1078, but see *Ram Chandra v Emperor*, A I R 1930 Lah 371=31 Cr L J 168

82 When any document is produced before any Court,

purporting to be a document which by the

Presumption as to document admissible in England without proof of seal or sig nature

law in force for the time being in England and Ireland, would be admissible in proof of any particular in any Court of Justice in England or Ireland, without proof of the seal

or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed, the Court shall presume that such seal, stamp or signature,

2. is genuine, and that the person signing it held, at the time when he signed it, the judicial or official character which he claims,

and the document shall be admissible for the same purpose for which it would be admissible in England or Ireland

Origin of this section. This section consolidates ss 9, 10, 11 of Stat 14 & 15, which were inserted into the Evidence Act of 1874 after to be Court of signature

extent and for the same purposes in any Court any person having in Ireland by law and receive and examine evidence, without proof of authenticating the same, or of the judicial character of the person appearing to have signed the same.

Section 10 runs as follows "Every

shall be admitted in evidence to the same extent and for the same purposes in any Court of Justice in England or Wales or before any person having in

in any Court of Justice of any of the British Colonies, or before any person having in any such colonies, by law or by consent of parties authority to hear, receive, and examine evidence, without proof of authenticating the same,

Ibid) So British Colony included British India. But section 11 of Lord Brougham's Act was repealed in India by the Indian Evidence Act section 2 and schedule and from the Statute Book by Statute Law Revision Act of 1874. The Indian Evidence Act has repealed section 11 above but has given effect to the object of that section by enacting this section

Scope of the English law. There are many instances where records are kept by persons occupying public office, or engaged in occupations of a public nature. These records, though somewhat similar in kind to those of which the Court may take judicial notice, do not usually have a sufficient degree of publicity to bring them within the limits of that class of matters. They are, however, deemed

admissible if

a person having

readily discovered

of duty also enters into the case. Usually the person keeping the record is under some obligation, official or otherwise to keep them, and this brings them close to those entries in account books which are admitted because made in the regular course of business, pursuant to duty. The application of this exception to the hearsay rule in the early cases caused the admission of acknowledgment of deeds made before a Court of record, enrolments of deeds, fines and recoveries, and many records of similar nature. *Snart v Williams* 1 Salk. 280. *Lynch v Clerk*, 3 Salk. 151. It is necessary conditions of the

admissibility of a public record or document that it shall have been intended to S.

this exception. He says at page 214: "What a public document is within that rule, is of course, the great point which we have now to consider.... I do not think that 'public' is to be taken there as meaning the whole world. I think an entry in the books of a manor is public, in the sense that it is an entry in a public book. I think that all the entries in a public book must be a public document. I think that it should be made for the purpose of being a public document, that it may have access to it afterwards."

It is not even by the Common Law of England was by means of examined copy, that is, a copy taken on behalf of the party, generally by some clerk or other private persons, who produces it in the witness box and proves that he has copied it accurately from, or examined it

parties authority to hear, receive and examine evidence, provided it be proved to

and burials which have been kept in pursuance of canon and statute law answer his description, [*Re Hall's Estate* (1852) 22 L. J. Ch. 177; *Re Porter's Trusts*, (1856) 25 L. J. Ch. 698]; but it seems doubtful whether it could be held to

beneficial effect of the enactments was much diminished. In order to remove that—
that—
to any certain joint stock

or other. of any document, by law, entry in
 any reg. proceeding, shall be receivable in
 evidence of any pr local tribunal
 or either house of
 judicial proceeding,
 they respectively
 signed, or signed
 directed by the and signed, as
 without any proof
 the signature or

. n appearing to have signed the same, and
 every case in which the original record
 "The general result of these two Statutes

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L. R. 2 C C 85 The re
 poll books were provable und
 75 The bye-laws of a rail
 B & 9 Vict. C 20, §§ 108-111,
 the secretary of the company in whose custody they are *Monier v . . .*
 Counties, 7 C B N S 53-29 L J M C 57 As to proof of bye-laws
 of a municipal corporation under Stat 45 & 46 Vict C 50, s 24, *vide*
Robinson v Gregory, (1905) 1 K B 531 For a complete list of Statutes
 which contain provision making certified copies evidence, *vide Roscoe's*
Digest of the Law of Evidence, Eighteenth Ed Vol. I pp 93 100 For an
 exhaustive list of documents which are provable in England by means of
 certified copies under particular Acts of Parliament *Vide §§ 1602-1609 of*
Taylor on the Law of Evidence, Wills on Evidence, 2nd Ed Appendix A
 pp. 422-465.

Scope of the Section The object of this section is to give currency in
 the Courts of India to the presumptions which, with regard to certain classes
 of documents, are recognised in the English Courts Such documents are
 declared by the section to be admissible in India as they would be in England,
 and it is no more necessary in Indian Court, than it would be in an English
 Court to prove the seal or signature or to prove that the person signing held
 the office which he claims *Cun Ev 11th Ed 175* The chief magistrate of
 the city of Glasgow being a person lawfully authorized to administer oaths,
 a declaration as to the execution of a power of attorney taken before him and
 authenticated by his certificate and the common seal of the city of Glasgow
 and by a Notarial certificate is sufficient proof of the execution *In the goods*
of Hend the declarations purport to have been made
 under Will IV C
 62; *see* 367; *In the*
goods *In the goods*
of Hend *s of William*
Cornell *nina Lindo,*
her a deceased,
 n appointed

application must be refused *In the goods of A J. J. J.*
 delivering the judgment *Novis J* said "Section 85 of the Evidence Act pro-
 vides that the Court shall presume that every document purporting to be a
 power of attorney, and to have been executed before and authenticated by a
 Notary Public or any Court, or Judge, Magistrate, British Consul or Vice-
 consul, or Representative of Her Majesty or of the Government of India,
 was so executed and authenticated. This power of attorney is not executed

before or authenticated by any of the persons mentioned in the section, and in order to comply with the provisions of the section, the power of attorney of those persons. Therefore It is submitted that Norris e Section 85 of the Evidence acilities to prove powers of than that allowed by that

attorne
section
Court

to have been executed in

been held in Calcutta that, in as much as the execution is not proved in the manner indicated in section 85 of the Evidence Act, the application for letters of administration ought to be refused (*In the goods of A J Primrose*, 16 C 716). In arriving at this decision, Mr Justice Norris seems to have assumed that the provisions contained in section 85 is of an exhaustive character and no other mode of proving the execution of a power of attorney is admissible. That assumption however, is, in my opinion, not

not to apply to affidavits
prescribed by the statute of
oath I am of opinion that
I am told
to receive
But certi-

T 385-24 M L J 517-19 Ind Cas 452 and section 35(5)
N 35-13 M L

83 The Court shall presume that maps or plans purporting to be made by the authority of Government were so made, and are accurate, but maps or plans made for the purposes of any cause must be proved to be accurate.

Principle The general ground of reception is that such documents contain the results of inquiries made under competent public authority and concerning matters in which the public are interested. *Phipson*, 313. The very office of a surveyor is to run lines and establish boundaries for the purpose of applying the terms of grants and patents and thus of perpetuating the settlement of boundaries. It is therefore a natural authority to make a written maps are admissible in evidence.

does not of itself prove any title, but only that the person fills the office.

3. *Per Patteson J in Bouley v. Barnes*, 8 Q. B. 1037. The well-known maxim of *omnia presumuntur rite esse acta* applies

Scope of the section :
purporting to be prepared
9 M L T. 415 This section
of a private map. If such a map
depend upon the relevancy of the map in relation to the question in controversy
Shib Charan v. Nil Kantha Maharo, 16 Ind. Cas. 747 = 17 C. L. J. 612. In the
absence of evidence to the may be
properly judicially received in *Gyan*
v. Ma Nque, 2 L. M. R. 56 A in the
the silted bed of a
83; but it is a
before it can be
23 C. 385 In a
valuable evidence

which should be considered
Ranee v. Gireedharce, 20 W.
ment, while in charge of
only that of a private prop-
a presumption of the accu-
574; *Ram v. Bansidhar*, 9
making a *thakbust* map, as
what lands were *debutter*, but only to lay down and to map boundaries, held that
this map could not be treated as raising a presumption of correctness within
this section, on the question as to the amount of *debutter* land in one of the
villages mapped. Where statements as to what lands were *debutter* appeared
on the face of the map to have been made as pointed out by agent on behalf of
the proprietor of the *manor* and the principal tenants, in the presence of the
agent of the holders of
section has not the
v. Lalor Mont, 18 C. 2
accuracy of drawings and measurement. It has no reference
1 W. R. 179.

must be presumed to be accurate under this section. *Kahimamunni v.*
of State, 113 P. L. R. 1913 = 113 P. W. R. 1913 = 18 Ind. Cas.
799 No presumption of accuracy can
within this section. *Madhabai v. Gagan*
section a *thakbust* map must be presumed
22 W. R. 519, see also *Photal v. Ranee*, 13 W. R. 501 & C. A. 1913
Government survey map having been prepared does not affect the presumption
of accuracy, under this Act of an earlier superseded map. *Joggesur Singh v.*
Bycunt Nath, 5 C. 823 = 6 C. L. J. 510 A copy of a map prepared by an *Amia*
employed by Government,
for possession. It was adm-
ultimately rejected by him,
was made by the High C

as correct when made. *Gopal Lal v. Mariamunnessa*, 84 Ind. Cas. 433 = 11
1924 Pat. 719 The signature of a revenue-surveyor on a *thakbust* map signifies,

not that the thakbust map is correct, but that the demarcation boundaries laid down in the course of this bust survey have been correctly picked up on the survey map. *Sashubhusan v. Ind Cts* 205. There is no preference over a Thak map, agree, where they differ, the one that more nearly agrees with the land mark is the one which should be incumbent upon the day, if it considers the survey map. *Maharaja of Cooch Behar v. Raja Mohen Ira Ranjan*, 66 Ind Cas 923; see also *Abul Hossain v. Doucun*, 11 C W N 629, *Burn v. Ichambit*, 20 W R 14, *Nanah v. Gopinath*, 13 C L J 625 (632), *Amrita v. Sheraulin*, 19 C W N 565 (576). But where the Thak proceedings and the decision of a dispute took place in the presence of the predecessors of the parties to a suit, that map must be treated as valuable evidence in this suit between the successors of the persons who were present. *Maharaja of Cooch Behar v. Raja Mohen Ira Ranjan*, 66 Ind Cas 923; see also *Suraj Kanta v. Sarat Chandra*, 15 C W N 1281 P C, *Dunne v. Dhavan*, a *Sutani* 2 W R 210; *Gungu v. W R* 179, *Nobo v. Gobind*, 9 C L : *Ind v. Kuan*, 7 C W N 819.

The state of things at the time the map was made is the state of things at the time of permanent settlement. *Secretary of State v. Hazard*, 15 Ind Cas 667, *Jagadindia v. Secretary of State*, 7 C W N 193 P C, see also 20 C W N 1028; 35 Ind Cts 132. Presumption both as to physical features and to statements as to possession may be made from a thakbust map. 64 Ind. Cas 326.

The question whether a map is a public document within s. 74, Evidence

Ac. in the state, in a case has no 3=10 Ind orion of a , and the

the Government, acting not in its sovereign capacity, but as the land lord of certain holding is admissible in evidence, if not under this section, under section 13 of the Act. *Upendra v. Chairman of the Calcutta Corporation*, 16 C W N 116.

received in evidence as correct when made. *Jagadindia Nath v. Secretary of State*, 30 C 291=7 C W N 193=5 Bom L R 1; see also *Satcourt v. Secretary of State*, 22 C 252, *Maung Thin v. Maizan*, 44 Ind Cas 247, *Syama Sunder*, 784; *U v. V.*

s. 13 when it is not known whether they were acted on for the purpose of registration proceeding or if in fact reliance was placed upon them by

&
5.

the purpose of
Ind. Cis. 85=A
without enquiry
be placed on it
C L. J. 319
ment on which
evidence, there

such matters as to which it is admissible in evidence *Secretary of State for India v. Ananda Mohan*, 31 C L J 205; see also *Narash Narayan v Secretary of State*, 71 Ind Cas 1048=32 M L T 162=50 C 446=45 M L J 444=23 C W N. 453 P. C. *Haridas Acharyya v Secretary of State*, 43 Ind. Cas 361=26 C L J 590=23 M L T 433=20 Bom L R 49 (P. C.), *Secretary of State, v Kalika*, 15 C L J. 281.

84. The Court shall presume the genuineness of every book

Presumption as to collections of laws the authority of the Government of any and reports of decisions, country, and to contain any of the laws of that country,

and of every book purporting to contain reports of decisions of the Courts of such country.

Principles
ness of print
to a general
publications
stantly issued
however, are
to be printed

original, and secondly, the presumption of genuineness of a particular printed document purporting to be of such official origin. The two questions are seldom separated, either in decisions or in statute; a sanction of the former principle has usually been regarded as carrying with it a sanction of the latter also" *Wigmore* § 2151

Sense of the section. The words "any country" are wide enough, to

na section 33 reports of cases recognized by the Courts of a country will be evidence; and be relevant and receivable *Nori Ev* 202; see also notes under section 39.

85. The Court shall presume that every document

Presumption as to powers-of-attorney, purporting to be a power-of-attorney, and to have been executed before, and authenticated by, a notary public, or any Court, Judge, Magistrate, British Consul or Vice-Consul, or representative of Her Majesty, or of the Government of India, was so executed and authenticated.

Principle. The genuineness of certain purporting official seal impressions need not be evidence otherwise than by the production for inspection of the document bearing them. What is the significance of this rule? What is it that Courts actually do, evidentially, when they accept such seals with no further evidence? When a document bearing a purporting official seal—a notary's

certificate to a power of attorney, for example—is offered in Court the accept-

document purports to be
 result of the first three
 ury, did make this written
 and the document was
 merge (i.e. the purport-
 ily in the case of a
 and yet another
 third elements are

ing J S
 seal that
 person n
 always judicially united, i.e. any presumption of genuineness, whenever made
 covers both elements. Hence, in effect, the situation, for seal or signature alike,
 is reducible to the following elements and is so in practice treated (1) that
 there is an official of that name (2) (3) that this document was genuinely
 executed by him. Now the remaining element (4) that this hearsay statement
 of his is admissible, is obviously concerned with the Hearsay rule.

Of these, the elements (2) and (3) are obviously pure questions of authentica-
 tion, i.e. the acceptance of the document signifies that we have somehow
 assumed that this document was genuinely executed by one J S. What is the
 true nature of the process? Is it the process of Judicial Notice? It is some-

soon as the party alleged by counsel that J S had executed an alleged docu-
 ment, the Court must notice that as a fact, and no production of a purporting
 seal or signature would be necessary; but this is obviously not the practice.
 Further more it is conceivable that a Court might judicially know what the design
 of a certain public seal was but this would not of itself enable the Judge to
 declare that the specific impression offered in Court was genuine or forged. It
 would seem, then, that what is actually done is not done by virtue of any doctrine
 of jud

ment
 The
 of an
 this may well serve as sufficient evidence because the forgery of the seal or
 signature would be a crime, and detection would be fairly easy and certain.
 On the other hand the element (1) noted above, namely that J S who has thus
 genuinely executed this document is the official that he purports to be, is a real
 result of the principle of Judicial Notice. This element is wholly separable
 from that of the authenticity of the paper. *Wigmore* § 2161

and authentication of a power-of-attorney when such execution was done before
 and authentication was done by any of the officials mentioned in this section.
 The section is an extension of the provisions contained in the Registration Act,
 with reference to powers-of-attorney executed for the purpose of procuring the
 registration of conveyance or other such instruments. *Cun Ev 11th Ed* 178
 Where a power-of-attorney was neither executed before nor authenticated by
 any persons mentioned in this section, letters of administration to the estate of
 a deceased
 the goods of
 execution is
 not exhausti
 16 C 776

5. been executed before, and authenticated by, a Notary Public, is produced before the Court, an affidavit of identification as to the person, purporting to make the goods is admissible for, the III, rule Ind. Cas England ed by his signature alone without ids of *Bridoon*, Nov 19th 1899, per

ie term "power of attorney" is given the *Indian Stamp Act*, "power of-attorney" includes any instrument (not chargeable with a fee under the law relating to Court fees for the time being in force) empowering a specified person to act for and in the name of the person executing it. So a power or letter of attorney in a in such case is called the attorney of a t, in the stead of another; as to person; transfer stock or give possession upon a deed of feoffment. It is either general or special, i e, general in respect of the conduct of all affairs of a person, as where he leaves the country; special in respect of any one or more named matters, as to receive money. This instrument gives the attorney authority to act in his name exactly as the party giving it would himself do until revocation. *Bank of Bengal v Ramanatham*, 43 C 527, *Venkataramana v Narasinha*, 38 M 134-24 M L J 180-1913 M W N 72-18 Ind Cas 187; *Permanand v Sat Prasad*, 33 A 487-19 Ind Cas 617 (F B), *Reference under the Stamp Act*, s 46, 15 M 386, *Righu v Ramchunder*, 10 W. R 39-11 B L R 65 (F. B.), *Jogi v Mohammad*, 60 Ind Cas 467, *Biyant v Banque du Peuple*,

the power of attorney was a proper power under s 33 of the Registration Act. Section 34 of the Registration Act imposes upon the registering officer the duty of enquiring as to the due execution of the document, and by s. 35, he registers the document on being satisfied as to the various particulars mentioned, so that when the

tion of omnia

in his procedu

v. *The National*

v. *Jamal*, 28

375-27 C W N 437 P C; *Kristonath v Brown* 14 C 170; *Jambu v Muhammad*, 42 I A. 22-37 A 49-19 C W N 282. As regards deposit of original instruments creating powers-of-attorney; vide section 4 of the Powers-of-Attorney Act (VII of 1892). Powers of attorney should be strictly construed. *Krishna v Pribhuban*, 114 Ind Cas 305-A I R 1929 Oudh 12, *Bank of Bengal v. Ramanathan*, 43 C 527-43 I A. 49

Notary Public In the interests of commerce the rules of evidence have been so extended that the acts of notaries public in the discharge of their duties under the law merchant are judicially noticed in all Courts, and their proper official acts under the law merchant are *prima facie* sufficiently authenticated

ooke v Brooke,

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Ineff, 24 L J Ch 120, under s 133 of the Negotiable Instruments Act (XXVI of 1891) the Governor General in Council is authorized to appoint notaries public within any local area and by s 139 of the same Act power is given to the same authority to make rules for notaries public

86. The Court may presume that any document purporting to be a certified copy of any judicial record of any country not forming part of Her Majesty's dominions is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of Her Majesty or of the Government of India * [in or for] such country, to be the manner, commonly in use in that country for the certification of copies of judicial records

† [An officer who, with respect to any territory or place not forming part of Her Majesty's dominions, is a Political Agent therefore, as defined in section 3, clause (40), of the General Clauses Act, 1897,‡ shall for the purposes of this section, be deemed to be a representative of the Government of India in and for the country comprising that territory or place.

Principle The theory of judicial records is that the judgment roll, as finally made up embodies in itself alone the entirety of the controversy adjudicated, and thus supercedes the miscellaneous mass of oral and written pleadings, motions, and orders, which have gone to make up the proceedings *Wigmore* § 2450 The doctrine about producing the original of a document, or when the original is not of the original judicial

under the Great Seal of a State in as much as proof than inspection, the seals of state of other nations which have been recognized by their own sovereign *Greenleaf Ev* 479) they may be authenticated by a copy, proved to be a true copy by a witness who has compared it with the original, properly authorized by law to give a copy, duly authenticated *Buttrick v Allen*, 8 Cranch 228, *Church v Hubbard*, 152 subject is thus stated by *Marshall C.* The sanction of an oath is required for their establishment unless they can be verified by some other

So this section authorises the representatives of his Majesty or the Government

* These words in s 86 were substituted for the words "president in," by the Indian Evidence Act (1872) Amendment Act, 1891 (3 of 1891), s. 2

† This paragraph was added to s 86 by s 4 of the Indian Evidence Act, 1899 (6 of 1899), in substitution for the paragraph added by s 2 of the Indian Evidence Act (1872) Amendment Act, 1891 (3 of 1891)

‡ X of 1897.

6. of India in or for such country to give such certificate. So if the copy is merely certified by an officer of the Court, without other proof it is inadmissible. *Appleton v Lord Braybrook*, 2 Stark 7, *Thompson v. Stewart*, 3 Conn 171.

Scope of the section. This section does not exclude other proof. *Vallabdas v Pra*
So a c
Court
being
If the

... cler, 1 Campb
proved, even
... v Stark,

1 Stark. 525, *Frost v Atkins*, 3 Campb 215 n And if it is clearly proved that the Court has no seal, entitle it to credit. *Black v Cowen* 434 If the copy is merely other proof, it is inadmissible. The section says that if a copy of a given way, the Court, may preclude other proof. The as and that she gave evidence before evidence of those matters. His and by ss 65 and 66 of the public documents, which they a party, when the person in question not subject to the process of the Court, which is the case here." *Per Lord*

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Cas 929

with merely because it can be of of depositions of a Court of due course does not make them

Achut Das, supra. So also was

authenticated in accordance with the

prescribed by the English Extradition

the records were admissible under it

C W. N 1053-14 C L J 375-14 C W N 1053-14 C L J 375

instance of documents to which s 65 cl (f) seems to refer. *Hurish v Prosonno*,

22 W R 303

Section 14 of the Civil Procedure runs as follows "The Court shall presume,

upon the production of any document purporting to be a certified copy of a

pronounced by a Court of competent

the record; but such presumption

jurisdiction." The presumption is a

Hadje Isup, 6 C W N 829-29 C

31, *Udho v Puran*, 41 P. L R 1910;

Ramanathan v Lakshmanan 24 M L 1 343, *Sita Devi v Gopal Saran*, 9 Pat.

L. T. 397-111 Ind Cas 762-A I R 1928 Pat 375, *Iskhar Prasad v Sri Ram*,

25 A I R 887-105 Ind Cas 186-A I R 1927 All 510

546 In this
of the 8th
regarding :

the Governor General in Council had, under s. 434 of the Civil Procedure Code,

notified that decrees of Cooh Behar Courts might be executed as if they were

decrees of British Indian Courts, was a compliance with the provisions of s 83 of

the Evidence Act, when there was a representative of the Government of India resident in Coach Behar. The notification referred to above is of no use when sent out of India in Coach Behar, so that Coach Behar cannot then be received in 86 of the Evidence Act

87 The Court may presume that any book to which it may refer for information on matters of public or general interest, and that any published map or chart, the statements of which are relevant facts and which is produced for inspection, was written and published by the person and at the time and place, by whom or at which it purports to have been written or published

Presumption as to books, maps and charts

Scope of the section. In proving matters of public or general interest the declarations will not be confined to those which are merely oral. Thus in England ancient maps showing public roads and the boundaries between counties, towns, parishes and manors are admissible, when it is proved that they have been made or recognized by persons having knowledge of the subject who are since deceased. *Hammond v Braintree* 10 Ex 390. *Pipe v Fitcher* 28 L J Q B 12, *Reg v Milton* 1 C & K 53. But this section authorises a Court to presume that book on matters of public or general interest and any published map or chart, was written or published by the person and at the time and place, by whom or at which it purports to have been written or published. A Court in

28 C L J 306-48

legitimately be made to the work of Mr Crokes on Castes and Tribes on the North Western Provinces and Oudh is an authoritative custom prevalent among the Urdu sect of Mahomedans. Great weight attaches to the accuracy of survey maps but they are not conclusive. In the absence of evidence to the contrary, however they should be presumed to be accurate. *Secretary of State v Radha Kishore*, 38 Ind Cis 379 P C - 21 C W N 291-44 C 328

88 The Court may presume that a message, forwarded from a telegraph office to the person to whom such message purports to be addressed, corresponds with a message delivered for transmission at the office from which the message purports to be sent, but the Court shall not make any presumption as to the person by whom such message was delivered for transmission

Presumption as to telegraphic messages

Scope of the section. To prove a telegram sent by the accused the writing handed to the telegraph office not the copy received is the original. *R v Regan* 16 Cox Cr 203, *Hinkel v Pape* L R 6 Ex 7, *Godwin v Francis*, L R 5 C P 295. Whether in proving the terms of a telegram the despatch sent or the despatch delivered and received is the one to be accounted or depends upon the substantive law involved. *Wigmore* § 1230. In *Duiles v Ro, Co*, 29 Vt 127, 140 (a Vermont Case) *Redfield C J* said 'It depends upon which party is responsible for the transmission across the line, or in other words whose agent the telegraph is.' Where the received despatch is the legally material document, it must be accounted for, a recorded copy of it would ordinarily be preferable to mere recollection, and the message as handed in by the sender perhaps might also serve as a copy, but where the party to whom the communication is made is to take the risk of transmission the message delivered to the operator is the original.' *Wigmore* § 1236. This section allows the

9. Courts to treat telegraph messages received as if they were the originals sent,

addressed. In the absence of such evidence, the telegram cannot be held to have been proved. *Thakur Singh v Emperor*, 4 Ind. Cas 240. The Court is forbidden by the express provisions of this section to make any presumption as

telegram to ask the Court to presume that it was sent by a supposed sender. But there is nothing in the section to prevent the telegram once admitted from being considered along with the rest of the evidence. *Emperor v Abdul Gani*, 49 B 878=27 Bom L R 1373=91 Ind Cas 690=A I R 1926 Bom 71

89. The Court shall presume that every document, called for and not produced after notice to produce, was attested, stamped and executed in the manner required by law.

Presumption as to due execution, etc., of documents not produced.

Principle A circumstance sometimes treated as an extrajudicial admis-

the paper) Everything is to be presumed in *odium spoliatoris*; and had it certainly appeared that the destroyed paper purported to be an agreement such as is attempted to be established, it would have sufficed for the admission it

it would be not only innocent but prudent to destroy. If the paper destroyed were shown to have been an agreement for the land, it would raise a presumption of identity, sufficient to dispense with the ordinary proof of execution, and let in the contents of the paper (as proved by another witness). (But the witness

identity and consequent execution." *Wigmore* § 2132. So this section proceeds on the maxim, *omnia presumuntur contra spoliatorem* (Every presumption is made against a wrong doer)

Scope of the section. There is a presumption also in favour of innocence, the law assumed, produce *Vort Es* nature of his case would be manifested, every presumption to his disadvantage will be

adopted" I Smith L C 10th Ed 353; 1 Vern 19. According to the same principle, if a man withhold an agreement under which he is chargeable, after a notice to produce, it is presumed as against him, to have been properly stamped Anderson, 1 Stark N P C 35, Marine,

625 This section is restricted to cases, party It does not extend to cases, where a summons to produce is delivered to a stranger to the suit Mark Ev p. 68 See also Ahmad Raza v Sayyad Ibid, 38 A 494-21 C W. N 265 So where any document is not produced after due notice to produce, and after being called for, it is presumed to have been duly stamped, (Closmadence v. Carrel, 18 C II 44), unless it be shown to have remained unstamped for some

R 5 E & The Act presumed to nents In

case (a) they are presumed to have been made after the execution of the Will Simons v Rudall, 1 Sim N S 136 In case (b) they are presumed to have been so made that the making would not be an offence Gordon's Cas Deat SI & P 592 per Jervis C J, Stol'e's Anglo Indian Code, Vol II § 909 Where the

gagae and where the mortgagor failed to produce the deed before the Court though called upon to do so Held that the execution of the mortgage deed was in view of s 89 of the Evidence Act satisfactorily established, irrespective of the provision of s 68 Jang Bahadur v Chandraj Singh, 41 Ind Cas 171

90. Where any document, purporting or proved to be thirty years old, is produced from any

Presumption as to documents thirty years old custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested

Explanation—Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be, but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.

This explanation applies also to section 81

Illustrations.

(a) A has been in possession of landed property for a long time He produces from his custody deeds relating to the land, showing his title to it The custody is proper

(b) A produces deeds relating to landed property of which he is the mortgagee The mortgagor is in possession The custody is proper

(c) A, in connection of B, produces deeds relating to lands in B's possession which were deposited with him by B for safe custody The custody is proper.

Principle The First, after a long saw the document's

90. exists for resorting to circumstantial evidence Secondly, the circumstance of

been found amongst deeds and evidences of land may be given in evidence, although the execution of them can not be proved; and the reason given is, 'that it is hard to prove ancient things, and the finding them in such a place is a presumption that they were fairly and honestly obtained and reserved for use, and are free from suspicion of dishonesty' *Wigmore* § 2137; *Wymne v. Tyrnhill*, 4 B & Ad 376; *Andreas v Motley*, 32 L J C P 128, 131. So as a rule of procedure, the witnesses in proving procedure or practice of convenience may

to writings thirty years old are conclusively presumed to be dead,—so that execution of such a deed, will or other document need not be proved *Chamberlayne's Est* § 1165 As the question is one of procedure and not of logic, this presumption is not allowed to be rebutted by proof that such witnesses are alive and actually in Court *Doe v Hooley*, 8 B & C 22, *Doe v Burdett*, 1 A. & E 19, *Marsh v Collnett*, 3 C-p. 655; *Phip Ev 7th Ed* p 504

the case may be, by persons, in the manner, &c.

state or otherwise identify the means or characters of the parties to it, some sort of evidence will be necessary before it will be admissible *Wills Ev, 2nd Ed* 381

The rule is

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purporting to be ancient is not likely to escape exposure, when subjected to the

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rule and to admit, under proper restrictions, ancient documents purporting to

constitute part of a transfer of title or

11 Apv Cas 603 "The proof of

difficulty Time has removed the with

nection with many different kinds of documents *Doe v Samples*, 8 A. & E 151), *Wills*, bonds (*Chelms v Couper*, 1 Esp 275) memo- 28 L R 141), leases (*Plaxton v Dora*, 10 *Thornbury*, 29 L J M. C. 109), cases stated

for counsel's opinion (*Meath v*
containing entries of the receipt

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years old, they need not be proved, provided they have been so acted upon or brought from such a place as to offer a reasonable presumption that they were

title which such documents profess to create *Luteffunmissa v Goor Sarun*, 18 W R 485 The rule regarding the proof of documents more than thirty years old is that they need not be proved provided they have been so acted upon or brought from such a place as to offer a reasonable presumption that they were honestly and fairly obtained and preserved for use, and are free from suspicion of dishonesty *Hari Dhagonr v Biru Dasee*, 5 B H A C 135 In order to establish the authenticity of an ancient document it is not necessary to show that it was accompanied by possession *Bisheshur Bhattacharya v George Henry Lamb*,

than 30 years old and that it was produced from proper custody, yet before ce, it must be shown that it is Evidence Act *Mathura Pershad*

thirty years old and is produced from proper custody, the Court may under this section presume its genuineness and more particularly that of the signature appearing on it *Bhupali Singh v Khetal Singh* 41 Ind Cas 274, *Nur Muhammad v Allah Wasai*, 5 P W R 1915-35 P L R 1915-27 Ind Cas 562, *Gulab v Mahomad*, 35 Ind Cas 593, *Duarka v Mala*, 49 Ind Cas 419 The Will in dispute having been duly registered and the document being over thirty years old, it must under this section, be presumed that it was a genuine document, and the fact that it was registered raised the presumption that the testator was of sound mind at the time of the execution of the Will *Babu Badri Prasad v Anupurna Kuer*, 6 O L J 311-52 Ind Cas 837 A Will of 1873

the attesting witnesses except one were dead and the surviving attesting witness

of the law may not have been given to the purchaser, there is no reason why the Court should presume that no possession was given *Pandurang v Basappa*,

0. A. I. R. 1923 Bom 364.

rently from proper custody
show that it was not acted

nature to be acted upon, the presumption as to the title created by such document falls down *Mahadeo v Ragotrai*, 1923 Bom 293 In the case of a document more than 30 years old executed by an illiterate person but registered, there is from this two circumstances a presumption of its being genuine *Bhim Sankar v Mani Ram*, 9 O & A L R 893 A deed more than 30 years old and executed before the Transfer of Property Act, even if not signed by the executant but only by some scribe at his instance will be presumed to be genuine *Gaya Singh v Surnybal*, A I R 1924 All 832 If one is dealing with a document some thirty years old the main fact that the proof of consideration is not at all satisfactory, is by itself a slender ground for holding that the document known to have come into existence was entirely unreal *Sailaya Nath v Raja Resheecase* 51 C 135=39 C L J 340=81 Ind Cas 493 The document was more than 30 years old and was produced from proper custody and all the witnesses were dead *Held* that the presumption must be made under s 90 of the Evidence Act that the attestation

der, 12 O L J

ore than 30 years

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was no proof that it

proof establish that the

10 *Purna Chandra v.*

Radhakamohan, 90 Ind Cas 722 Where all the executants are dead, the scribe is dead the persons who purport to have been the attesting witnesses are dead,

receipt of consi-

10 is also dead,

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a document was

executed by the person who purported to be the executant, but the Court cannot presume the correctness or genuineness of every statement appearing in the document *Kshetra Mohan v Bhuvanab Chandra*, 98 Ind Cas 1021=A. I R 1927 Cal 229; *Abdul Gham v Fuqir Mahomed*, 111 Ind Cas 361 Genuineness of jama uasil baki papers more than seventy years old, can be presumed under this section *Nirod Krishna v Prodyat Coomar*, 45 C L J 129 The presumption of execution of the document extends to the marks man *Shailendra v Giriya*, 58 C 686=A I R 1931 Cal 896 This section does not contain any restrictions that a presumption should not be drawn thereunder if the person claiming under the document in question is out of possession or has not actually signed or thumb marked the document itself *Iman v Natha*, A I R 1932 Lah 43=32 P L R 626.

Purporting Section 90 of the Evidence Act, does not enable a Court to presume that unsigned accounts, which do not purport to be in the handwriting of

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would be excluded were it not for this section, which contains an excellent provision, if it is not misunderstood *Mark Ey* p 63

Thirty years--Mode of reckoning Since the chief reason for the rule is the impossibility of obtaining living testimony to the signing or to the hand-

writing, the necessity does not arise until time has made such testimony unavailable. At first under the English Common law, this requirement was satisfied by the simple and indefinite notion that the deed must be ancient. In some of the old books the average age of a man was computed to be sixty years, that an . . . ars old . . . nson v.

Oliver, Bunbury 250, Clarkson & Woodhouse, 3 Doug 169 But this reckoning was too strict, because the witness were more persons and therefore at least thirty years of age, suffice to bring them near the end of the span 1700 B, the period of thirty years has sufficed to constitute an ancient document.

constitute an ancient document.
l v Baker, 1 Atk 21, 49, R.
252, Chelsea Water Works v
Wigmore § 2138 The period

have forged the written date . . . years ago must be somehow shown *Forbes v Hale*, 1 W. Bl 532 In the above named case *Lord Mansfield* said; 'If the length of the date is alone sufficient to establish it a man has nothing to do but to forge a bond with a very ancient date" *Wigmore* § 2138 But it seems that this section does not require any such extra evidence Hence in the case of a Will the period of thirty years is reckoned not from the testator's death, but from the date of execution of the instrument *Doe v Holley*, 11 B & C 22 In applying the presumption allowed by s 90 of the Evidence Act, the period of thirty years is to be reckoned not from the date upon which the document is filed in Court, but from the date, or otherwise become . . . If 135 But in any . . . years old when it was produced, there is no presumption as to its genuineness

thirty years old on the date when arguments were heard *Mahadeo v Nasiban*,
54 Ind Cas 368 The period of thirty years mentioned in this section is to be
reckoned from
the date when
283-75 Ind C

Thirty years should be counted from the date of its genuineness being subjected to proof. *Konda Reddi v Pichu Reddi*, A I R 1925 Mad 184

Proper custody The mere production of an ancient document by a party affords no proof of proper custody and it is for the party producing it to explain how the document came to be in his custody *Trimbak Das v Mattabar*, 27 N L R. 75=124 Ind Cas 609=A I R 1930 Nag 225, *Ramnarash v Chukut*, A I R 1932 Oudh 227=9 O W N 379 The Court added that it was only necessary to show the age of over thirty years, and that they came from a natural and reasonable cause found 1901 the cause

to be consistent with its genuineness *Doe v. Phillips*, 8 Q. B. 158, *Doe v. Keeling*, 11 Q. B. 884, *Wills v. 2nd Ed* 385. In *Meath v. Winchester*, 8 Beag. N. C. 183, 200, *Tindal v. J.* said: "It is not necessary that they should be found in the best and most proper place of deposit. If documents continue in such custody, there never would be any question as to their authenticity. But it is when documents are found in other than the proper place of deposit that the investigation commences whether it was reasonable and natural under the circumstances in the particular case to expect that they should have been in the place where they are actually found. For it is obvious that whilst there can be only one place of deposit strictly and absolutely proper, there may be various and many that are reasonable and probable though differing in degree, some

90. A. I. R. 1923 Bom. 364. . . .
 rently from proper custody
 show that it was not acted

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 a than 30 years old and executed
 signed by the executant but
 mel to be genuine *Gaya Singh*
v Sumbali, A. I. R. 1924 All 832 If one is dealing with a document some
 thirty years old the main
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dead Held that the pre-umption must be made under s 90 of the Evidence Act
 that the attestation was duly made *Mahomed Hasan v Ali Hinder*, 12 O L J
 1-85 Ind Cas 509 A partition chitta purporting to be more than 30 years
 leposed that the Record
 court Held, the presump-
 was no proof that it
 collectorate custody was proper custody within section 90 *Purna Chandra v.*
Radhalamohan, 90 Ind Cas 722 Where all the executants are dead, the scribe
 is dead, the persons who purport to have been the attesting witnesses are dead,
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executed by the person who purported to be the executant, but the Court cannot
 presume the correctness or genuineness of every statement appearing in the
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 1927 Cal 229; *Abul Gham v Faguir Mahomed*, 111 Ind Cas 361 Genuineness
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 claiming under the document in question is out of possession or has not actually
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which are excluded were it not for this section, which contains an excellent
 provision, if it is not misunderstood *Mark Ey* 68

Thirty years—Mode of reckoning Since the chief reason for the rule is
 the impossibility of obtaining living testimony to the signing or to the hand-

Horner, (1913) 2 Ch .

thereof so far as t

which, judging from

tances of the case, it would naturally be expected to reside, then the document ought to be treated as authentic to such extent as to become admissible in evidence between the parties *Chundra Kant v. Brojonath*, 13 W R 109. Whether the custody of a document is a proper one under section 90 of the

s of each case.

documents sixty

custody of the

the presumption

ld be admitted

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than 30 years

old comes from custody of the mortgagee, the presumption of proper execution readily arises and it is proof of the mortgage *Samachari v. Sadho Suran*, A. I. R 1924 All 269 The mere fact of a certain document having been produced from a Court where it had been filed does not necessarily bring that document within the requirements of this section *Rajendra v. Gopal* 4 Pat 66=A I R. 1925 Pat 442

May presume It is in the discretion of a Court whether it will raise the presumption, in favour of a document for which s 90 provides But this discretion is not to be exercised arbitrarily but must be governed by principles which are consonant with law and justice And while, on the one hand, great care is requisite in applying the presumption, on the other hand, it is clear that very grave injustice may be perpetrated, if an ancient document coming from proper custody is rejected by a Court capriciously or for inadequate reasons *Gorinda Hazara v. Protap Naram*, 29 C 740; *Ram v. Chulut*, A I R 1932 Oudh R 227=9 O W. N 379 When a document, which is over thirty years old, has been which is a mentioned

ment, stating its reasons in the latter event and, in the former, whether the presumption has been rebutted or not *Sumath Patra v. Kuloda*, 2 C L J. 592 The effect of the presumption is weakened by circumstances which tended to raise doubts as to its authenticity *Madan Mohan v. Kumar Rameswar*, 7 C. L J 615 The presumption allowed by this section is not a presumption which the Court is bound to make *Honuman v. Ramchuritra*, A W N 1901, 28. As to the presumption which a Court may make under s 90 of the Evidence Act, the power thereby given must be exercised with great discretion in a country where documents are written on such material as *parabick* and palm leaf, and where in Burmese time neither parties nor witnesses were ever in the habit of attaching their signatures, so that the term execution is rather a convenient

it be more than thirty years old and purports to come from proper custody and that under the circumstances of the present case the discretion was rightly exercised *Safiq unnessa v. Shaban Ali Khan*, 7 O C 290 The words "may presume" in this section, ought generally to be construed in the more rigorous of the sense allowed by s 4 and in view of danger of a blind acceptance of a document as genuine for all purposes, merely because it purports to be a before the pre- found v *Lakh* previous at the time, and as to whether it has ever been acted on previously to its production in Court *Mehar Amir v. Nur Muhammed*, 110 P. L. R. 1902. So it

90. is not obligatory, under this section, upon a Court to assume that the document produced is genuine merely because it purports to be thirty years old and is produced from proper custody. The Court has a discretion in the matter, but the discretion is not to be exercised in a manner which would be inconsistent with the presumption with regard to the genuineness of a document under this section is one in which the Court has to exercise its discretion and when that discretion has been exercised with due care and the presumption allowed by law has been made an appellate Court should be slow to interfere with such discretion. *Mahomed v. Rahim*, 57 P. W. R. 1918-44 Ind. Cas. 559. The presumption is not to be applied to a deed executed by an illiterate.

in refusing to draw the presumption under s. 133 of the Act nor would such presumption be

in itself sufficient to prove the genuineness of a document but such evidence may

age of the document. *1930 Bom. 39.*

in my opinion, lays down more a rule of expediency than a rule of law."

Unsuspicious appearance. A third requirement is that the document must in appearance be unsuspecting. *Wanmore* 6 P. 140. "On inspection it must

is suspicious, on the face of it, and when the very place of importance has been erased and re-written, presumption under this section does not arise. *Baldeo Misir v. Bharos Kumbhi*, 95 Ind Cas 261-A I 1926 A 537. Where a document more than 30 years old purporting to come from proper custody, is required by the Court before which it is produced to be proved and is left unproved, and there are circumstances, both external and internal, which throw great doubts upon the genuineness of the document the Court can, in the exercise of the discretion vested in it under s 90 of the Evidence Act, decline to admit it to evidence without formal proof and their Lordships of the Privy Council will be always slow to overrule the discretion exercised by a Judge under s 90. *Shafiq-un nissa v Shafan Ali*, 6 Bom. L R. 750.

Old Copies The use of
raises two or three questions
fiance, moreover, of the circumst

but this rule does not enable one to use an unauthorized record. Thus, when the record is unauthorized, some other mode of proving the deed must be resorted to. Keeping these principles in mind, the various situations may be distin-

cular mode of proof has been prescribed by the Act. *Krishnaswami v Ananthachari* 4 Mys L J 264, *Saryu Dey v Ram Hwakh*, 18 Ind Cas 250. This section of the Evidence Act does not make it incompetent for the Court to draw any presumption
a copy of the sa

which
section
id was
94-A
218,

Nanu Nair v Kantan Ashta, 2 L W 509-29 Ind Cas 386. But this section

M W N 454-73 Ind Cas 66

Where the alleged ancient original is lost, and proof of its contents (including the purporting signatures) is offered to be made by one who having seen it before its loss, recollects its contents or took a copy, the difficulty in

any witness and the presumption in section 90 cannot apply, for that only relates to documents which purport or are proved to be thirty years old, and This is not one of such documents, and, section 90 can not apply. One of the agent for admitting Exhibit E in Ponnani

Ialeth Porapman v Karoth Sankaran, 12 Ind. Cas 153, but from the brief judgment of the contrary, the copy."

copy is offered, made by a private hand, and the purporting maker being unknown and the copy 2113. The

an alleged official record copy offered, though not *Ibid*. When a copy of a document is exhibited in a suit and the original document is not produced, though the original purports to be more than thirty years old, the presumption which, under s 90 of the Evidence Act, may be made where a document over thirty years

not to be made *Appathura v. Gopala*, cases in which the document is actually produced in Court, secondary evidence of an ancient document is admissible, without proof of execution of it have been lost

P. R 1910=1

case of a copy

Court to presume that the copy is in the hand-writing of the person in whose

though this section does not refer to stamps,

Evidence Act regarding the same on the production of certified copy.

Bahadur v mentioned in the presumption

Duari anath, *Banuarial v.*

Aiyar, 16 L. *v. Subramania*

N 611=46 L. 2=(1922) M. W.

1 copy *Scethaya* authenticating,

Bom L R 756=1

this section with

as well as originals

be made in favour

Prosad, 6 O W N 880=A I R 1929 Oudh 483 The Court may presume

the genuineness even of an unregistered document thirty years old from a copy

of such document, if the original is proved to have been duly executed, and

further it is also proved that the original is since lost But such a presumption

can only be made after a careful consideration of all the circumstances of the

and, for the purpose

competent to execute

The words 'duly

according to law

whether she has fully understood the question of execution. The term only an abbreviated form of expression intended to connote the necessity of bringing home the transaction to the executant and of proving that it was fully explained to and understood by the parlanshin lady. *Afsar Bejam v Mahomed*, 5 Luck 326=8 O W N. 55=130 Ind Cas 861=A L R. 1931 Oudh 103

Presumption of genuineness whether presumption of executants authority to sign or grant. Where the executant of a document purports to sign it on behalf of others, the fact that it is more than thirty years old, though it would, under the provisions of section 90 of the Evidence Act, raise a presumption in favour of the genuineness of the document, would not dispense with proof of the authority of the executant to sign it on behalf of others so as to bind them or those claiming under them. *Ubtack Rai v Daliai Rai*, 3 C 557. Where it is not shown that the executant of an ancient document was entitled to grant such a document, mere production of it would be no proof of title. *Uggar Kant v Harro Chunder*, 6 C 209. The provisions of s 90 of the Evidence Act merely establish that the document was executed by the persons whose signatures it purports to bear, but that can not and does not

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only the execution of the deed, but not, in the absence of the power or evidence thereof, the authority of the solicitor to execute it. *Re Airey*, (1897) 1 Ch 164, *Phip Ex 7th Ed* 505

This section does not prove the authority of the person who has made the grant, the genuineness whereof is presumed by the Court under the provisions of that section. *Kashi Nath v Jagat Kishore*, 20 C W N 643=23 C L J. 583=85 Ind Cas 298. The presumption that arises under s 90 of the Evidence Act only extends to the genuineness of old documents coming from proper custody, it does not further go to the extent of holding that the document was in fact executed by persons possessed of the requisite authority. *Tarakeswar Pal v Sush Chandra*, 27 C W N 964. Although in the case of sale deeds more than 50 years old the presumption of law was that they were executed by the persons who purported to execute them, there was no presumption that the scribe who signed these documents executed them to do it. *Haji Shaikh v Ind Cas 989, Ramam Kant v Bhu* Cas 220

Full Bench case has held that the Act in the case of a document executed by the party by whom it purported to be executed includes the presumption that when the signature of the executant purports to have been made by the pen of the scribe, the latter was duly authorized to sign for him. *Haji v Sulham*, A L J 837=1925 All. 1=47 A 31 (F B), *Balloran v Ut Dular*, 24 A L J 920=97 Ind Cas 292

7 O C 299=31 I A
Cas 773. When the
applicability of the pro
the High Court can
7 In *Parankura Zales*
said. "The presumption

Act as to the genuineness of a document 30 years old, is one of fact and stands

that the District Munsiff had drawn the presumption under this section in

Vaiyya Dayan, 108 Ind Cas 412

Ancient document—Corroborative evidence : It is well settled that mere production of an ancient doc evidence of acting under it is not.

be corroborated by evidence by other equivalent or explanatory proof, it is then pre-umed to have constituted part of the actual transfer of property mentioned, because this is the usual ab-sence of proof of possession does udly affects the weight to be attached to a, 12 C L J 14-89 Ind Cas 747-A

I R 1925 Cal 1189

later when even that attesting witness was dead. There was no reasonable explanation about the delay after 1910 in making the application for probate. There was no evidence as to the custody of the Will before 1907, held that the applicant cannot get the benefit of s 90 *Channulal v Mt Puna*, 75 Ind Cas 660-1923 Nag 169. Where circumstances of suspicion surround the genuine character of a document thirty years old, the question of applying to it the present rule is one largely of administration. Should the evidence in the case explain and account for these circumstances to the satisfaction of the presiding judge, he may admit the writing to the benefit of the rule of procedure. *Chamberlayne's Ev* § 1165

Rule should be applied with proper care and caution. The rule laid down in s 90 of the Evidence Act as to proof of execution of documents thirty years old ought to be applied with special care and caution. *Trailokya Nath v*

Din, 241 P. L. R. 1913-19 Ind. Cas. 961. Before a Court is justified in making this must Cas s is a ution Allah

presumption contained in this section *Gobinda v Pulin Behary*, 31 C W N 215-98 Ind Cas 147-A I R 1927 Cal 103

Explanation This is to provide for cases in which the custody is not, perhaps, that where it might most reasonably be expected, but yet sufficiently reasonable to constitute such custody not improper. Thus in the two first illustrations, (a) and (b), the documents are produced from their natural place of custody; in (c) the documents ordinarily would be with the owner B, but

v The Bishop & the see laxton v

Dave, 10 H & C 17, or of the lessee *Hall v Ball* 3 M & G 242

CHAPTER VI

OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE

91 When the terms of a contract, or of a grant, or of any

Evidence of terms of contracts grants and other dispositions of property reduced to form of document. other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms

of such contract, grant or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained

Exception 1—When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved

Exception 2—Will "[admitted to probate in British India]" may be proved by the probate

Explanation 1—This section applies equally to cases in which the contracts grants, or dispositions of property referred to are contained in one document and to cases in which they are contained in more documents than one

Explanation 2—Where there are more originals than one, one original only need be proved

Explanation 3—This statement in any document whatever, of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.

* These words in s 91, *Exception 2* were substituted for the words under the Indian Succession Act" by the Indian Evidence Act Amendment Act 1872 (18 of 1872), s 7

91.

Illustrations

(a) If a contract be contained in several letters, all the letters in which it is contained must be proved.

(b) If a contract is contained in a bill of exchange, the bill of exchange must be proved.

(c) If a bill of exchange is drawn in a set of three, one only need be proved.

(d) A contract, in writing, with B, for the delivery of indigo upon certain terms. The contract mentions the fact that B had paid A the price of other indigo contracted for verbally on another occasion.

Oral evidence is offered that no payment was made for the other indigo. The evidence is admissible.

by B

it,

judgment, the contract, the devise, etc., it is in reality declaring a doctrine of the substantive law of these subjects, namely in the case of a written contract, that

It does not exclude certain data because they are for one or another reason untrustworthy or undesirable means of evidencing some fact to be proved. It does not concern a prohibitive mental process,—the process of believing one fact on the faith of another. What the rule does is to declare that certain kinds of evidence are inadmissible under the rule of substantive law; and this of course (like

when desired, (c) its prescribed forms, if any, and (d), the Intended external objects affected by it. Of these four, the first and the fourth are necessarily involved in every jurat act, the second and the third are important, but are always possible elements.

deemed by law to be the sole document was intended by the parties between them and therefore to be valid. *Wignote* § 2401. The practical parts, in their former and inchoate shape, have no longer any jurat effect, they are replaced by a single embodiment of the act, in other words: When a jurat act is embodied in a single memorial, all other utterances of the parties on the topic are legally immaterial for the purpose of determining what are the terms

of their act. *Ignore* § 242. This rule is based upon an assumed intention on the part of the contracting parties, and to put their ideas in such shape that there can be no misunderstanding, which so often occurs where reliance is placed upon oral statements. Written contracts presume deliberation upon the part of the contracting parties, on by the embodied common law on that the best phrase when the contents of a case are submitted to the tribunal, *Ev* § 2 substituted into

cited with approval by Lord Carson in *U Subramanian v Lutchman*, 50 C 338-38 C L J 41-28 C W N 1-44 M L J 602-50 I A 77 P C

instruments, or to contradict or alter them. This is a matter both of principle and policy, because such instruments are, in their own nature and origin, entitled to a much higher degree of credit than parol evidence of policy because it would be attended with great mischief if those instruments, upon which the evidence is by loose collateral *Charan, W R* 68 (69) *which requires the*

Statute of Frauds In all these cases, the law having required that the evidence of the transactions should be in writing no other proof can be substituted for that, as long as the writing exists, and is in the power of the party. *Green* *Ev* § 86. In the second place oral proof cannot be substituted for the written evidence of any contract which the parties have put in writing. Here the written instrument may be regarded in some measure, as the ultimate fact to be proved especially in cases of negotiable securities and in all cases of written contracts, the writing is tacitly agreed upon by the parties themselves, as the only repository and the appropriate evidence of their agreements. The written contract is not collateral, but is of the very essence of the transaction. If for example, an action is brought for the use and occupation of real estate, and it appears by the plaintiff's own showing that there was a written contract of tenancy, he must produce it, or account for its absence, if he were to make out a *prima facie* case, without any appearance of a written contract, the burden of producing it, or at least of proving its existence, would be devolved on the defendant. *Breuer v Palmer*, 3 Esp 213, confirmed in *Ramsbottom v Tunbridge* 2 M & S 431, *R v Rauden* 5 B & C 708 *Strotter v Boor*, 11 Bing 136, *Per Parke J*. But if the fact of the occupation of land is alone in issue without

1. respect to the terms of the tenancy, this fact may be proved by any competent
 variations of the tenant, notwith-
 an agreement in writing; for
 a question *R v Inhabitants of*
 ing 239, 241. The same rule
 applies to every other species of written contract *Greenl Ev* § 87. Save and
 ings, there is a third class of document
 existence of which is disputed, and which is
 the parties, or to the credit of witnesses
 be proved in accordance with the provisions
 of section 64 *supra*, "I have always" says Lord Fentenden, in *Vincent v. Cole*,
 1 M & M 253, 'acted most strictly on
 only be proved by the writing itself
 danger of relying on the recollection of
 contents of written instruments; the
 the purposes of justice
 the writing does not
 there is no ground for
 written communication
 latter may
 of the writing
 may be pro
 4 Esp 213; *vide* to this section. In stating that oral testimony cannot be substi-
 1

although they relate to the, which are
 directly in issue in the cause *Parke B*,
Newhall v. Holt, 6 M & W *Bethell v*
Blencowe, 3 M & Gr 119, *Howard v Smith*, 3 M & Gr 254 "The reason"
 *Peron Parke* "why such statements or acts are admissible, without

In this, may reasonably be presumed to be" *Taylor* § 410 But in *Mass*

the genuineness of a document produced is in question (*Vide* § 22) When
 to be

limitation it must be taken that even a third party if he wants to establish a

I made orally there being no docu-
 is in fact reduced to the
 be determined on a
 and the circumstances
 e terms are not reduced
 to the form of a document registration is not necessary and while the writing
 cannot be used as a document of title it can be used as a piece of evidence, & §

settlement made. Any antecedent documents and maps can be used solely

in the plaint, to the effect that he would make good any loss the (plaintiff) purchaser might incur in respect of the property sold, is not excluded by section 91 of the Evidence Act, and renders proof of the agreement unnecessary. *Sadhu v. Nga St*, U B R 1907, Evidence 1. When men agree to preserve by writing the remembrance of past event of which they wish to create a memorial either with a view to lay down a rule for their own guidance, or in order to have in the instrument a lasting proof of the truth of what is written, the truth of the written act must be established by the acts themselves, that is, by the inspection of the originals. *Upendra v Umesh Chandra* 12 C L J 25-6 Ind Cas 346. The consent in writing by the landlord to the division of a tenure has the effect of substituting a new contract for the old. It should be proved by the terms of the new contract. Section 91 of the Evidence Act does not exclude the terms of the old contract.

application. *Ganoda v Girish*, 4 Ind Cas 400. As required by ss 250 and 251, of the Code of the Civil Procedure, the warrant must have been in writing and therefore, under s 91 of the Evidence Act, the fact, that the warrant gave

admissible. *Sheo Ho v King-Emperor*, 3 L B R 128. Previous conviction should, regard being had to the provisions of this section, and section 511 Cr P.C. Code, be proved by copies of judgments or extracts from judgments or by any other documentary evidence of the fact of such previous conviction, if those convictions is, having warrant or justification. *Lasin* 70. When a dying declaration is not evidence, but the precise statement of the Magistrate who recorded the statement or some one who heard it. This section does not apply to such a document. *Gowindas v Emperor*, 36 C 659-13 C W N 659-10 Cr L J 186-2 Ind Cas 541. Section 91 of the Evidence Act has no application to matters embodied in the special diary under s 172 of the Criminal Pro. Code.

1.

- Ind Cas 766 An agreement within the meaning of section 10 of the Evidence Act, reduced to writing, is admissible.

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Civil :
ing th
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gift has been validly made in accordance with Muhammadan law *Ali Baksh v Ghuras*, 28 Ind Cas 180 = 18 O C 122 Where the terms of a compromise are found to be set out in a petition, the petitioner must prove the terms of the compromise and oral evidence would not be admissible to vary or alter its terms *Bharora v Sukhdar*, 12 A L J 993 There is no rule of law that the only evidence of an agent's authority admissible in evidence is a written power of attorney The fact can be proved by evidence, *alunde*, and so far as third parties are concerned, non the-less so because the agent was appointed under a written document executed by the principal. There is nothing in section 91 or section 92 of the Evidence Act to preclude such third party from proving the existence of a particular relationship between the persons who respectively executed and accepted the power of attorney, though the terms which govern such relationship appear to be in writing *Lala Nanakchand v. Mahammad Abzal*, 279 P W R 1912 The object of s 10 A of the Dekkan Agriculturists'

the parties but embodies only some of the conditions, oral evidence to prove

judicial determination of the meaning of the language of parties to an agreement though the parties may not testify as to their intention. *Morris v David Jones*, 125 Ind Cas 867 = Ind Rul (1930) P C 231 It is not necessary to get a family settlement reduced into writing and get the writing registered Oral evidence on the point of the alleged settlement is therefore admissible *Rangu v. Lal shiman*, A I R 1930 Bom 438

When the terms of a contract or of a grant, or of any other disposition of property have been reduced to the form of a writing Where a transaction

memorial may be termed the integration of the act : i. e., its formation from scattered parts into an integral documentary unity. The practical consequence of this is that its scattered parts, in their

material for the purpose of determining what are the terms of their act *Wignore* § 2425. It is for this reason that whenever the parties to any contract or grant or other disposition of property have set out its terms and conditions in a writing, which they presumably intend to be a record of the transaction, the law forbids any attempt to establish any other terms by means of oral evidence. *Powell* *Ex p* 181. The moment an oral contract is reduced to writing, it is not open to any of the parties thereafter to seek to prove the term of contract referring to the original oral agreement and this section applies not only to cases where the contract is brought about or concluded by the writing, but also where the contract having been originally made by parol is subsequently reduced to writing. Where the parties reduce the terms of a contract into writing, it clearly indicates the contemplation of the parties that the terms would be reduced to a form where there could be no question at all as to what the terms were and the undoubted policy of the law is that whichever parties have taken such precaution it is the document itself that must be produced and proved as evidence of the contract subject of course, to any rules as to secondary evidence. *Kappu Suami v Chinnu Suami*, 28 L. W. 234-111 Ind. Cas. 671-A I. R. 1923 Mad. 546. Thus, where a contract of agency had been orally made between the parties, but had subsequently been put into writing and signed by them, it was held that the document was only admissible evidence of the agreement. *Morris v Delobel Flipo*, (1892) 2 Ch. 352; *Phip* *Ex p* 7th Ed. p. 547. Having regard to the terms of this section, what the Court has got to do is to find out the real contract between the parties. *Meenakshisundaram v. Chenchu*, 109 Ind. Cas. 18-A I. R. 1928 Mad. 459. The fact of partition may be proved by oral evidence although the deed embodying the terms of partition cannot be proved because of the inadmissibility of the document. *Maung Tan v Ko Tu*, 111 Ind. Cas. 472-A I. R. 1928 Rang. 196. But where an award in writing which effected a partition of joint family properties, plainly and unambiguously effected an out-and-out partition among all the members of the joint family, held that extrinsic evidence was admissible to explain or control its terms, to show for instance that there was no separation between two of the members inter se. *Babu v Gakuldass*, A. I. R. 1928 Mad. 1064-55 M. L. J. 182-112 Ind. Cas. 184. The agreement to refer to or other disposition of property and so forth. *Ram v Lala Ram*, 116 Ind. Cas. 853-A. A will may be created by word of mouth, been put in writing the document itself or secondary evidence of the same should be tendered. *Mahomed v Bibi Marian*, 5 Pat. 481-117 Ind. Cas. 633-A I. R. 1929 Pat. 410. When a plaintiff alleges that possession of immovable property has been given to the defendant as security for a loan of hundred rupees or upwards, but without the execution of a registered instrument, oral evidence is not admissible to prove the transaction. *Maung Sa v Maung*

have been reduced to the form of a document, except the document itself or secondary evidence of its contents in cases in which secondary evidence is admissible. *Maung Pan v. Ma Bue*, U. B. II (1892-1896) Vol. II, 347.

1. Terms of a contract. The general rule laid down in section 91 of the Act is, that when the terms of a contract have been reduced to writing, no evidence shall be given in proof of terms of the contract except the documents itself, or, in certain cases, secondary evidence of its contents. *Sri Dutt v. Bodri*, 15 R. D. 339, *Nar v. Ran Mohan*, 53 A 114=1931 A L J 61=A I

From the mere fact that a bill of exchange or hundi has been executed, it does not necessarily follow that the whole of the contract between the parties

dence of an agreement as well as of what took place when the agreement was made to prove the agreement if the written instrument is not produced. *Iyan-latesh v. Ganesh*, 61 Ind Cas whenever the terms of a contract are inadmissible in evidence the *Ishai Das*, 3 Lah. L J 157=60. 23 Bom L R 767=63 Ind

parties been reduced to writing and the of the contract of loan but if the hundies

then it is the oral terms proved and this section is 180=57 Ind Cas 391 If contract contemplate the fact it is a question of construction is a condition or term of desire of the parties as to will in fact go through either because the condition a contract to enter into and the reference to the mere formal document may be ignored. 4 P. L. J. 580=(1919) Pat 305=53 Ind Cas 832 When it was admitted that the terms of the contract were reduced to writing and as no oral evidence was admissible to prove the said terms, the suit should have been brought within three years of the date of the transaction if it could be maintained on the original consideration. *Gobinda v. Ram Chandra*, 29 C L J 508=51 Ind Cas 945 Oral evidence to prove admissible under it 22 C W N 416=4

controlled by final expression of obligation his own language. *Moung Po Thet v. Irua* Vol II, into at a the writ

N 147 (P C)=32 C. 96=31 I A 188 A question as to who the contracting parties are is not a question as to the terms of the contract, within the meaning of this section. *Venkata Subbiah v. Gobindarajulu*, 18 M L J. 1=3 M L J. 250=31 M 15 Where an agreement is inadmissible, oral evidence is barred.

Samsam v Ram S.
 procedure does not
 need to be in the form
 of the suit or in
 proceedings. The

agreement or compromise itself, that is made out of Court may be in writing or by word of mouth. If the Court did not record the terms of it, this section is no bar to the suit being brought on the terms of the compromise. *Biya v On Gaung*, 3 I. M. R. 243. Ordinarily when the terms of a contract preceded by proposals, negotiations, conditional acceptances, counter proposals and so on are reduced finally to the form of a document signed by one or both of the parties the strong presumption is not that there are two independent contracts (the first an oral contract the second written contract) but that the written contract is the only final contract between the parties and when a contract is once reduced to writing no other evidence can be given of its terms. *Kotam Reddy v Vennalalant*, 20 M. L. T. 41—(1916) 2 M. W. N. 33—31 M. L. J. 240—35 Ind. Cas. 18. When the terms of contract for payment of interests were excluded from evidence by Court of Wards Act oral evidence is admissible to prove the terms of contract. *Ism Bahadur v Dassur*, 17 C. L. J. 399—19 Ind. Cas. 818. The rule of evidence, which excludes evidence of the terms of a contract which has been reduced to the form of a document has nothing to do with an action for money had and received the basis of which action is not the contract reduced to the form of a document but the doctrine of equity that a person who has received a sum of money from another for a consideration which has wholly failed must return the money to the payer. *Bay Nath v Sahj Ram*, 16 Ind. Cas. 33.

Promissory note—Proof of oral contract of loan. Apart from the promissory note there is always a contract to repay a loan and such contract can be proved independently of the instrument. It is only the other contract relating to the rate of interest which can only be proved on reference to the instrument itself. So even in cases where the lending of the money and the execution of the promissory note are contemporaneous the plaintiff is entitled to maintain a suit for recovery of the money lent and to adduce evidence other than the instrument or the promissory note itself in order to prove the loan. *Dhaneswar v Ramrup Gir*, 7 Pat. 845—111 Ind. Cas. 482—9 Pat. L. T. 471—A. I. R. 1928 Pat. 133. "It is a well established rule that a contract to repay a loan, cannot be proved by evidence in law to prevent and if he can satisfy the court on any reason why a decree should be granted." *Mahamad A. I. R.*

1081 Pat. 293—133 Ind. Cas. 685, see also *Lal v Ram*, 130 Ind. Cas. 347, 10 Pat. 506. But a Full Bench in *Khan v Ram Mohan* decided differently. Between cases where the transaction is separable from the promissory note and cases where the execution of the promissory note and the payment of the money are part and parcel of the same transaction, it being held that in the former case the debt could be held proved, although the promissory note was not admissible in evidence, while in the latter cases it could not and the suit must fail if the promissory note itself be inadmissible in evidence. In that case the cases of *Sima*, 34 A. 153—13 Ind. Cas. 685, overruled see also *Sheik Albar*, 256 M. L. J. 256—133 Ind. Cas. 685. The case of *Sheik Albar* is also overruled see *Sheik Albar v Sheikh Khan*, 23 C. 551. In the Madras High Court in *Varlagadda v Gotantala*, 29 M. L. J. 111—13 M. L.

the transaction is separable from the promissory note and cases where the execution of the promissory note and the payment of the money are part and parcel of the same transaction, it being held that in the former case the debt could be held proved, although the promissory note was not admissible in evidence, while in the latter cases it could not and the suit must fail if the promissory note itself be inadmissible in evidence. In that case the cases of *Sima*, 34 A. 153—13 Ind. Cas. 685, overruled see also *Sheik Albar*, 256 M. L. J. 256—133 Ind. Cas. 685. The case of *Sheik Albar* is also overruled see *Sheik Albar v Sheikh Khan*, 23 C. 551. In the Madras High Court in *Varlagadda v Gotantala*, 29 M. L. J. 111—13 M. L.

J. 484 and in *Mulhu v Vishuanatha*, 38M 660=21 Ind Cas 864, s 91 of the Evidence Act was relied upon and it was held that in circumstances similar to the Allahabad Full Bench Case, oral evidence could not be given in proof of the loan; see also *Alimam v. Kolisetti*, A I R 1932 Mad 693=63 M L J 303. In *Chandra* . . . A I R 1922 Lch 307=66 Ind Cas 201=2 . . . also took the same view. The point of view whether the fact of payment of a sum of money can be regarded as a term of the contract does not seem to have been considered by the learned Judges who decided the case. In a recent full Bench case of the Oudh Chief Court, it has been held that in spite of the provisions of s 91, it is open to the party who has lent money on terms recorded in a promissory note which terms ought to be inadmissible in evidence for want of proper stamp duty to recover his money by proving orally the advance of the loan. *Kunwar Bahadur v Suraj Bihari*, A. I. R. 1932 Oudh 235, see also *Krishnan v Rajmal*, 24 B 360=2 Bom L R 25; *Duaria v Idur*, 74 Ind Cas 813=26 O C 361, *Narain v Guja*, A I R 1929 Oudh 349, *Mung Kyu v. Ma Ma*, 10 L J R 51=74 Ind Cas 84 (F B). For further discussion on the subject vide pp 1007—1009 *infra*.

Terms of a grant. Under this section grant when it has been reduced to the form of secondary evidence of its contents is admissible only under the terms of section not proved to have been lost, (1 C) of s 65 cannot be invoked. *Mahomed Khan v. Shoo Bihari*, A I R 1929 Oudh 447=6 O W N 353. Under section 85, sub section (2) of the B n.

Oral evidence of such grant is also excluded by section 91 of the Evidence Act. *Jarip Khan v Durfa Beua*, 16 C L J. 144=15 Ind Cas 116=17 C W N 59.

want of registration—whether secondary he contract can be received. *Nya Sheru*. The combined operation of s 49 of the Evidence Act is to completely partition. In other words it would prevent the plaintiff from proving that in di

intention of 927 Nag 113 property can to determine van 103 Ind Cas. 153, see F 276=103 Ind Cas 281=A. I Cas 47=1923 Rang 57; *ngdas v Uttamchand*, A I R deed can be used as evidence

terms of a partition deed. *Mg Po Leen v. Ma E Mai*, 1 Bur. L J 111. Secondary

evidence of a lost unregistered document affecting an interest in an immovable S.

oral agreement to lease made before the execution of the document, in order to support a claim

Kashnam 71 In

1923 P 111 W

tered, the tenant

formance *Damodar v Masoodan Singh*, 105 Ind Cas 172: *Islaram v Sukla*,

111 Ind Cas 358 = A I R 1928 Nag 378 Though a lease for agricultural

purposes for more than a year is reduced to writing, it cannot be received unless registered. The document

out other evidence of the transaction

349 = 79 Ind Cas 26 = 5 Pat L T 511, *Ram Chandra v Tama*, 11 Bim L R.

390 = 36 B 500 = 15 Ind Cas 830, *Jasod v Anulau v Ram Kuar*, L R 34 537,

Budhan Felt v Madanmohan, 3 Pat L T 185 = 63 Ind. Cas 653 An un-

registered deed of lease is not admissible to prove that the property to which

it relates was let for a term of three years nor can oral evidence of the terms of

the lease be tendered in such a case *Madar v Raul*, 63 Ind Cas 90 The

plaintiffs having agreed to convey a house to F received the purchase money,

executed a sale deed,

suit for possession of

deed, secondary evidence

Held, on second appeal, that under s

was compulsorily registrable, and

sale Section 91 of the Evidence

evidence of sale deed *Gangabisan*

Section 49 of the Registration Act prohibits unregistered lease from being given

in evidence whether the suit be for specific performance or for damages, and

section 91 of the Evidence Act forbids any other evidence from being given of

the agreement *Sieeramulu v Ramaswami* 33 M L J 596 Where the tenant

wrote to the landlord to grant a lease in pursuance of an oral conversation

and the landlord sent a reply which in law amounted to an agreement to lease

but which was rendered inadmissible for want of registration and the tenant

thereupon sought to fall back on prior oral agreement, held that if there

was a prior oral agreement, it was either the same as that in interest or it was

modified by the letters and that in neither case did s 91 of the Evidence Act

admit oral

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pro note payable otherwise than on demand, bearing an one anna stamp is an

insufficiently stamped document and is, under section 34 Stamp Act, inadmissi-

ble in evidence for any purpose even on payment of penalty In such a case

a person is not entitled to fall back upon the original consideration of the

contract as no other evidence of the terms of the document which is the best

evidence in the case is admissible under this section *O Gorman v Mahtab*

Singh, 92 P R 1898, *Chandan Singh v Amritsar Banking Co*, 2 Lab 330 =

1923 Lab 307 = 66 Ind Cas 201.

Where a plaintiff is able to prove the loan independently of and without

the assistance of a promissory note, which cannot be admitted in evidence for

some reason, he can fall back upon a claim for money lent *Ram Sawrup*

v Jasodah 9 A L J 72 = 31 A 153 = 13 Ind Cas 133 [Since over

ruled by 53 A 114 (F B)] So a creditor can fall back on the original

transaction and recover his money on its basis when it is found or con-

ceded that the document or instrument which he had obtained from the

debtor was ineffective to establish any contractual relation of debtor and

creditor between them so as to serve as a basis for a suit in a Court of law,

Udaram v. Laxman, 104 Ind. Cas 470 = A I R, 1927 Nag 241. Where a person

1. sued to recover money on the but the *sail hat* appeared to be a duly stamped *bill*, that if the plaintiff was able to prove *any* money he was entitled to a decree. *Launjari Chaudh v Parsotom Chaudh*, 25 A L J 567=103 Ind Cas 631=A I R 1927 All 563

The mere existence of an unstamped receipt which is inadmissible in evidence does not prevent other evidence being received.

Ram prosad v Nathu Ram.

If a creditor has a cause of action or has executed a promissory note separate from and independent of the note he can recover upon such cause in case the note for any reason as for want of being properly stamped cannot be put in evidence. *Hashu Prosad v Panna Lal*, 74 Ind Cas 379=L R 4 A 377=1923 A 29. A promissory note which is insufficiently stamped if sued upon may give rise to three kinds of transactions. Either the contract may be considered as contained wholly in the promissory note or bill of exchange is in all (b) to s 91 of the Indian Evidence Act, in which case the plaintiff cannot sue on the promissory note,—he can not sue at all, or secondly the promissory note may be regarded as a conditional payment of the amount of the loan in which case, of course, if the promissory note is insufficiently stamped it is only the plaintiff may sue on the loan; or thirdly passed as security for the loan, in which case plaintiff to sue on the promissory note at all or not, he can bring a suit on the loan. *Jacob* 132=102 Ind Cas 178=A I R 1927 Bom

note there is always a contract to repay a loan independently of the instrument. It is only the other contract relating to the rate of interest which can only be proved on reference to the instrument itself. *Dhaneshwar v Ramrup* 7 Pat 845=111 Ind Cas 482=9 Pat L T 171=A I R 1928 Pat 426, *Chedu Singh v Jagannath*, 26 A L J 416=108 Ind Cas 912=A I R 1923 All 297, *Nanhu Singh v Girja Bux*, 6 O W. N 649=119 Ind Cas 865=A I R 1929 Sind 399, *Ram Sarup v Jasodha Kunwar*, 9 A L J 72=13 Ind Cas 138=31 A 158. But where the money was borrowed simultaneously with the execution of a promissory note by the borrower and it appeared that the note was unstamped. *Held* that the promissory note could not be sued upon and that it was not a case in which the suit was maintainable on the basis of the original contract either as there was none. *Tenkata v Mumtaz* 6 Mys L J 157. If a hundi is an embodiment of the whole of the contract between the evidence and cannot be looked at for the the contract, other evidence to prove the allowed. But where the hundi embodies

form

the original consideration, even when a pro note has been executed and when for any reason the document is excluded. The reasonings of the several decisions apply not merely to unstamped documents, but to any case in which reliance cannot be placed of, or a collateral. *White, U B* 1003

under section 31 of the Stamp Act, cannot according to ss 65, 91 of the Evidence Act, be given. *Bakshi Ram v Kalka Ram*, 42 P R 1895. A person who takes a promissory note on account of a pre-existing debt, may, if the document becomes inadmissible in evidence sue upon the original consideration, disregarding the instrument, provided he has not endorsed, lost or parted with the same. But if the original cause of action is the promissory note itself and does not exist independently of it, he cannot succeed without the instrument, according to s 91 of the Evidence Act, as the instrument is the only contract between the parties. *Sheo Das v Kanhaya Lal* 61 P. R 1893. Where a promissory note itself is the agreement of loan a plaintiff cannot sue on the original consideration and the promissory note must be proved. *Ram Singh v Perumal*, 11 S L R 150-32 Ind Cas 582, *Bail Singh v Bhuguan*, 7 Bur L T 95-93 Ind Cas 975-7 L B R 101.

When it is proved that certain *hundis* were renewed from time to time and the suit, but the r and could not be upon the *hundis*

that were given prior to the last renewals and secondary evidence could be admitted to prove them. *Jagan Prasad v India Natl*, 12 A L J 361-86 A. 259-23 Ind Cas 589. Where the contract in case of a loan and a simultaneous promissory note has been reduced to writing in the form of the note which contains the definite terms of the contract, Courts cannot resort to inconsistent or consistent implied contracts in such cases, simply because the contract as entered in the promissory note cannot be admitted in evidence. *Muthu Sasthigal v Viswanath Pandara*, 14 M L T 520-(1914) M W N 58-26 M L J 19.

Any matter is required by law to be reduced to the form of a document. Oral Evidence can not be substituted for any instrument which the law requires to be in writing, such as records public and judicial documents, official information or examinations, deeds of conveyance of lands, Wills, other than nuncupative, promises to pay the debt of another person, etc., *Taylor* § 399. In all these cases the law having required that the evidence of the transaction should be in writing no other proof can be substituted for that, so long as the writing exists, and is in the power of the party. *Ibid*. Instances of this class in India are —

(1) Judgments and decrees in civil cases. *Vide* Or XX, and Or XXXI, of the Civil Procedure Code.

(2) Depositions of witnesses in civil cases, *Vide* Order XVIII of the Civil Procedure Code.

(3) Judgments and orders in criminal cases. *Vide* §§ 367, 424 of the Criminal Procedure Code.

(4) Deposition of witnesses in criminal cases. *Cr Procedure Code*, sections 354-362.

(5) Examination of an accused person. *Cr Pro Code* s 361.

(6) Confessions of an accused person. *Cr Pro Code* s 164.

(7) Lease of immovable property from year to year or for any term exceeding one year. *Vide* s 107 of T P Act. But this does not include an agreement to lease. *Nanda v Sarat*, 6 Ind Cas 563.

(8) Deed of mortgage when the principal money secured is one hundred rupees or upwards, other than a mortgage by deposit of title-deeds. *Vide* s 59 of the T P Act.

(9) Gift of immovable property. *Vide* s 124 of the T P Act.

(10) Sale of immovable property of the value of one hundred rupees and upwards. *Vide* s 54 of the T P Act.

91. (11) adred rupees
and upwar
(12) Rule s 111
of the Criminal Pro Code
(13) Acknowledgment of debt under s. 19 of the Limitation Act.
(14) Acknowledgment of debt by part payment of debt under s 20 of the
Limitation Act
(15) Assignment of copy right. Rule s 5 of the Copy Right Act.
(16) Agreement without consideration (Rule s 25 of the Contract Act)

Box Pitumal v
underlying s. 360
on the grounds of
on oath if the
accuracy of the record of such examination is to be vouchsafed, particularly when
it is to be utilised as a basis for a possible perjury in future for it would be
unsafe to use against a complainant what on face of it purports to be only a
substance and not the full version of his examination. But under the present
state of the law, it cannot be contended that the substance of the oral examina-
tion is inadmissible in evidence under s 91 of the Evidence Act in proof of the
statement therein contained *Bhagirathi Bai v Emperor*, 89 Ind. Cas. 713-26
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able. *Queen v Nga*, L B R (1872-1892), 572

Mortgage : When in a suit for redemption of a mortgage the existence of
the mortgage possession on
the strength ground of a
contract of sale evidence to
rebut the existence of such a contract. Held also that a pycet paing which
reported an actual sale could not be considered as a document recording the
terms of a contract for the purpose of section 91 of the Evidence Act. *Maung
Ain v Maung Sun*, 5 Rang 679. Where on the back of a mortgage deed an
endorsement of the payment was made and it was also added that the mort-
gages were extinguished, the endorsement requires registration. But oral evidence
is admissible to prove the payment of mortgage amount, apart from the endorse-
ment. *Labhu Ram v Sazaur*, 100 Ind. Cas 129-A I R 1927 Lab 237. If

transfer and have an account taken as to what was due on the mortgages
)-A I R 1926
contract relating to
ment, no evidence
document itself
Where a mortgage
stantial evidence

such as recitals in deeds referring to the mortgage, extracts from account books and by a transfer of a share of the mortgage *Held* that the written

per mensem compoundable yearly and the defendant alleged in a suit on the
 the interest
 agreement
 of Abdul
 a mortgage
 as produced,
 transaction.

Maung Po v. Ma Le, 3 Bur L J 238—84 Ind. Cas 468—A I R. 1923 Rang.
 102 A mortgage which ought to have been by a registered instrument cannot
 be so proved by other forms of evidence *Maung Tin v Maung Khan*, Rang
 441—A I R 1925
 title deed, in the
 open to the plaintiff
 document was depo

But as the defendant executed a document in writing the Court must refer to it
 in order to ascertain what the contract was *Chunilal Lal v Vital Das*, 24 Bom.
 L R 502—68 Ind Cas. 1005—A I R 1922 Bom 440 According to section
 91 of the Evidence Act, the terms of a mortgage can only be proved by the
 production of the mortgage deed or of secondary evidence of its contents, in
 case it is shown to be lost or destroyed,
 ment fails to produce it after notice
 1907, 4th Qr Evidence 13, *Fateh Sing*
Samandar, 276 P L R 1913—20 In

of transaction completed independently of them and not embodying terms of
 evidence
 at where it
 nature of
 the transaction *Holka v Nanupan*, A I R 1932 All 259—1932 A L J 101.

Sale Where property is
 the document cannot be relied up
 be referred to for the purpose,
 ween the parties and to prove delivery of possession To such a case this
 section does not apply *Keshwar Mahton v Sheonandan*, 10 Pat L J 449—A
 I R 1929 Pat 620 An unregistered sale deed can not be made basis for suit
 for specific performance as if it were merely document creating right to obtain
 another document *Duan v Guba Chan*, A
 227 Section 49 of the Registration Act
 17 of that Act and s 91 of the Evidence Act
 an unregistered document, which is
 being given in evidence as to the
Pe v Maung Sein, 7 R 411—A I R
 evidence of the terms of a dispositi
 applicable to both classes of documents mentioned in section 91 Consequently

91. to take effect for want of registered conveyance *Mg Myat v Ma Dun*, 3 Bur. L J 78-81 Ind Cas 857-A I R 19'4 Rang 214 Where unregistered deed of sale is inadmissible in evidence other evidence of the contract of sale is inadmissible *Parmeshri v Autar Singh*, 3 Lah L J 173; *Baggu v Tara Singh*, 5 P L R 1919 So also where an agreement to relinquish ex proprietary rights which should be in writing and registered was not executed, held that oral evidence was not admissible regarding the agreement *Ram Nath v Special Manager*, 12 L R 1 Rev The plaintiff can rely upon an oral sale accompanied by delivery of possession in a case where a sale deed was executed in evidence

Ma Anas Paul, 34

property under a receipt
the production of
evidence with regard to

section 91 of the Evidence Act *Safar Ali v Mohesh*, 23 C. L J. 122-34 Ind Cas 956 After acknowledging the receipt of consideration in the deed of sale, a vendor is not estopped from showing that he had not actually received the consideration stated in the deed *Puthi v Nand Kishore*, 25 Ind Cas. 27.

Deposition Since the act of deposing is a physical act which can always be proved by any one who has heard the statement being made, the fact of deposing might be proved by any one who has seen and heard the witness *Ganapathi v Sakharayappa*, 115 Ind Cas 140-A I R 1929 Mad 187. But under Order 18 rule 5, C P Code, it is necessary that the deposition of a witness in an appealable case, in order to bind him to the statement recorded therein, should be read over to him This provision is mandatory and not directory. The omission to do so renders the deposition inadmissible in evidence against him on his subsequent trial for perjury Section 91 of the Evidence Act excludes

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recognition made is the only admissible proof of what was said, but in a trial, the Magistrate need not generally record the evidence, and where no obligation is laid upon the Judge or presiding officer by law to reduce depositions or statements to writing, they may be proved by the presiding officer or by persons who heard them, in order to establish the fact that they were made *Howard v Rustamji*, Rat Un Cr C 334 The accused was charged in the

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the oral evidence of the contents of the accused's deposition at the trial before the Magistrate was inadmissible under this section *Queen Empress v Bapu Nawari*, Rat Un Cr C 401 Under section 91 of the Evidence Act the document embodying the deposition is the only evidence of the statement charged having been made under section 80 of the same Act, it is admissible only when it was taken in accordance with law *Kadir Pakiri v. Emperor*, 18 Cr L J. 966-42 Ind Cas 326.

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when departmental enquiry was going on was not a matter required by law to be in writing, and section 91 of the Evidence Act had no application. The Magistrate therefore was competent to prove the confession. *Haydar Razvi v. King Emperor*, 12 A. L. J 306-36 A 222=15 Cr L J 569-25 Ind. Cas 321. Where statements made by an accused person are inadmissible in evidence, secondary evidence of the contents of those statements is inadmissible also under this section. *Queen Empress v. Viran*, 9 M 224=2 Weir 125; *Reg. v. Bai Ratan*, 10 B H C 166. The confession of an accused person made to a Magistrate holding an enquiry is a matter required by law to be reduced to the form of a document within the meaning of section 91 of the Evidence Act, and no evidence can be given of the terms of such a confession, except the record, if any, made under s 364 of the Code of Criminal Procedure. *King Emperor v. Gulabu*, 11 A. L. J 286=14 Cr L J 211=19 Ind Cas 507=35 A 260.

Acknowledgment of debt. Secondary evidence of the contents of an acknowledgment, used to keep alive a cause of action beyond the ordinary period of limitation, can be given, where the original is proved to have been lost or destroyed, the effect of paragraph 2 of section 19 of the Limitation Act of 1877 not being absolutely and always to exclude secondary evidence in such a case. Para 2 of the above section belongs to that branch of the law of evidence contained in section 91 of the Evidence Act. *Shambu Nath v. Ram Chandra Saha*, 12 C 267. Section 19 of the Limitation Act (XV of 1877) says clearly that oral evidence of the contents of an acknowledgment may not be received; nor has the Act made any saving of acknowledgments received or given back before the Act came into operation. *Zulnissa v. Molidev*, 12 B 268.

Search list. A search list is not evidence of the facts stated therein and this section, therefore has no application to it. It is simply a declaration, not on oath or affirmation or subject to cross examination, made by a police officer and the person's presence at the search that certain formalities were observed and certain events took place. Oral evidence may, therefore, be given as to what took place at the time of the search. *Public Prosecutor v. Saralu Chennaya*, 2 Weir 776. This section, presupposes that, where a certain matter is required by law to be reduced to writing the writing is itself evidence of the matter so reduced, and the section does not apply if the writing is not evidence of the matter. A search list is not evidence of the matter stated therein and it does not therefore exclude oral evidence of such matter. *Public Prosecutor v. Sarabu*, 33 M 413=8 Ind Cas 808=21 Cr L J 716. The search list prepared under s 103 Criminal Pro Code, is proper evidence of the matters which it should contain, viz the properties found and the place where they were found. *In re Mammadi*, 2 Weir 47=2 Weir 515. The provisions of this section do not apply to the case of a search list prepared under s 103 of the Criminal Procedure Code, *In re Solai Nadick*, 8 Ind Cas 173=21 M L J 281=11 Cr L J 576.

Application of section 91 to an oral statement made by a witness to a Police officer. "In discussing the non applicability of section 91 of the Evidence Act to an oral statement made by a witness to a police officer and entered by him in his special diary I shall show that the distinction between the oral

Procedure prohibits the use of oral statements made by a witness to a
gating officer and that is the point in question. In the
91 of the Indian Evidence Act has no application to an oral

to an investigating police officer, for it is not a matter, which is required by law to be reduced to the form of document (see *Reg v Ulam Chand*, 11 B H C R 120 and *Empress v Kali Churn*, 8 C 151). In the third place the entry in the diary of the police officer, correctly speaking, is not the statement either oral or written by the witness for any legal purpose. It is by habit of thought

with the depositions of witnesses statement made by a witness by the way in ordinary parlance. This calls for speech and writing are two distinct

objective entities perceptible by two different senses. Speech is heard by the ear and writing is seen by the eye. A deaf person is not a possible witness to a speech nor a blind person to a writing. Both are means for expressing ideas. A may state orally that a certain event happened or may write that it happened, but in order to constitute the oral or the written statement of A to be his act in the eye of the law it must have been made with a consenting mind as his own juristic act. A making an oral statement within the hearing of B C and D the oral statement of it under section 8, illustration (c) of the Evidence

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made by A, in the presence of B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, is not allowed to

deemed to represent his own oral statement and his own juristic act' Per *Karamat Husain J in Rustam v King Emperor*, 7 A L J 168 (481)

Exception 1

showing that the p

involves two element

such action, or, as

the first element alone is mentioned as essential. *Greenl Ev* § 38(a) This

presumption is based on the maxim *omnia presumuntur rite esse acta*, that is

that will be presumed to have been done which ought to have been done. The

general rule is that where the contents of a writing are desired to be proved, the

writing itself must be produced, or its absence is sufficiently accounted for

before other evidence of its contents can be admitted. *Greenl Ev* § 563 (a)

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Campb 131, *R v Ireland*, 3 *Campb* 432, *Greenl Ev* § 563 (g)

Will annexed when no executor is therein appointed or the appointment of executor fails), or other proof tantamount thereto of the admission of the Will

in the Probate Division is legal evidence of the Will in any question respecting personality. *William on Executor*, 11th Ed. 206. It can only be granted to an executor. *Behary Lal v. Jaggo Mohan*, 4 C. 1. Probate of a Will can not be refused on the ground simply that it is what lawyers in ancient time called "inofficious" *Rammal v. Kalalkola*, 22

Under this exception the contents of a Will may be proved by the probate. Section (XXXIX of 1925) lays down that probate of Will from the death of the testator, and rend the executor as such

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the executor by virtue of the Will, not of the probate. The Will gives property to the executor; the grant of probate is the method which the law specially provides for establishing the Will. So long as the probate exists it is effectual for that purpose. *Kamal Lochun v. Nitruttun*, 4 C 560 (362). The law on the subject is the same as in England. *In re Ezekiel Joshua Abraham*, 21 B 189. Probate is an evidential ceremony. *Smith v. Miller*, 1 F R 180, *Ganapathi Iyer v. Siv mahi*, 36 M 375, *Mathuradas v. Goluddas*, 10 B 468; *Jehanger v. Kulubai*, 27 B 281; *Bai Harkai v. Manellal*, 12 B 621. The probate is only conclusive as to the appointment of executors and the validity of the contents of the Will. *Hormusjee v. Bai Dhanabai*, 12 B 161, *Whicker v. Hume*, 7 H L C 124, *Braynath v. Anandamoyee*, 8 B L R O C 208, *Balgangadhar v. Sakwarbai*, 26 B 762, *Chintaman v. Ram Chandra*, 34 B 589. The probate shows that it was duly executed by the executor. *Bhabangana v. Harendia*, 17 C. W. N. 445-16 Ind Cas 48

Explanation I. "The learning on this head" says *Mr. Norton* "must be sought for in work grant, or disposition

Take the familiar from a series of letters passing between the parties" *Ailen v. Bennett*, 3 Taunt. 169; *Jackson v. Loue* 1 Bing 9. *Phillimore v. Barru* 1 Camp 513, *Wagner v. Wellington*, 25 L J

suffice if the contr party, provided su together. *Spardlow* .

a letter in which the with the letter. *Pearce v. Gardner*, (1897) 1 Q B 688, *Taylor* § 1026. It is sufficient if the contract can be plainly made out in all its terms from any writings of the party, or even from his correspondence. But it shall be collected from the writings, verbal testimony not being admissible to supply any defects or omissions in the written evidence. *Boydell v. Drummond*, 11 East 143, *Green v. Ly* § 268; *Cox v. Middleton*, 23 L J Ch 628, *Ridgway v. Whorton*, 21 L J Ch 46, *Caddiel v. Skiamore*, 3 Jur N S 1185

Telegrams "Telegraphic messages are instruments of evidence for various purposes and are governed by the same general rules which are applied to other writings. If there be any difference, it results from the fact that messages are first written by the sender, and are again written by the operator at the other end of the line, thus causing the inquiry which is the original. The original message, whatever it may be, must be produced, it being the best evidence, and in case of its loss, next best evidence the

ork from which
message, and the
party sending

31. returned, are what would govern in construing the contract, provided both parties voluntarily and of their own accord sent their messages by the telegraph and thus adopted the company as their agent. So when a contract is made by telegraph, which must be in writing by the Statute of Frauds, if the parties authorize their agents, either in writing or by parol, to make a proposition on one side and the other party accepts it through the telegraph, that constitutes a contract in writing under the Statute of Frauds; because each party authorizes

the acceptance in the
with a steel pen an inch
long attached to an ordinary penholder, or whether it has a pen or a copper wire a thousand miles long. In either case the thought is communicated to the paper by use of the finger resting upon the pen, nor does it make any difference that in one case common record ink is used, while in the other case a more subtle fluid, known as electricity, performs the office. We know that by the

admirable system regulating the government of the telegraphic companies, the original despatch is preserved and may be at all times procured for the proper purposes. The paper filed at the office from which the message is sent is of course the original, and that which is received by the person to whom it was sent purports to be a copy. If the despatch is sought to be used in evidence the original must be proved and its execution proved precisely as any other instrument.

in the same mode, before the copy can be received. H 488, *Lurr Jones* § 53. By the decision

of the communication sent in or the one received is to be deemed the original depends upon which party is responsible for its transmission, in other words, upon the question for whom the telegraph company is agent. If there is but a single communication, the despatch as delivered at the place of destination is the best evidence. In such case the telegraph company is the sender's agent, but if the message were sent in response to a request by letter to telegraph a reply, it appears to us that the company would be the receiver's agent and the despatch as handed for transmission the original. And generally in controversies arising between sender and the receiver, when the

the message
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Broker's
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a proxy, a factor agent, but with this difference that the broker being employed by persons who have opposite interests to manage, he is as it were agent for both the one and the other to negotiate the commerce or affair in which he concerns himself. Thus his agreement is twofold and consists in being faithful to all the parties in execution of what every one of them entrusts him with. (*Dumas*, *Et c.* 1, tit 17, cited in story on Agency, p 28, in notes) But primarily he is deemed merely the agent of the party by whom he is originally employed. To make the other side liable to pay him brokerage, it must, we think, be shown that he has been employed by such party to act for

no parol evidence is admissible, but if they intend only to reduce into writing

fact, then I think they are entitled to give did not intend to reduce into writing exchanged, as it usually intended that these notes should constitute the whole of the contract? I think not. *Mr. Benjamin* in his work on the law of 'sales' lays down as the result of the authorities that the bought and sold notes do not constitute the contract. I think this proposition is clearly borne out by the case of *Scrimgeour v Archibald*, 20 L J Q B 529-17 Q B 115 [See especially the decision of *Mr Justice Erle* in that case] and also by the case of *Porton v Crofts*, 33 L J C P 189. In both these cases the distinction between making a contract and a memorandum showing that the contract has been made is pointed out. The result of those cases is that broker's notes as a memorandum may satisfy the Statute of Frauds but not exclude parol evidence. In *Clarton v Shaw*, 9 B L R 252, *Sir Richard*

have been furnished the plaintiff
Durga Prosad v Bhajan Ah,
 discussion as regards the evi

defen
 as having been made between a third person and the defendant. In a suit

Court as to whether the mistake in the sold note was a bar to the plaintiff's suit for damages on the contract. *Held* that there was a contract between the parties for breach of which the plaintiff could sue for damages. *Mahomed Bhoy v Chatterput*, 20 C 854. In *Ah Sham Shole v Moothua Chetty* 4 C W N 453-27 C 403 (P C), a contract was made through a broker for the purchase of a quantity of paddy at a settled price. The bought and sold notes were in taken with the wrote thereon it if wet. The ion until after of yellow rice ondent sued for

Explanation II Where a document is executed in several parts, each part is primary evidence of the document. Where a document is executed in

Nort Ev 269

terms (a) of
 re a document
 as for instance,
 then contract,

etc., (*Sreejully v. Loharam*, 7 W. R. C. R. 384), it relates to some other independent money [Illustration receipt Smith & J. attract or a grant or tion and it does not *Loharam*, 80 Ind Cas which is inadmissible in prove discharge by pay- a document relied on, eds is held to constitute inadmissible in evidence inadmissible to prove of the Evidence Act no

41 M. L. J. 297 A.

and by this section to z, or by action, and co inadmissible in evidence, *Tansittart, A. W. N.*, require to be n for a contract at *Chandra v* ere a receipt for amount can be proved *ahundi* by virtue of section 91 of the Evidence Act *Chhutan v Mul Chand* 8 P. R. 1917=23 P. W. R. 1917, see also *Sharaf Ali v Jogandar* 93 P. R. 1916

Existence as distinguished from terms of contracts, or of a grant or any other disposition of property Extrinsic evidence is sometimes admissible to

evidence shall be given in proof of the terms of such a contract, grant or disposition of property except the document itself. This however refers only to the method of proof of the terms of contract, grant or disposition of property, and this being so, the induced in proof of the I R. 1922 P. 222 The oral evidence, although be proved for want of (sh) 43=61 Ind Cas. been a writing is not produced, section 91 of the Evidence Act unlike as in the case of documents required to be in writing only bars proof of the terms of the

there be any. *Nago v. Tukaram*, 49 Ind. Cas. 843. Where the plaintiff in a suit for rent showed that the suit was not based exclusively on a *Kabuliyat* executed by the defendant, but also on the collection of rent, and the plaintiff did not produce the *Kabuliyat*, but filed collection papers to prove that the defendant was holding at the rate claimed by the plaintiff in the year, collection papers were admissible in evidence, as they were not put in proof of the terms of the *Kabuliyat*, and section 91 of the Evidence Act did not apply. A *ruyat*

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d deed cannot

properties claim

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Ind. Cas 83

of the contract.

the parties sign

case must be decided upon its own facts, and the real question is whether a document in question is a true award of arbitrators, or merely a deed of partition by the parties themselves disguised in the form of an award in order to escape

the only evidence

document itself,

in proving aliunde

, plaintiffs could

partition Sukh

Dial v Mani Ram, 29 P R 1915=27 Ind Cas 489=29 P R. R 1916.

432; *R v Langton*, 2 Q B D 296; *Phup Ev.* p 500. The fact of birth, baptism, marriage, death, or burial, may be proved by parol testimony, "though a narrative or memorandum of these events may have been entered in registers which the law required to be kept." The reason for the above is that the existence or contents of these registers form no part of the fact to be proved, and the entry is no more than a collateral or subsequent memorial of the fact, which may furnish a satisfactory and convenient mode of proof, but can not exclude other evidence, though its non-production may afford ground for scrutinizing such evidence with more than ordinary care. *Jivandas v Francis*, 7 B H C R 45 p 63, *Evan v Morgan*, 2 C & J 453, *R v Ahson*, R & R. 190; *Lady Limerick v Lord Limerick*, 32 L J P & M 22; *Taylor* Vol I 5th Ed. 413.

92. When the terms of any such contract, grant or other

disposition of property, or any matter re-

quired by law to be reduced to the form of a

document, have been proved according to the

last section, no evidence of any oral agreement

Exclusion of evi
dence of oral agree
ment

or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms.

Proviso (1).—Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, * [want or failure] of consideration, or mistake in fact or law.

Proviso (2)—The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering

* The words "want or failure" were substituted for the words "want of failure" by s 11 of the Indian Evidence Act Amendment Act, 1872 (18 of 1872).

2. whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

Proviso (3).—The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

Proviso (4).—The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

Proviso (5).—Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved.

Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

Proviso (6).—Any fact may be proved which shows in what manner the language of a document is related to existing facts.

Illustrations

(a) A policy of insurance is effected on goods ‘in ships from Calcutta to London.’ The goods are shipped in a particular ship which is lost. The fact that that particular ship was orally excepted from the policy cannot be proved

had always been regarded as part of the estate and was meant to pass by the deed cannot be proved

(d) A enters into a written contract with B to work certain mines, the property of B upon certain terms. A was induced to do so by a misrepresentation of B’s as to their value. This fact may be proved

(e) A institutes a suit against B for the specific performance of a contract, and also prays that the contract may be reformed as to one of its provisions, as that provision was inserted in it by mistake. A may prove that such a mistake was made as would by law entitle him to have the contract reformed

(f) A orders goods of B by a letter in which nothing is said as to the time of payment, and accepts the goods on delivery. B sues A for the price. A may show that the goods were supplied on credit for a term still unexpired

(g) A sells B a horse and verbally warrants him sound. A gives B a paper in these words:—“Bought of A a horse for Rs 500.” B may prove the verbal warranty

(h) A hires lodgings of B, and gives B a card on which is written—“Rooms, Rs 200 a month.” A may prove a verbal agreement that these terms were to include partial board

A hires lodgings
up by an attorney,
A may not prove that

(4) A applies to B for a debt due to A by sending a receipt for the money. B keeps the receipt and does not send the money. In a suit for the amount A may prove this.

(5) A and B make a contract in writing to take effect upon the happening of a certain contingency. The writing is left with B, who sues A upon it. A may show the circumstances under which it was delivered.

Principle. The principle underlying this section is the same as that underlying

single memorial

from scattered parts.

Consequence of this is that its scattered parts, in their former and incoherent shape, have no longer any legal effect, they are replaced by a single embodiment of the act. In other words, when a legal act is embodied in a single memorial, all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of their act. *Wigmore* § 2425. So there is a general rule sometimes spoken of as the "oral evidence rule," which declares evidence, the effect of which is to vary the terms of a written instrument, or to change, cut down, or alter the effect thereof to be inadmissible. *Mc*

the Courts to defeat this object. When persons express the agreements, in
indefiniteness, and to
understanding, which so
fits. Written contracts.

disinclination to disturb the condition of
act of the parties. The general rule, therefore, precludes the introduction of
testimony to show that the parties meant other than they have said in the
writing itself. But it sometimes happens that writings are procured to be
executed by fraud, or do not contain all the agreements between the parties,
having been used only to cover certain matters, while others are left to oral
understanding or there may be other circumstances which make it unjust to

These cases are usually
strictly such. *McKelvey's*

the
writing, it is conclusively presumed between themselves and their privies that
they intended the writing to form a full and final statement of their intentions
and one which should be placed beyond the reach of future controversy by bad
faith or treacherous memory. *Phelp I*
Lord Bacon said "The law will not countenance
which is of the higher account, with
account in law." (*Bacon's Maxims*, Reg
matters in writing made by advice as
import the certain truth of the agreement

1 P & D 117, *Davis v Symond* 1 Cox Cc 403, sometimes on the doctrine of
estoppel, for in each the party is precluded by his acknowledgment in writing
of what he so acknowledges—in estoppel however it is a matter of

another fact as to where and in what sources and materials are to be found the terms of legal act.

92. *Wigmore* § 2425. *Gulson* also remarks that the rule is one of substantive law directed not against oral evidence as an improper mode of proving the contract, etc., but (1) against such evidence as an improper mode of making it and (2) against extrinsic facts (however proved) being received to affect the meaning of written instrument. *Gulson* §§ 418-54; see also *Thayers' Pre Tr Ev.* 401, 17 *Harv L Rev* 240.

Scope of the section. When the terms of a contract, grant or other disposition of property have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives . . . of the contract, grant . . . of the writing. The . . . to be reduced to the form . . .

In *Pulcring v Douson*, 4 *Taunt* 779, 786, *Gibbs J* said. "I hold that if a man brings me a horse and makes any representation whatever of his quality and soundness, and afterwards we agree in writing for the purchase of the horse, that shortens or corrects the representations, and whatever terms are not contained in the (written) contract do not bind the seller, and must be struck out of the case." So "where the whole matter passes in . . . be taken together as forming part and parcel . . . can . . .

2 B . . . *Abbott C J* in *Kain v Old*, *Knight v Barber*, 16 *M & W* 66, says *Lord Blackburn* in *Angell v Dule*, 5 *L R* 1 *Rep N S* 320, "that, where there is a contract in writing, it should not be added to, if the written contract is intended to be the record of all the terms agreed upon between the parties. Where there is a collateral contract, *Wigmore* § 2425 . . .

that that writing . . . 4 *H & N* 1, 7 . . . ere is a deed in deed" *Irisham v* . . . contract, and put it . . . argain." *Per Martin* . . . *ca v Blake*, 13 *M* . . .

etc., is not governed . . . that oral evidence . . . provisions of this section . . .

"The language of this section is" says *Mr Field* "not quite free from ambiguity, the words 'No evidence of any oral agreement or statement shall be admitted' between the parties to any such instrument, etc., correspond with and have clear reference to the words 'contract, grant, or other disposition of property' in the beginning of the section; but their application to any matter required by law to be reduced to the form of a document required by law to be reduced to writing be a . . . an oral statement appears to be admissible the writing in cases other than those in *Field Ev* 8th *Ed* 501. But according to *Mr* contradiction. Section 91 deals with three (1) contract, grant, or any other disposition . . . been reduced to the form of a document (2) contract . . . grant or any other dis . . . by law to be reduced to . . . such as deposition of . . . reduced to the form . . . so as to bring it under . . . an act involving . . .

single parties)
contracts,

been reduced to the form of a document by the parties, as well as those bilateral acts which the law requires to be reduced to the form of a contract. Therefore these acts or matters must be contracts, grants or other disposition of property. So this section does not include such matters which the law requires to be reduced to the form of a document which are not contracts, grants or other disposition of property. *Woodroffe v Shil* 611. The deposition of a witness does not fall within this section and oral evidence is admissible to contradict raised by section 80 is only a
v p 611 Section 92 is also

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towards reduced by the parties into writing,
to ascertain the terms of the contract, but
there was no evidence of any agreement by
should be reduced into writing by the defendant,
the contract is first concluded by parol and afterwards the paper is drawn up, which appears to have been meant merely as a memorandum of the transaction
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240 While on
by virtue of sec
being in force,
bar ceases to operate and the Court can make enquiries, that bar of statutory prohibition no longer existing because of section 10 A of that Act *Dada v Bhanu*, 29 Bom L R 1419=105 Ind Crs 754=A I R 1927 Bom 627 This section merely prescribes a rule of evidence. It does not better the Court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances *Munna v Naram*, 107 Ind Crs 658 See also *Baynath v Hayu Talley*, 26 Bom L R 787=48 M L J 339 (P C) In a suit on promissory note, the defendant can prove a conclusion precedent to the attaching of any obligation by the promissory note was that there should under it unless there was a final balance against the defendant which he failed to pay. *Bhoji v Krishori*, 50 A 754=26 A L J 696 A lessee under a registered lease wanted to prove an oral agreement regarding his preferential right to purchase the leased property if it was brought to sale. The lease was silent on the point. Held that under s 92, evidence of
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written document
law for the time
of Act applies that

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Crs 897=

that one of the parties to the contract had acted as agent is admissible *Lachomal*
neous oral evidence is
The parties must
interest and compound
interest and if they deliberately have chosen to use one expression they cannot be
u v Ganpati, A I R 1931
Act it is immaterial whether
subsequent to the disposi-

92. tion *Gopala v Sankara*, 1930 M W. N. 240=125 Ind. Cas 545 In the case of a covenant for title which is presumed to go with a sale under s 55 (27) of the T P Act a contract to the contrary cannot take the shape of an oral agreement since it would be inadmissible in evidence under s. 92 of the Evidence Act *Mahammed Siddiq v* Ind. Cas 165=A I R 1930 deduced between the parties to show that the document was not to take effect forth with as mentioned in the document but after the expiry of a certain period *Parmesh-nara v Lachman*, 129 Ind Cas 439=A I R 1930 All 824=1930 A L J 1066 In case of a deed of gift by husband to wife the husband can prove that the same is of a fictitious nature *Mahommed v Sayed*, A I R. 1931 Oudh 177=8 O W N 349

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contract and such an agreement can be proved *Irpan Ali v Jogendra*, A. I R 1932 Cal 708=36 C W N 645=59 C 111. Oral evidence is not admissible to prove an agreement between mortgagor and mortgagee whereby a contract in the registered mortgaged bond was split up *Ram Barman v Sanat Kumar*, 25 C L J 24=44 C 162=21 C W N 740 Oral evidence is admissible to show that a mortgagee's possession of a certain plot was terminated by the payment of a certain amount of money *Baid Ram v Tila Ram*, 15 A L J to certain paddy to be divided Held, section 92, cl (2) of d not been divided 11a, 4 L W 329=34 and so far as the

adjective law is concerned, the code to be followed but also as to the extent

en the

England; and Courts of India are not justness statute law in the same way, as Courts of Equity of common law The effect of section 92 is

it, by proof of an entirely different contemporaneous oral agreement, is not sound *Guyarmal v Sitaram*, 3 N L R 19 An acknowledgment is not a document contemplated in section 92 *Chhedilal v Monohari*, A I R 1930 Nag 298=26 N L R 320.

circumstance that some collection of the terms of a sole memorial of the There may have been an attempt to make the merely to furnish an aid other party's satisfaction

tion. The essential idea remains for it, that the writing is something distinct

from the transaction itself. *Wigmore* § 2429; *Dahson v. Stark*, 4 Esp. 163; *S.*

Parsons v. N. Zealand Co. (1901) 1 K. B. 543; *Phip. Ev.* 555 When the parties during their negotiations reach a final agreement, but provide therein that the terms shall be reduced to a single memorial, the failure to execute such an agreed memorial does not preclude resort to the prior negotiations to ascertain the true terms of the agreement until supplanted. referring to an

for the parties. *McKelvey's Ev.* § 297.

Partial integration; General test for applying the Rule; Collateral agreement. The most usual controversy arises in case of partial integration, where a certain part of a transaction has been embodied in a single writing, but another part has been left in some other form. Here obviously the rule against disputing the terms of the document will be applicable to so much of the transaction as is so embodied, but not to the remainder. It is of course

may within the same half-hour sign articles of incorporation, authorize an overdraft, assign a mortgage and join in a committee's report to stockholders. Or a purchaser of land, negotiating with a broker, may at the same sitting accept a deed of grant of one piece of land and appoint the broker his agent in the purchase of another piece of land. These are clearly distinct, wholly distinct, and wholly distinct instances in which a negotiation concerns one general subject—such as the purchase of a single

"parts" of the same transaction, and therefore, if reduced to writing at all, must be governed by the same writing. In searching for a general test for

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be known that we know what there was to cover. The one is not which?

Now, such probably the writing was not intended for the negotiation. *Wigmore* § 2430. In *Webb v. Balyby J* said "Where there is a written agreement naturally to be expected that it will contain all if it is entirely silent as to the terms of quitting. the country as to that particular. If, however, it specifies any of those terms we must then go by the lease alone" *Dickson v. Zuzima*, 10 C. B. 602, 610. Where the writing covers only part of the transactions between the parties and there are oral agreements relating to the same subject, such agreements may be shown. If it appears that the parties did not intend the writing to embody all the transactions between them, the rule is that such transactions as do not purport to be covered by the document, but which supplement or complete it, may be proved. Here, again, there is no varying of the terms of a written instrument. It is only to be used to cover exception subsequent to the writing, as in *Hobby v. Lord* and *Lord* inference may be drawn from it.

It is also held for the purpose of adding to a deed a stipulation to which the parties did not intend by that deed to know the terms of a deed and satisfied by those means but the part to the terms which, though not applied in it, there is no reason why he

that where no collateral agreement is shown, it is also held that the collateral oral agreement must have an independent consideration in order to be admissible. *Coe v. Hobby*, 72 N. Y. 141. As a principle of the law of contracts, it would seem that no collateral agreement would be of any effect in modifying the original unless there was a consideration to support it, and these decisions are therefore strictly logical. *Mc Keehey's Ex* § 296.

Parol evidence rule—Nature of. Notwithstanding the phraseology generally employed in the cases relating to what is called the "Parol Evidence"

of them illustrate anything in the law
cerned with questions about the legal effect
the law, of requiring or agreeing upon a
writing, or with the principles governing the construction of documents or the
like; and not with merely evidential quality or operation of extrinsic facts, or
any rules of law relating to these. As when it is said that parol evidence is not
admissible
any other
reason
is of it

in the other. *Thayer*
Cas. Et. 2nd Ed. 820.

As between the parties to the suit
were not the parties to the contract, is
testimony for the purpose of including parol
contract, is

of others *Greenl. Ev.* § 279. *Holt v. Collyer*, L. R. 16 Ch. D 718; *Chemical E.*

stranger to it, either party may show that the instrument does not speak the
truth, and that the general rule does not apply as it does in cases where the
controversy arise between the parties to an instrument which they have made
the written memorial of their agreement *Venable v. Thompson*, 11 Ala. 147;
Pawel v. Young, 51 Ala 518. *Burr Jones* § 44c

by the statutory restrictions
22 C W N. 257 (262) = 45 C. 320;
A. L. R 1929 R. 86; *Annada v.*
4 N. L R. 115; see also *Jagat*
Panchoo, 28 A. 473 = 3 A. L. J.
Memudar v. Collector of Gorakhpur
1930

2. the terms of a contract which have been reduced to the form of a document "as between the parties to any such instrument or their representatives in interest." In the case of 10 A 421 the words quoted above were construed as meaning between the parties to the instrument on both sides and not on one side only as between t

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Madho, 10 A
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not prevent the proof of a fraudulent dealing with a third person's property, or proof of notice that the property purporting to be absolutely conveyed in fact belonged to a third person, who was not a party to the conveyance. *Maung Aun v Ma Shue La*, (1911) 2 M W N 30=14 C L J 276 (P. C.)=13 Bom L R 797=1 A L J 1181. Sale deeds and mortgage deeds are essentially transactions

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that they agree to make provisions for certain relations or dependants does not make such persons parties to the instrument and oral evidence given by a person concerning maintenance allowance to

cannot be excluded by reason of section 92,
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ve" documents between the contracting
parties. *Modiah v Vaidya*, 9 Mys L J 203

Section 92 limits its operation to cases where the issue as to the real nature of the written transaction arises between the parties thereto or their privies. It leaves out cases of strangers to the instrument wishing to adduce extrinsic evidence in order to prove that the real transaction was different from what it purports to be. *Saboji v Anand Singh*, 101 Ind Cas 736; *Mahomed Sultan Mohideen v Anthul*, 101 Ind Cas 603=52 M L J 557, *Ma Mi v Maung Aung*, 111 Ind Cas 832=A I R 1928 Rang 244, *Mahomed Ishaq v. Fahemunnessa*, A I R 1928 Oudh 472=5 O W N 825, *Maung Thein v. Maung Pyn* 3 Rang 836=108 Ind Cas 734=A I R 1928 Rang 61, *Narra v. Koganti*, (1925) M W N 214=87 Ind Cas 246=A I R 1925 Mad 775=48 M L J 260; *Hiraji v Vishnu*, 1923 Bom 429, *Bhullan v Kushi*, 21 A L J 932; *Jaram v. Rajnarain*, 20 A L J 777, *Sukumasi v Kalipada*, 45 Ind Cas 13. If a father

be between the nominal purchaser and the vendor, and in cases of dispute between the nominal and the real purchaser, there being no writing between them, no difficulty can arise, under this section, in proving oral agreement. *Laxmitai v Keshav*, 18 Bom L R 134=33 Ind. Cas 396; see also *Pathammal*

statement is admissible in such proceeding for the purpose of contradicting

mortgagor was placed in possession of a part of the mortgaged premises, the income whereof was sufficient to wipe out the annual debt. *Held* that as the arrangement was not in supercession or even variation of the mortgage, oral evidence was admissible to prove the transaction. *Ramaiatar v Tuls Prosad*, 14 C L J. 507. The liability undertaken by the drawer and the acceptor of a bill of exchange is in different ways and are of section 132 of the preclude the acceptor of a bill from proving that he never received any consideration for the bill but that he accepted it only for accommodating the drawer or some other party. *Pagose v The Bank of Bengal*, 3 C. 174.

Extrinsic evidence to control document is inadmissible. Evidence of oral agreement between the parties to a written and registered document, distinctly adding to its terms, another term which had been antecedently agreed

the defendants sought to show that the written contract was varied by adducing parol evidence as to the matter on which the document was silent. *Held* that such evidence was not admissible under section 92 of the Evidence Act. *Jadu Ras v Bhubotaran*, 17 C 173. The executants of bond as principals, are not competent. *Saing v Nga Lu Aun* bond are clear and it was an assignment. oral evidence of intention is not inadmissible deed or ascertaining the intention of the parties. L R 523-22 A 149-4 C W N 153

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as to the consent of the donee of the life estate to such an arrangement. *Held*, that such oral evidence was clearly inadmissible. *Nabooma v Khedar Hussain*, 108 Ind Cas 637-A I R 1928 Mad 618. Contemporaneous oral agreement not to charge compound interest though bond may stipulate therefor and the fact of simple interest only being realised cannot entitle a party to vary effect of written contract. *Abdul Aziz v Amanmu* A I R 1925 Cal 276. Evidence of conduct of parties is inadmissible to contradict an unambiguous grant, *Gopal v Ramadhar Singh*, A I R 1925 Pat 228, see also *Kesho v Thakur*, A I R 1925 person under deed and on this section oral agreement till he got possession of the entire property is inconsistent with the terms of the

deed it is not open to the executants to set up and prove an agreement that the rate of interest to be charged was lower than that agreed upon. *Sukh Lal v*

2. *Murari*, 95 Ind Cas 1019=A. I. R 1926 Oudh. 273 Evidence of subsequent oral agreement not to charge compound interest is inadmissible to vary the original contract which is a registered one *Jogendra Nath v. Khoda Baksh*, 1924 Cal 380, *Abdul Aziz v. Amanmal*, 78 Ind Cas 742=1925 Cal 276 An entry in certain account books evidenced a contract to sell goods and they were described as arriving by a certain ship *Held* that oral evidence cannot be let in to show that there was an agreement to deliver goods within a fixed time *Firm of Juwango v. Firm of Mathabari*, A I R 1924 Sind 127

In a suit on a joint and several promissory note payable on demand executed by A and B A creditor as security for B's oral agreement with C under the note in the

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formed the foundation of the suit formed a completed contract, whilst the defendant vendor urged that it was only a provisional arrangement conditional to the preparation by a vakil of a formal document evidencing the contract *held* oral evidence to show what actually took place on the occasion when the parties entered into the agreement relied upon by the plaintiff is irrelevant and inadmissible *Harichand v. Goind* 44 M L J 608=47 B 335=28 C W N. 73=50 I A 25=37 C L J 440=(1923) P C 47. Where the terms of an

proved the
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Evidence of an oral agreement substituting a new executory contract in lieu of a decree is inadmissible *Lachmi Das v. Babakali*, 44 A 258=20 A L J 65=69 Ind Cas 990 It is not permissible to a person who wishes to impeach a

L R 239=66 Ind Cas 865 Where a promissory note is sought to be enforced according to its tenor, it is not open to the defendants, to let in evidence an alleged

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it by way of security for others cannot be tried or determined except so far as it affects the question of consideration *Durgacharan v Laksh Naram*, 47 Ind Cas 917. In a suit to recover possession of the properties conveyed under a sale deed, evidence was adduced to show that the parties to the document intended to give simple mortgage rights to the alleged purchaser for the sum which one had promised to pay to the creditors of the other party. *Held* that such oral evidence is clearly inadmissible to prove that a different mode of operation was

the express terms of the promissory note be proved *Muthu Eulappa v*

and it was sought to
recited *held* that such
tion *Narra Reddiar v*
-3 L W 589-35 Ind.

Cas 801

Where the terms of the mortgage contract are reduced as required by law to writing, an oral agreement varying those terms can not be admitted in evidence *Muthu Kumar v Govinda*, A I R 1932 Mad 218-35 M L W 145 where according to the terms of the registered mortgage deed the whole of the mortgage money is payable on demand with interest, evidence of a contemporaneous oral agreement between the parties that the amount would not be payable on demand but shall be accepted on instalments, is inadmissible under the express provisions of s 92 *Mohammad v Kishori*, A I R 1932 All 375-1932 A L J 414. But when a mortgage bond is silent as to how the money due on it is to be paid and the mortgagee executes a *list bandi* which merely provides that mortgagor is to pay the amount then due in certain instalments spread over a certain number of years with a proviso that in default of any *list* the entire amount under the mortgage bond would become due, the *list bandi*, shows the arrangement between the parties and does not alter or vary the terms of the mortgage bond and it is *Ram*, A I R 1932 Ca provided that each one of

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Section 92
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be rent, it
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raised, and any length of payment of a lesser rent will not help the tenant, *Maharaja of Bobbili v Appala Naidu*, (1916) M W. N 139-32 Ind Cas 703. Where in a suit by the payee of a Hundi against the drawer and the acceptor, the Hundi is silent as to interest, the plaintiff is entitled only to 6 per cent

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Evidence of a contem-
not admissible under
1 Pat L J. 71=35 Ind
ot one for satisfaction

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of the deed :

Muhammad

party to a written contract to prove a contract the terms of which are clearly
inconsistent with terms of the written contract *Baranashi v Lulla Mal*, 29 Ind
Cas 950

Where a promissory note executed by defendants 1 and 2 contained an
uncon- is not admis-
sible to be conditional
on the variation of the
contract clearly forbids
evidence ble exceptions
to the *Narasimma*
v Rav 336=18 Ind
Cas 696

Where the subject matter of an appeal is compromised by the parties
by means of a written agreement, which recited that "all matters in dispute"
was adjusted, it is not open to any of the parties to tender oral evidence of a
separate agreement not

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was not the stated area within the specified boundaries Extrinsic evidence as
to the negotiations which led up to
construction of the lease *Raja Durga*
N 66=19 C L J 95=11 A L J

sale deed recites as consideration a cash
contract that the amount was really

of the sale price is a term of the contract within the meaning of section 91 of
the Evidence Act Evidence cannot be admitted to vary the provisions of the
condition fixed for the same *Adityam Ayar*
M W N 847=25 M L J 632=21

to contradict or vary the express and un-
ambiguous terms of a written instrument by reference to preliminary negotia-
tions or previous conversations *Sayid Abdullah v Sayid Basharat*, 17 C. W.
N 233=13 M L T 182=(1913) M W N 131=35 A 48=17 C L J 312=23
M L J 91 (P C)

Oral evidence is not admissible to prove that a document
which in terms is out an out gift was really meant to be *donatio mortis*
causa Benode Kishore v Ashutosh Mukhopadhyaya 16 C W N 606=14 Ind
Cas 720

Oral evidence to prove that parties to a sale deed, which was duly
executed and registered, subsequently rescinded it by mutual consent, is in-
admissible under section 92 of the Evidence Act *Byrakallu v. Veddula* 15
Ind Cas 282

Oral evidence to show that one of the executants of a note of
hand signed it only as a security and that his liability was only to the extent of
standing as surety for a month is inadmissible under this section *Hareh v*
Bishnu 8 C W N. 101

Neither a contemporaneous oral agreement nor the
subsequent acts and conduct of the parties can be proved under this section to
show that the contract was not intended to be performed *Endla*

mortgage, it is only agreed to
to be made by the mortgagee to
the season's crop such agree-
as such, would be inadmissible

Act. *Moran v. Mutu Bibee*, 2 C 58 Under this section no oral evidence is admissible to show that certain deeds of sale are not deeds of sale, but deeds of gift. *Rahman v. Elahi Baksh*, 28 C 70 Where the plaintiff in a suit for specific performance of a contract to sell a certain share of a house, set out a written contract, and alleged that, on its having been subsequently discovered that the share was less than it was originally believed to be, the price was reduced by verbal agreement, held that the written contract must be taken as intact save as to the price, and that no evidence could be given by the defendants in contradiction of the other terms of the document. *Brown v. Cutts*, 5 C L R 487 Where a written instrument provides for a joint tenancy and joint contract by all the parties executing it to pay the whole rent of a village without any reference to the quantity of land in the holding of each, oral evidence is not admissible to show that separate specific contracts have been entered into by each of the parties, and it makes no difference that the evidence is put forward as evidence of a custom. *Mr G Lee v Panchananda*, 5 M H C R 135 Defendant was lessee under a joint lease by K and P, co owners of the premises Plaintiff having purchased an undivided moiety from P gave defendant notice to quit the moiety from the termination of the lease and sued for possession The defendant set up an oral agreement giving him an option of renewal of the lease, but it could not be proved as being

S. 9

instrument whose terms are in themselves clear and undoubted. *Rambuddin v. Rames Sree Koonwar*, W R 1864 Act X Rul 22 Bought and sold notes together may form the contract in accordance with the custom of merchants in Calcutta So, parol evidence was not admissible to vary or add to the terms

of rent of a holding held under a registered lease, nor in the conduct of the leaseable to prove the *habuhyat* was granted partly in cash, and in kind was not duly *um* Held that oral evidence agreed to pay the price of the paddy at the current market rate, and not at the rate specified in the *habuhyat*, upon failure to deliver it duly. *Godas v Sarju*, 12 C L J 649-7 Ind Cas 842

The Writing is really not the contract in writing, which purports to

contract, may be produced, it is still

12. Cas 929, see also Woodroffe's Evidence 5th Ed p 613 But in a recent Allahabad case *Ashworth J* said - "The Appellant's counsel has referred to the following dictum in Woodroffe and Amir Ali's well known commentary, the Indian Evidence Act 'Though evidence to vary the terms of an agreement in writing is not admissible' In support of this, the appellant relies on *Harris v. Rick* namely, *Harris v. Rick* 6 El & Bl 370=25 L the dictum as stated

92 of Evidence Act. There is no authority for holding that evidence in any shape can be admitted for the purpose of showing that there was agreement at all or in other words, that a deed was meant to be inoperative" *Lachmandas v Ramprasad*, 49 A 680=A I R 1927 All 422 (424)=100 Ind Cas 1029=25 A L J 349, see also *Gujar Mal v Sitaran*, 3 N L R 19.

Cases where the oral evidence is admissible "The cases in which oral evidence when objected to is apart from fraud or mistake receivable to correct written instruments are cases where, for example, the evidence supplements but does not contradict the terms of the deed; or where the provisions of the deed leave the question doubtful whether merely a mortgage and not out and out sale was intended, or where the language sought to be explained in evidence is language in an ordinary conveyancing form not exhaustively accurate but

Instances of each of these will be found in *Jurion v Personal* *Trang Chuen v Li Po Kiat*, A I R 19 Where there was a mortgage by which a fixed rate of interest was agreed to be paid, and there was a contemporaneous oral agreement that the mortgagee should go into and be was reement.

written agreement, that it was merely a provision as to how the interest should be paid and that therefore the oral agreement was valid *Brundaban v Unrao*, A W N 1887, 61 In a suit for money due on a promissory note payable on demand the defendant pleaded a contemporaneous agreement in writing allowing

agreed not to be executed against the judgment-debtors is not inadmissible by reason of the section *Ganga v Ram Oudh*, 113 Ind Cas 760=A I R 1921

the joint C) Oral which the under the settlement and future idence which shows that two documents executed and registered on the same day are

... hunt to leading evidence so as
 ... *Ramlal*, 25 A L J 723=103
 ... oral agreement providing for
 repayment of a mortgage debt from the usufruct of the mortgaged property
 may be proved. Such an arrangement does not amount to a lease nor does it
 constitute an usufructuary mortgage. It is only a means of discharging the
 debt by putting the simple mortgagee in possession of the mortgaged property.
Nookamma v Dharmayya 53 M. L J 863 This section prohibits only the
 proof of any contemporaneous oral agreement between the parties in variance
 of the terms of the document. Where the father purchased certain properties
 and took a sale deed in joint names of his two minor sons and subsequently the
 individual share of each of the vendees was sought to be proved by evidence
 relating to the intention of the father. *Held* that section 92 of the Evidence Act
 was not a bar to the admissibility of such evidence as the sale-deed was silent
 regarding the share of two vendees. *Mohammed v Anthil*, 101 Ind Cas
 653=52 M L J 557=38 M L T (H C 247) In the case of an outright sale
 by registered deed, an independent contract to re-sell either orally by un-
 registered deed can be proved, but where the contract is not an independent
 transaction but forms part and parcel of the original transaction and together
 constitutes a mortgage, such contract cannot be proved. If the facts

of each other,
 proved for want
 of independent of each
 deed is one of an outright
Ma Nan v U Yang, 8 Bur.

314 There is nothing to
 prevent the parties from entering into an oral agreement for the settlement
 of decrees for money. They have the same freedom to do so as to make narrative
 of contract by an oral agreement modifying the previous written contract so
 long as the contract is not required to be in writing and registered. It cannot
 be said that the judgment debtor selling upon a verbal agreement by the decree-
 holder to accept some variations is
 Evidence Act. *Ma Shue v Mang San*,
 Oral evidence to prove that the def
 plaintiff on the understanding that it sh
 when the liability arose upon his part to restore to the plaintiff his share of the
 capital is inadmissible. *Sheo Prasad v Gobind* 49 A 464=100 Ind Cas 332=
 25 A L J 305 A I R 1927 All 292 This section is no bar to the admission
 of oral evidence of circumstances to show the relation of the written language

out of the rents for a certain charity, to pay also the cost and credit the
 balance of the rents towards the mortgage debt. The plaintiffs alleged that
 the defendant failed to pay the said sum of Rs 200 and the cost and that
 the mortgage debt had been
 admissible and that section
 case because it was not oral
 mortgage deed at all. *Ram*
 85=107 Ind Cas 808=A I
 that the amount of Rs 500
 menssem. The question was whether interest should be at one rupee per
 menssem or only one rupee for Rs 500 per menssem. *Held* that oral evidence was
 admissible to prove that the parties intended that interest should be paid at
 1 rupee per cent per menssem, under proviso 1 to section 92 of the Evidence Act.
Venkataramappa v Rama Setty, 3 Mys L W 146 Oral evidence is admis-

2. sible to prove a discharge and satisfaction of a mortgage bond *Krishnaji v Kashirao*, 90 Ind Cas 459 A recital on a sale deed that there is no incumbrance or that the vendor has a good title to convey is not one of the terms of

succeeded to the estate of their father made an oral partition of the same and also arranged orally to extinguish their mutual rights of survivorship It appeared from the evidence that two lists had been drawn up of the properties as divided and mention was made in those of the right of survivorship having been extinguished The lists were not produced but oral evidence was let in regarding the same *Held* section 92 of the Evidence Act did not apply and the oral evidence was admissible *Delakanta v Sundarasin Roie*, 48 M 933=22 L W 398=(1923) M W N 643=A I R 1925 Mid 1267=49 M L J 266

Even where an agreement is silent as to the consideration under this section oral evidence is admissible to determine what the consideration was *Pameshwar das v Neu Jooria*, 91 Ind Cas 371=A I R 1926 Sind 202 This section has no application where evidence of the conduct of the parties and their rights of the various members is let in to prove partition by the defendant in a suit *Ramuchetti v Panchammal* 92 Ind Cas 1028=A I R 1926 Mad 407 Where a promissory note is executed by two persons, oral evidence is admissible

rely for the other *Moolji v*
This section does not prohibit
recharge of a debt secured by a
710=96 Ind Cas 11=A. I R

1926 Cal 906

by the release to

Mahim v Ram

suit it is open to the mortgagor to prove that the mortgagee had been satisfied not merely by payment in full of the amount which was due thereon but by part payment and remission of the balance *Bhaba Sundari v Ramkamat* 41 C L J 269=A I R 1927 Cal 27 See also *Ramchandra v Kailash*, 1931 Cal 667=58 C 532 An oral agreement between the lessor and the lessee that the lessor should give credit for certain sums for having cut certain trees is admissible as the transaction is a mode of payment or a discharge or waiver of a portion

Cas 169=24 A L J

evidences a contract

terms is admissible

a suit on a bond the

is offered to show that the money due under the bond was meant to be the premium for a lease agreed to be executed by the creditor but which in fact was never executed, *held* that the evidence was excluded by section 92 of the Evidence Act. *Baldeo v Ram Autor*, 22 A. L J 850=82 Ind Cas 347 Where all the terms of a contract have not

admissible to prove the terms not

Coalfields of Burma v H H Johnson

Rang 128 Where a date is fixed in the

oral evidence to extend the period is

terms of the contract so as to make it

76 Ind Cas 62 Where a promissory note is endorsed on the back by a person who is neither the maker nor the holder, oral evidence can be let in to prove a contract of guarantee *Thakarsay v Kishendas*, 76 Ind Cas 292=1925 Sind 9

agreement between the mortgagee and
of redemption as regards the terms on
assign his interest *Sailesh Chander v*

oral evidence is admissible to prove a debt

acknowledged in writing by the debtors when such acknowledged writing being
unstamped is inadmissible in evidence *Thalhan Rim v Lall*, 74 Ind Cas 939=

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evidence of a contemporaneous oral agreement to the effect that the

agreed to treat it as a mortgage is admissible. *Talak Chand v Almatam*, 25 Bom L R 818—A I. R 1924 Bom 58 Oral evidence is admissible as to negotiations antecedent to execution of the mortgage instrument, showing that what was intended to be offered and accepted as security was a certain ancestral share.

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cured by a promissory note does purpose for which the advance was

239—64 Ind Cas 33 Where an

oral agreement is made, which in respect of the manner of payment rescinds or required by law to be in payment if made in accord- partial satisfaction of the not exclude evidence of the payment or the oral agreement that explains it It does, however, exclude evidence of the agreement in respect of future payments not in accordance

L J 387—18 A L J 359—55 Ind. Cas 522—47 I A 17 (P. C) Where in agreement for the sale of land, it was impossible to reconcile the statement in the body of the agreement with the recital in the schedule as to the extent of the land to be conveyed, extrinsic parol evidence is admissible to explain the facts that led to the execution of the agreement, in order to reconcile the different statements regarding the property sold. *Hussonally v Mangoldas*, (1920) M W N 728 (P C) There is nothing in this section to exclude evidence of an oral agreement which contradicts, varies, adds to, or subtracts from not the terms of the contract, but some recitals in the contract itself, *Mukhi Singh v Kishun*, 51 Ind Cas 320 Where there is an oral agreement to grant a lease section 92 of the Evidence Act does not stand in the way of proof that there has been an agreement under the circumstances as to the time of the

Chandra v Bijoy Kanta, 23 C W

Kabuliyat executed and registered by a tenant is proved by the tenant in a suit there is nothing in the Evidence Act to prohibit the landlord from showing that he never assented to or accepted the *Kabuliyat Hemanta v Birendra*, 47 Ind Cas 1003 Oral evidence of a sale by the mortgagor to the mortgagee

consideration that has passed, by showing that the actual consideration was something different to that alleged *Vashudeta v Narayamma*, 5 M 6; *Dookha v Ramlal*, 7 W. R. 100. *Indanyit v. Lalchand*, 1 Bomaya Naik v. Vir. rent is admitted by the lessee, the lessee can rely on it. This section does not affect the case *Satyesh Chunder v. Dhunpul*, 24 C 20. Where the plaintiff executed a mortgage instrument to the defendant and the consideration recited therein was that the defendant was to pay certain debts, and the instrument was not signed by the defendant nor was there any promise by the defendant to pay the debts, the instrument, does not c tendered which samsi, 7 M 19 entered into between the parties, when some others have been reduced into writing in letters exchanged between the parties *Ambika v Gaultstain*, 13 C W N 326 and not a sale—the question being regarded as purely one of intention *Ismail v Hafiz*, 10 C W N 570 (P C) = 3 A L J 353 = 33 C 773. Section 92 of the Evidence Act, only enacts that oral evidence cannot be given to vary or contradict the express terms of a document and does not prevent a party from giving evidence to prove that certain persons caused the document to be executed in favour of certain others mentioned in the document *Shah Muhammad v Ram Dutt*, 5 P R 1896, see also *Tani Mahesha v Secretary of State*, 67 P. R 1894. Liabili upon rescinc a case 1903 and re able from any oral agreement to vary the terms of mortgage contract and can be proved without the evidence of such agreement *Suppanchett v. Yegnarayan*, A I R 1932 Mad 141.

Evidence of conduct or intention for varying, contradicting etc. The acts and conduct of the parties can only be proof either (1) of a contemporaneous oral agreement varying the terms of the registered contract, or (2) of a subsequent oral agreement having the same effect. In the former case the evidence

tional sales, which it has always been permitted to be shown to be mortgages. As pointed out in *Rahman v Elahi Baksh*, 28 C 70 such cases are admitted. But the plea of the

question was *Banerjee*, 5 Full Bench

was really varied by a verbal promise to reconvey on repayment of money, making it in fact a mortgage." In answering the question in the negative

Nith, 23 W R. 167; see also *Madhab Chandra v Gangadhar*, 11 W R 450 = 3 B L R A C 83. In *Peacock C J* 300 = 4 C L R 419 it was held that in *Kashi Nath v Chan* *Hecra Lal*, 3 C L R 50. What is the effect of this section on the Full Bench case was again considered in *Hem Chandra v Kali Charan Das*, 9 C 523. There *Garth C J* for the Court consisting of *Garth C J* and *Millet J* observed: "It has now been argued that the principle established in the Full Bench case was passed in 1872,"

ground for supposing, that the Full Bench case is not law at the present day, made, or intended to make, any prevailed here before the Act was in the Full Bench case, I should

consider that our proper course was to refer the question to another Full Bench; but who seems to rule as

which the judgment in the Full Bench case proceeded in one which, in my opinion, is perfectly consistent with that rule. It is a principle which has constantly been England, as well as by the

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the present *Turner L J* has brought an action of ejectment against *Lincoln* to recover certain land, which the latter had conveyed to him by a deed, which appeared on the face of it to be an absolute conveyance. *Lincoln* then brought a suit in equity to restrain the ejectment, on the ground that the transaction was in reality a mortgage, and he relied in support of that contention, partly upon a parol agreement, and partly upon the acts and conduct of parties. *Turner L J* says "The principle of the Court is that the Statute of Frauds

9 C 898

So although parol evidence will not be admitted to prove directly that simultaneously with the execution of a bill of sale there was an oral agreement by way of defeasance, yet the Court will look to the subsequent conduct of the parties, and if it clearly appears from such conduct that the apparent vendee

2. real intention and purpose of the parties at the time : The exercise of this remedial jurisdiction by the Courts of India exercising a similar jurisdiction covers the whole of the section does not say that, in order to constitute an estoppel, the acts which a

which was one of the grounds for calling 'past performance' But the ground upon which it is safely be rested, Courts will not allow a rule or even a statute, which was passed to suppress fraud, to be the most effectual encouragement to it and accordingly in England the Courts for common law have the same rule as the Indian Evidence Act and 92 of the Act, the Legislature, Specific Relief Act

Indian Evidence Act so as to bring them into conformity with the practice of the English Courts of Chancery *Balshu Lal s'man v Gourinda*, 4 B 594 So the principle of law laid down in the *Churn*, 5 W R 68 was approved or *Pheloo v Geerish*, 8 W R 515; *Ha Sheikh Parabal v Sheikh Mohammed*, 1 B L R A C 87; *Behary v Tej naran*, 10 C 764, *Nundo v Prosunno*, 19 W R 333, *Bholanath v Kaliprasad*, 8 B L R 89, *Venkataramnam v. Reddiah* 13 M 494, *Rahien v Alageppu dayan*, 16 M 80, *Kader v Nepean*, 21 I A 96-21 C 892 (P. C.) see also *Balkishen Das v Legge*, 19 A 434, *Holmes v Mathews*, 9 Moo P C 419, *Mutty v Annundo*, 5 M I A 72, *Barton v Bank of New South Wales*, L R 15 App Cas 379 The question was again considered by a Full Bench of the Calcutta High Court in *Prionath Sha v Madhusudan Bhuiya*, 2 C W N 562-25 C 603 (F B) There *Banerjee and Watkins JJ*, in their order of reference reviewed all the previous cases on the subject *Maclean C J* in delivering the judgment of the Full Bench observed "In regard to the question of law, which was the main ground for this reference, namely, whether oral evidence as to acts and conduct of the parties was admissible to prove that the deed in this case was intended to operate as a mortgage and not as an out and out sale, the learned *vakil* who appeared for the Appellant stated that having regard to the authorities he could not successfully contend that such evidence was not

oda Balsh, 26 In Cas 717

v Legge, 4 C W N 153 (P C) =
y Council In that case the question was

whether certain deeds executed by the respondent in favour of the appellants constituted a mortgage transaction or an out and out sale with a contract of repurchase *Lord Dary* in holding that oral evidence of intention was not admissible for the purpose of construing the deeds or ascertaining the intention of the parties, said, "By section 92 of the Indian Evidence Act (I of 1872) no evidence of any oral agreement or statement can be admitted, as between the parties to such instrument or their representatives in interest, for the purpose of varying, or adding to, or subtracting from, its terms, subject to the exceptions contained in several provisions It was conceded that this case could not be brought within any of them The cases in the English Court of Chancery which were referred to by the learned Judges in the High Court have not in the opinion of their Lordships any application to the law of India as laid down in

the Acts of the Indian Legislature. The cases must therefore be decided on the S. 9

of the parties, that is, evidence of the repayment of the money, the return of the deed and the exercise of the acts of possession by the vendor, and not of the acts of the parties. If that was the view we take of section 92 of the Evidence Act does not support the parties. The view we take is supported by a full Bench decision of this Court in the case of *Preo Nath v Madhu Sudan*, 2 C W N 562=25 C 603. It was contended by the learned J. for the appellant that the decision must be taken to have been in effect overruled by the decision of the Privy Council in the case of *Balkishen v Legge*, 27 I A. 53=4 C W N 153. We do not consider the argument sound. The evidence that their Lordships considered inadmissible in the case just referred to was certain oral evidence of intention which had been admitted in the Courts below and the ground upon which their decision is based is that such evidence is excluded by section 92 of the Evidence Act. Their Lordships

evidence of the acts and conduct of the parties not being in the nature of an oral agreement or statement." See also *Mahomed Ali v Mst Nazar Ali*, 5 C W N 826=28 C 289; *Ali Sherkh v Imam Ali*, 35 Ind Cas 102; *Miriam v Ibrahim*, 28 C L J 306=48 Ind Cas 561; *Kamala v Nandan*, 11 C L J. 39, *Ramavatar v Tulsi*, 16 C W N 137, *Sharadi v Jamal*, 17 C W N. 1053. In the last named case B executed in favour of A a deed of out and out sale with a condition of re-purchase of a house but no date was fixed for the repurchase. On the same date B executed a *kabulyat* in favour of A by which he accepted a lease of the housesold. The Court took into consideration how the language of the document was related to the existing facts such as that the vendor continued in possession, paid rent at the usual rate of interest, etc., and further that the value of the property was much more than the consideration paid. In delivering the judgment *Jenkins C J* said "The argument before us has been that it was not open to the Appellate Court to regard the transaction as a mortgage. I designedly use the word 'transaction' because that with which we have to deal is not contained in one document but in two, and what we have to consider, in the circumstances is, whether there is anything in section 92 of the Evidence Act or in *Balkishen v Legge*, 22 A. 149—which is in opposition to that section—that would compel us to hold that the decision of *Mr Justice Chatterjee* is erroneous. We would certainly

in Calcutta. But it appears to me that all these authorities to which allusion has been made are beside the point in this case, for I cannot find that the learned Judge of this Court has relied on any evidence of oral agreement or statement or of intention, with a view to coming to the conclusion at which he arrived. He took the transaction as it is expressed in the documents. He also took into consideration those facts which may legitimately be proved with a

principal document is expressed in qualified terms, and it is only open to the suggestion that it is an out and out sale, if and so far as it can be said that the express terms of the deed must be disregarded.

In *Narendra Lal v Bholanath*, 21 C W N 331=11 Ind Cas 102, cases of *Preonath Shaha v Madhu Sudan*, 25 C 603=2 C W. N 562; *Khanlar Abdur v Ali Hafez*, 23 C 256 and *Mahomed Ali v Najar Ali*, 23 C 280=5 C W N 306 were followed, see also *Kailash Chandra v Darbaria*, 20 C W N 347; *Manindra v Durga Sundari*, 20 C W. N 680; *Arjad Ali v Sheikh*, 50 Ind Cas 12; *M Priyabarta*, 20 C W.

an instrument, only of showing that the transaction is not what it purports to be. *Krishna Lal Sinha v Sri Raj Kuar*, 104 Ind Cas 299=1 Luck C 97=A I R 1927 Oudh 276. *Mariam Bibi v Ibrahim*, 28 C L J 306=48 Ind Cas 561. The rule, that the conduct of the parties in respect to an instrument may be looked to in construing a document, is subject to this reservation that it can be admitted only after every other means to construe a deed have been exhausted. *Deves Trikamjee v Dayamoy*, 103 Ind Cas 418=A I R 1928 Pat 225. Subsequent conduct of

contract were never in the deed to be acted upon from the very beginning. *Narendra v Bholanath*, 77 Ind Cas 154=27 C W. N 336, see also *Ali Sheikh v Iman Ali*, 35 Ind Cas 102.

A different view has been taken by the Bombay High Court in *Dattoo v Ramchandra*, 30 B 119=7 Bom L R 669, where *Jenkins C.J.* said "The plaintiffs sue to recover possession of land alleging that the document passed by his father, though in form an absolute conveyance was intended to operate as a mortgage. The grounds on which their contention is based, are that the consideration was a debt and not money paid at the time; that the plaintiff's father, notwithstanding the execution of the deed, remained in possession for until his death, and that after his death his widow remained in possession for

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case in that there was no agreement enforceable by law to sell the property, but that there was a mortgage agreement, it should be specifically determined whether or not the parties as shown by evidence, in a mortgage Bom L R 764 The plaintiff sued in

is not open to
misrepresentation
void Sangira
na v Godigaya,
om L R 684
mortgage dated

1899 The mortgage having been expressed in the form of a sale deed, he
referred to s 10 A of the Indian Agriculturists' Relief Act to show that

words which refer to s 12 of the Evidence Act, and does not point to any
Gopal v Morar, 15 Bom L R
ana, 31 Bom L R 1266, Gopal
The object of s 10 A of the

Bom L R 1200
the case of Ballishen Das v

inference that there was a contemporaneous oral agreement or statement between

2 from, the terms of any contract, grant or disposition of property which has been reduced to writing, and no exception is made in any of the provisions to sect 92 or elsewhere in the Act, in favour of evidence which contradicts the acts and conduct of parties from which an inference might be drawn that there was such an oral agreement to vary the terms of the contract or grant. The question before us is really concluded by the recent decision of the Privy Council in *Balishen Das v Legge*, 27 I A 58=22 A 149. In this connection we may also draw attention to the direction which is drawn by the same tribunal between admissibility of evidence to show that a recital of a fact in a contract or grant is erroneous, and evidence to vary the terms of a contract or grant (*Sri Lal Chand v Indrajit*, 27 I A 93=22 A 370), and also to the decision in the House of Lords in *North Eastern Railway v Lord Hastings*, (1910) A C 200 in which it was held that when the words of a deed were plain and unambiguous, the fact that the parties understood it otherwise and acted on such understanding for a period of more than forty years, could not affect the construction of the instrument and the effect to be given to it. See also *Tenafra v Subramaniam* (1917) M W N 674, *Chall Venkaya v Derajalakum*, 1912 M W N 164. Where the contemporaneous agreement though in writing is not registered, it is not open to the party to show that what is apparently a sale was really a mortgage. *Meenaksh Sundaram v Chenchu*, 109 Ind. Cas 18=A. I R. 1928 Mad 409. Evidence of subsequent conduct to prove contemporaneous agreement is not admitted. *Fry v Holmes v The Bank of Upper India*, 77 Ind Cas 523=5 Lah L J 439. In delivering the judgment the Court observed "On the question of whether he can be allowed to produce evidence of a contemporaneous oral agreement varying the terms of the written document, the learned senior

very clearly and we find which he comes that this in which the High Courts *Ma Shue*, 44 I. A 236 (P C). It was contended Council has not definitely =114 P L R 1901 A. wed Preonath ankar Abdur the Calcutta s conduct as

by the same way in *Holms v The Bank of anhya Mil*, 15 P W 9 *Bm v. Ma Bang*, 3 J. B R. (1:02-1903) 14 O. C. 321; *Ramesh* 3 R 1903, 3rd Qr Cas. 644, *Sookna v B L R Sup Vol*

399=5 W. R 76, *Jugobundhoo v Rukee*, W R. (1869) 393; *Mahomed v Raesooden*, 6 W. R 117, *Radha v Ram*, 9 W R 251; *Bulak v Flad*, 27 P. R 1911=118 P W R. 1911=10 Ind Cas 1004

In *Maung Hym v Ma Shue*, 15 C W N 958=39 I A 146 P. C=21 W L J 1105, the appellants who had acquired certain properties under absolute conveyances subsequently purporting to be a mortgage. In this conveyance the parties (as distinguished from evidence of oral statements and conversations constituting in themselves an agreement to contradict or vary the written instrument) to show that the transaction was

on this appeal is whether or not that evidence was properly rejected . . . Its object was to show that whatever the terms of the document may have been, none of the parties had acted on them as effecting an absolute sale, but that through a long course of mutual dealings materially affecting their respective positions

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opinion on the construction or application of section 92 of the Indian Evidence Act in relation to the deeds of the 4th March, 1903. That case again went up to the Privy Council (*Vide Maung Aye v Ma Shue La*, 22 C W N 377 P. O. 7th Nov 1903).

Lordships are now in possession of the facts and of concurrent findings upon the most important of them. Upon the non admissibility of the evidence reliance is placed by the respondents upon section 92 of the Indian Evidence

the respondents maintain that the ed On the contrary, the Appellants the section, they are entitled to set the parties as inconsistent with the

transfer of property and only consistent with the true nature of the transaction having been one of mortgage or transfer of mortgage. They found upon a considerable body of authority to that effect, the cases cited being, *Balshu Lakshman v Govinda Kanu* 4 B 594; *Hem Chander v Kally Charan*, 9 C 523, *Rakhen v Algappudayan*, 16 M 80, *Preonath v Madhusudan*, 25 C 603=2 C W N 591, *Khanlar v Ali Hafez*, 28 C 256 and *Mahomed Ali v Narai Ali*, 28 C 289=5 C W N 326. The judgment of Mr Justice Melville in the first of these cases is repeatedly founded upon in the course of the series, in which the learned Judges expressly followed the English equity doctrine as expressed in *Lincoln v Wright*, 4 Deg & J 16 by Lord Justice Turner thus: 'The principle of the Court is that the Statute of Frauds was not made to cover fraud. If the real agreement in this case was that as between plaintiff and Wright, the transaction should be a mortgage transaction, it is, in the eye of this Court, fraud to insist on the conveyance as being absolute, and proof evidence must be admissible to prove the fraud.' In the opinion of their Lordships, this series of cases definitely ceased to be of binding authority after the judgment of this Board pronounced by Lord Dorey in the case of *Balshu Das v Legg*, 27 I A 58=4 C W N 153. It was there held that oral evidence was not admissible for the purpose of ascertaining the intention of the parties to written documents. Lord Dorey cites section 92 of the Indian Evidence Act, and adds—The cases in the English Court of Chancery which were referred to by the learned Judges in the High Court have not in the opinion of their

he Acts of the consideration of the evidence of what manner the notwithstanding the the subject still remains in issue. But the respondents rightly refer to *Acuta Rinarani v Subbarani*, 25 M 7, *Maung Bin v Ma Hlaing* 3 L B R 100 and *Dattoo Vali v Ram Chandra*, 30 B 119, and in particular in the judgment of Jenkins C J in the last case. In this the Lord Dorey, has been rightly followed *Annada Chandra*, 71 Ind Cas 336=77 Ind Cas 151. In *Narasimhan v Janakiam*, 20 C. N. 17 M.

729 (P C) the question was whether documents executed between the parties constituted a mortgage by deed or a sale with an agreement to reconvey. It was held that the documents were a mortgage, Lord

22 A 149-4 C W. N 133, are clearly, required to show, in what manner the language of the document

In *Bainath Singh v. the Natu Singh Oil Co* on the footing that certain transactions entered into between the plaintiff and defendant, *Hajee Mahomed Jamal*, were mortgage. The defendant contended that the transactions were, as they purported to be, absolute sale to the original defendant followed by contracts for the resale of the shares to the plaintiff, that time was chase had been extinguished of the transactions Sir

in *Balkishen Das v Legge*, 27 I A 58-23 A 149-4 C W N. 153, that under section 92 of the Indian Evidence Act, as between the parties to an instrument, oral evidence of intention is not admissible.

cribes a rule of

PROVISO (1).

Scope of the provision The admissibility of extrinsic parol testimony to

or variation or contradiction of a written transaction

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(4) Fraud, mistake, duress, incapacity, failure of consideration, or other matter showing that the writing is not the valid transaction it purports to be

(3) Any collateral verbal agreement on the same subject-matter, consistent

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Scope of proviso (1)—Parol evidence is admissible to show that a writing is not really the valid transaction which it purports to be. Such evidence may therefore be given to prove fraud mistake, illegality, incapacity, failure of consideration, or other matter affecting the validity of a writing as a document. *Cockle Cas* 341. In *Henkle v Royal Ex Ass. Co*, 1 Ves 317, Lord Hardwicke said, "No doubt, but this Court has jurisdiction to relieve in respect of a plain

which they put down is final as to what they mean; it is the binding record of the agreement. But they are always at liberty to show whether it is the binding record of the agreement. Suppose that the signature were made in the course of a dramatic representation, or suppose a printed form of agreement were used and the witness who signed his name in the space meant for the signature were at liberty to show the real signature. *Wake v Harrop*, 7 Jur 710; *Att. (1900) 1 Ch 618*, *Dobell v Stephens*, 3 L J K B 89, *Cockle cas* 341. So the first proviso in no way transgresses the rule in *Mark Ev* 73. So the rule is not, under the proper pleading, that it never had any legal effect of forgery or fraud, or for the due execution and delivery, *Att. 9 East* 421, 422, *Taylor* § 3). In delivering

defence to point out and to claim protection from enquiry in contradiction and variance of the terms of which is not in question. In such cases, the Court is not bound by what has been described as a mere paper expressions of the parties and is not precluded from enquiring into the real nature of the transaction between them. The first proviso to that section, therefore, declares that any fact may be proved which would invalidate any

want of due execution or capacity. But in my opinion, this is not so, as the instances given are not exhaustive but, as appears from the use of the words 'such as' are set out by way of illustration. Some of the cases that the Court has decided are the

2. did not wish to put in writing *Mottayabhan v Palani* (1913) M W N 650-25
 M L J 290-20
 jointly and severally
 he signed only as a
 his signature that he
 in the evidence *Maung Sein v Ma Saw* 3 Bur L J 112-82 Ind C 816
 When a document can be shown to come within proviso (1), evidence of
 contemporaneous oral agreement contradicting the document is admissible
Mahomed v Abdul, 63 Ind Cas 368 Under proviso (1) to s 92 any fact may
 be proved even that there was
 never any I was altogether
 dropped cannot be given
 effect to to the defendant
 in a redemption suit to plead that the mortgage is a fictitious document intended
 to cover a previously
 the first proviso to set
 invalidate the deed &
 purporting to be a
 standing of both parties that it is not to be treated as the real contract between
 them, is not an agreement enforceable by law, and there is not a contract at all
 and does not acquire the
Muhammad v Cassim Ali L
 property in suit to defend
 a conveyance in consideration of services rendered or to be rendered by defen
 dant No 2 in inducing his master L to sell certain property to the plaintiff
Held that the defendant No 2 was entitled to prove the real transaction by
 oral evidence *Abd Khan v Mussamat Seval* 9 Ind Cas 161-15 C W N
 409 Where a party deliberately and with eyes open executes a deed of sale he can
 not be allowed to set up against it an oral agreement that the sale is a mortgage
 He may prove that a mortgage was intended but that by fraud, mistake or
 otherwise tended to execute
 a sale deed at that the sale
 was to be C P L R 127
 Parties can show that they never came to an agreement or that written contract
 having an uncertain date *Radhakissen*
 v D
 inadmissible for the purpose of
 invalidating a written agreement *Dholan Das v Pritya Singh*, 85 P R 1893
 Under this proviso any fact may be proved which would invalidate any docu
 ment Therefore in a suit on a bond, a defendant
 of = 241, 03 1 R 183-1191
 a void or a conveyance in an apparent sale deed formed only part of the real
 agreement between the parties, and the oral agreement to re-convey to the
 vendors which gave them a claim to equitable relief formed another part of the
 same transaction, it is in the eye of law a fraud to insist on the conveyance as
 as for proving
 the validity of the oral
 it would invali
 a in the document as a deed of absolute sale within the meaning of the first
 proviso to the section and constitute a ground for a Court of equity and good
 conscience giving effect to it only as a mortgage *Rallen v Alagappudayam*
 15 M 80 This proviso seems to apply to cases where evidence is admitted to
 show that a contract is void or voidable, or subject to reformation upon the ground
 of fraud or fraud alleged to be
 a, where the
 of that kind,
 at the other
 C 20 B 636

It may always be shown that the document in question never had any legal existence. On this ground rests the very important exception that duress or fraud in the inception of the contract may be proved, although accompanied by the

ever
case, to
Waddell
Blanton,
'83; *Phip*

Ev 4th Ed pp 537, 538 If the fraud is clearly proved, one of the essential elements of contract—consent—is wanting. Thus it may be proved by parol evidence that any material part of the contract was fraudulently omitted or inserted by the other party, (*Heter v Glasgow*, 79 Pa 79) or that it was fraudulently misread to one not able to read and that he was thus induced to give his signature; (*Mc Messon v Sherman*, 51 W 303) or that a part of the contract was not reduced to writing because of the fraud of one of the parties, in which case the whole transaction is open to explanation by parol evidence. *Phyfe v Wardell*, 2 Edw Ch (N Y) 47. In brief, if one person fraudulently

85—3 Ed
which ar
with the
negotiated
Russ, 16
alleged, &
in such

motives and intentions that prompted the parties to execute the same. Such evidence is permissible to show fraud in a transaction which, if shown, annuls the contract, and prevents its enforcement. It is not admitted for the purpose of varying the terms of a contract but merely to ascertain whether it is a *bonafide* transaction or sham. If there is no fraud, the contract will stand, conversely, if there is fraud, the purpose of the admission of parol testimony is served. *Fairbanks v Simpson*, 28 S W 128 (Am). In such cases any secret agreement radiating the face of the
nto (*Gray v Hankinson*,

entire transaction may be investigated
brought by one of the contracting parties

contract should not be impeached or changed, unless it appears that one of the parties was fraudulently misled or deceived. Without enumerating them then,

a certain sum and deliver up a note of the lessee then held by the lessor. The evidence established the facts stated, and the Court said it would be difficult to

S. 92

Undue influence U
Influence, in order to
would make it sufficient to
by coercion or fraud"
at p 45 Similarly *Parl*
observed: "Undue influ

in a state of
l, in *Williams v*
destroying free

Illegality The c
it is forbidden by law, c
the provisions of any
person or property of another, or the Court regards it as immoral, or opposed
to public policy In each of these cases, the consideration or object of an
agreement is said to be un

in which it is intended to
Budge Budge Mill, 83 C 702, *Cun Contract Act* p 102 the legality of a
contract has to be determined by the law of the place of performance, or if no
particular place is designated by the law of the place where the contract is
made But the *lex fori* det
be recognised Although ther
the law applicable to it, it
laws expressly prohibit such an agreement Nor will the *lex fori* suffer the
foreign law to be applied, if the agreement is contrary to the interests of the
state or to common principles of justice and morality *Santos v Illidge*, 28
L J C P 317 Accordingly, the Court will not enforce an agreement obtained
by threats of a criminal prosecution although the agreement is valid according
to the law of the country where it was made and where the parties to it were
domiciled *Kaufman v Gerson* (1904) 1 K B 591; *Cun Contract Act* p 103
Illegality covers instruments or transactions against public policy, such as

Ev § 1137 So oral evidence
object or consideration of an

agreement in writing is unlawful and that therefore the agreement is void
Kashi Nath v Brindaban, 10 C. 649, *Anup Chand v Chandra*, 12 II 585; *Dens*
Midhab v Sadasook, 32 C 437 Moreover, when it appears that the transaction

is thus unlawful, it is the right and may be the duty of the Court to take cognizance of the fact although it may not have been pleaded *Fischer v. Kamali Naicker*, 8 M. I. A. 187; *Scott v. Brown*, (1892) Q. B. 724; *Hill v. Clarke*, 27 A. 267, *Gun Contract Act* p. 101. Oral evidence is admissible to show that an agreement in writing to sell Government promissory notes is really an agreement made by way of wager on its market price on a future day *Eshoor Das v. Venkata Subba Ram*, 17 M. 480.

Want of due execution : "Execution" when applied to a document, is the last act or series of acts completion *Bhouany v. De* to the act of completing a by the testator, yet in ordinary the testator and the attestation of his signature *Per Sir A. J. 1200*.

Syed Ali, 12 O. L. J. 1 = A. I. R. with executing a signed document, legal consequences, the act which he adopts and makes his own the general, immaterial whether he has acknowledged it. It is even *Ignored* § 2134. It is in writing, ion, Seal, Attestation. These formalities some of the Acts

as an inherent element of form in the validity of the transaction. *Lake* all other

certain general danger sake of this policy.

the fact that the an unlawful object, is in the suit is brought *Arumengadu v. Maung*

Want of capacity of the contracting parties Parol evidence may also under the proper pleading, be offered to show that the party was incapable of contracting by reason of some legal impediment, such as infancy, coverture, idiocy, insanity, or intoxication *Barret v. Buxton*, 3 Atk. 167. Besides the two classes of persons *non compos mentis*, viz. idiots and lunatics *Lord Coke* mentions two more classes viz., those who were of good and sound memory, but by the visitation of God has lost it, and those who have become *non compos* by their own act, as drunkards (*Will Exor* 25). In the former of these two latter classes must be reckoned those who from sickness, grief, accident or old age *Lord Coke*, as *lunatics* those under has assigned *17th Grammar*, 13; *Rigauy v.*

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1872)
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where
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from
L. J.

183 *Golshede v Su*
of N. S. W., 15 App
v *Hancharan*, 32 P L

ent but it is the recital of a fact
viso (1) to section 92 *Nabin v.*
y to prove want of consideration
o him to prove a variation in the
Mahomed, A I R. 1930 Mad.
M L J 414 Expl) If the state-
al of a fact section 92 is not
ght come under
!f one party to
, the receipt of
alle within the
rty is at liberty
given to prove
537-24 Ind.
C W N 159
sory note was
in the meaning
can be given

to prove that the consideration represented gambling losses *Balgobind v*
Bhaugg Mal, 11 A L J 854-35 A 558 Notwithstanding an admission in
a sale deed that the consideration had been received, it is open to the vendor
to prove that no consideration had been actually paid *Le Hen v Elahu*
Duz, U B R (1897-1901) Vol II, 400, see also *Sahdat v Dulogir*, A
W N. 1886, 53 Pre emptor can show that transaction which is ostensibly
a mortgage is really a sale 157 P W R 1909 Under this proviso, a party
to a contri

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The provis
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received by the vendor it is competent to the vendor, under the provisions of the
Evidence Act, to prove a collateral agreement that the purchase money should
remain in the hands of *Salpa*.
93=2 Bom L R 553
proviso is a complete

L J 721 When there is a recital in a document of the payment of a certain
sum of money as consideration, oral evidence is admissible to prove that the
recital is incor-
of fact, s 92 of
it to be wrong
oral evidence to
in and for the purpose of proving it, he must be allowed to prove what the real
consideration was Section 92 does not in any way bar such proof, for the proof
adduced not for the purpose of varying or altering any term of the written
contract, but only to show

2. C L J 552=75 Ind Cas 557=1923 CIL 570 In the case of a deed of sale actually paid and recited in Singara Charlu v A 61=A W N

1900 120=A L J 300

contract from that contained in recital Although this purpose of contradicting of the parties to the contract from showing either that there was no consideration or that the consideration was different from that stated in a conveyance Gopal Singh v Laloo Lal 10 C L J 27=2 Ind Cas 953 Evidence is admissible to show that consideration, mentioned in a deed as having been paid never passed and also to show that the consideration specified in the deed was satisfied in a different way from that mentioned in the document itself Muhammad v Muhammad 4 A L J 441=A W N 1907, 181

Mistake of fact With regard to deeds or

agreement at all an in resumption Tay § 1150
 (1910) 1 Ir R 167, may be
 5 Q B 574, Philp v Th
 ie Indian Court sits as a Court
 ie principles which prevail in
 evidence is often admitted to
 equity and illustration (e) in equity, p
 vary or even contradict a writing, where by some mistake surprise, or the
 like, it does not represent the party's true intention, but it requires a very clear
 case to induce the Court to interfere The mistake must be most satisfactorily
 made out and the error be shown to be one which ought to be corrected If this
 be done by the plaintiff, the Court will reform the instrument so as to make
 it in conformity with the true intent A defendant, against whom specific
 performance is sought may insist on the mistake in his defence, and establish it
 by parol evidence Lord E 215 Section 20 of the Contract Act enacts
 'where both the parties to an agreement are under a mistake as to a matter of
 fact essential to the agreement, the agreeer
 Act lays down "A contract is not voidable
 one of the parties to it being under a
 section is not a bar to plead the mistake of
 Sanjiva M Mys L J 103 Where on
 property was misdescribed
 belonging to the mortgagor
 sible to establish identity
 216=20 A L J 53=L J 3 A 61=104 111 112 113 114 115 116 117 118 119 120 121 122 123 124 125 126 127 128 129 130 131 132 133 134 135 136 137 138 139 140 141 142 143 144 145 146 147 148 149 150 151 152 153 154 155 156 157 158 159 160 161 162 163 164 165 166 167 168 169 170 171 172 173 174 175 176 177 178 179 180 181 182 183 184 185 186 187 188 189 190 191 192 193 194 195 196 197 198 199 200 201 202 203 204 205 206 207 208 209 210 211 212 213 214 215 216 217 218 219 220 221 222 223 224 225 226 227 228 229 230 231 232 233 234 235 236 237 238 239 240 241 242 243 244 245 246 247 248 249 250 251 252 253 254 255 256 257 258 259 260 261 262 263 264 265 266 267 268 269 270 271 272 273 274 275 276 277 278 279 280 281 282 283 284 285 286 287 288 289 290 291 292 293 294 295 296 297 298 299 300 301 302 303 304 305 306 307 308 309 310 311 312 313 314 315 316 317 318 319 320 321 322 323 324 325 326 327 328 329 330 331 332 333 334 335 336 337 338 339 340 341 342 343 344 345 346 347 348 349 350 351 352 353 354 355 356 357 358 359 360 361 362 363 364 365 366 367 368 369 370 371 372 373 374 375 376 377 378 379 380 381 382 383 384 385 386 387 388 389 390 391 392 393 394 395 396 397 398 399 400 401 402 403 404 405 406 407 408 409 410 411 412 413 414 415 416 417 418 419 420 421 422 423 424 425 426 427 428 429 430 431 432 433 434 435 436 437 438 439 440 441 442 443 444 445 446 447 448 449 450 451 452 453 454 455 456 457 458 459 460 461 462 463 464 465 466 467 468 469 470 471 472 473 474 475 476 477 478 479 480 481 482 483 484 485 486 487 488 489 490 491 492 493 494 495 496 497 498 499 500 501 502 503 504 505 506 507 508 509 510 511 512 513 514 515 516 517 518 519 520 521 522 523 524 525 526 527 528 529 530 531 532 533 534 535 536 537 538 539 540 541 542 543 544 545 546 547 548 549 550 551 552 553 554 555 556 557 558 559 560 561 562 563 564 565 566 567 568 569 570 571 572 573 574 575 576 577 578 579 580 581 582 583 584 585 586 587 588 589 590 591 592 593 594 595 596 597 598 599 600 601 602 603 604 605 606 607 608 609 610 611 612 613 614 615 616 617 618 619 620 621 622 623 624 625 626 627 628 629 630 631 632 633 634 635 636 637 638 639 640 641 642 643 644 645 646 647 648 649 650 651 652 653 654 655 656 657 658 659 660 661 662 663 664 665 666 667 668 669 670 671 672 673 674 675 676 677 678 679 680 681 682 683 684 685 686 687 688 689 690 691 692 693 694 695 696 697 698 699 700 701 702 703 704 705 706 707 708 709 710 711 712 713 714 715 716 717 718 719 720 721 722 723 724 725 726 727 728 729 730 731 732 733 734 735 736 737 738 739 740 741 742 743 744 745 746 747 748 749 750 751 752 753 754 755 756 757 758 759 760 761 762 763 764 765 766 767 768 769 770 771 772 773 774 775 776 777 778 779 780 781 782 783 784 785 786 787 788 789 790 791 792 793 794 795 796 797 798 799 800 801 802 803 804 805 806 807 808 809 810 811 812 813 814 815 816 817 818 819 820 821 822 823 824 825 826 827 828 829 830 831 832 833 834 835 836 837 838 839 840 841 842 843 844 845 846 847 848 849 850 851 852 853 854 855 856 857 858 859 860 861 862 863 864 865 866 867 868 869 870 871 872 873 874 875 876 877 878 879 880 881 882 883 884 885 886 887 888 889 890 891 892 893 894 895 896 897 898 899 900 901 902 903 904 905 906 907 908 909 910 911 912 913 914 915 916 917 918 919 920 921 922 923 924 925 926 927 928 929 930 931 932 933 934 935 936 937 938 939 940 941 942 943 944 945 946 947 948 949 950 951 952 953 954 955 956 957 958 959 960 961 962 963 964 965 966 967 968 969 970 971 972 973 974 975 976 977 978 979 980 981 982 983 984 985 986 987 988 989 990 991 992 993 994 995 996 997 998 999 1000

to the mortgagee, provided in it there was to be no accounting between the parties at the time of redemption and it appeared that a portion of the mortgage consideration was set down in the deed as being due to the mortgagee from the mortgagor, merely by way of guess without any accounting having been really taken at the time. Held that the mortgagor should show that there was an agreement at all an in resumption Tay § 1150
 (1910) 1 Ir R 167, may be
 5 Q B 574, Philp v Th
 ie Indian Court sits as a Court
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 vary or even contradict a writing, where by some mistake surprise, or the
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mistake the words "per cent" had been omitted from the mortgage deed *Held* S. 9
 that it was a case of mutual mistake for which provision was to be found in the
 Act *Ram Bharosay v Janaki Prasadi*,
 Oudh 95 Under this section, mistake of the
 be proved *Sukdeo v Ram Narain*, A I R
 may be adduced to show that owing to the
 ignorance of the draftsman, a deed of sale did not truly express the real intention
 of the parties *Thakur Rohini v Vishwanath*, 13 C P L R 33 It is open to
 the Court, having regard to this proviso to allow oral evidence of mutual mistake
 of fact to set aside a deed of sale. *C. W. N. 260*, see
 Ch. 530,
 Ch. 285;
Idling v.
contra
 rectification
 instrument, the proviso
 ignous unreformed and
 mistake a term has been
 one would found a claim
Venkata, A. I. R. 1931 Mad

Mistake of law A contract is not voidable because it was caused by a

with a knowledge
 practicable in the
 note to § 126
 against mistake
 circumstance
 money or other
Mohendranath, 17 C 602 The maxim *Ignorantia juris nemini excusat*
 refers to ignorance of ordinary law of the land and not to mistakes regarding
 constructions of documents *Beauchamp v Winn*, L. R. 6 H. L. 223, *Cun*
En 99

in a suit brought for the purposes under section 31 of the Specific Relief
 Act, subject to the
 faith and for value
Kantli, 31 Ind Cas
 in the description of
 the mistake is so proved the document can be construed by the Courts as if
 the mistake had been rectified, and a separate suit for rectification of the instru-
 ment under section 31 of the Specific Relief Act is not necessary, provided
 that the rights of third persons acquired in good faith and for consideration are
 not prejudicially affected thereby *Koula Chinn v Cannellanti*, 3 L. W. 551.
 The combined effect of section 93 of the Evidence Act and section 31 of the
 Specific Relief Act is to entitle either party to a contract, whether plaintiff or
 defendant, to protect his right by proving a mistake in contract as a mistake

name A
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 mortgage
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 the 1st

collateral contract the written contract does not contain the whole of terms. Here the lease expresses the whole terms, the defendant agrees to let, and the plaintiff to take, the house and furniture at a certain rent, there is said to have been a negotiation, that the defendant for the same rent, how is this

But the general rule under discussion is not violated by allowing parol evidence to be given of the contents of a distinct valid, contemporaneous agreement between the parties which was not reduced to writing when the same is not in conflict with the written agreement. *Burr Jones* § 439. Undoubtedly matter on which a written terms may be proved case it may be properly

inferred that the parties did not intend the written paper to be a complete and final statement of the whole of the transaction between them. But such an agreement must not only be collateral, but must relate to a subject distinct from that to which the connected with the where the writing complete legal obligation, without any uncertainty as to the object or extent of the agreement of it was reduced to writing

'where a writing, and is not intended by the parties to define some of its terms, the parts of the actual contract as established by parol' *Hood & Co* criterion of the completeness of agreement of the parties in the writing itself. If it imports on its face to be a complete expression of the whole agreement,—that it contains such language as to be presumed that the parties intended to be governed by the agreement to which the

Jones § 440

Where a promissory note is silent as to interests this proviso does not preclude a party from setting up and proving a subsequent oral agreement to pay interest. *Saudamoney v Spalding*, 12 C L R 163. But where a bond declares that money is to be repaid with interest at a certain rate, an oral contract to the effect that no interest is to be paid but the person is to be in possession of a certain piece of land and to pay himself the interest out of the usufruct cannot be proved. *Kalee Deen v Jogdat* 172 Ind Cas 894—1930 A L J 1009=A I R 1930 All 440. Where there is a contract with a partnership and a promissory note signed by a partner in his own name and not in the name of the partnership, on evidence of such contract, all the partners will be liable. The principle that only the maker of the promissory note can be held liable contract is alleged evidence as to the

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In considering whether or not this proviso applies etc. The principle applies only to formally complete contracts, for in such it is reasonable to suppose that the parties have set down all they intended, and omitted nothing. This presumption becomes weaker and weaker as the document is found to be less and less formal. *Beharee v Kamnnee*, 11 W R C R 319. And in the

v. H. 111 S. 27. On this ground the section directs the Courts in considering whether oral testimony is admitted or not, to have regard to the formality of the documents. The illustrations (g) and (h) N. 111 S. 27. Where a document is based on a negotiable instrument which is a document of a formal character, the existence of a separate oral agreement as to any matter on which the instrument is silent cannot be proved under s. 92 of the Evidence Act, as proviso 2 to the section would not apply to the case. A *Shahyad* *Hundi* is an instrument of a formal character and where it is silent as to interest, a separate oral agreement for payment of interest cannot be proved by virtue of proviso 2 to section 92 of the Evidence Act. *K. v. Chand v. Gurhilla*, 165 P. L. R. 1911; *Patna v. Hemant*, 1 M. L. J. 299, *Lachmi v. Hemant*, 18 C. W. N. 1249, 1a & *Ishtiaq Ali* (Case 212), but see *Gowram Sri Ganesha v. Laxmi Bai*, 11 C. W. N. 105-20 A 31-17 M. L. J. 35-1 A. L. J. 29-9 B. v. I. R. 1. Defendant in staged certain shops and their stock in trade to the plaintiff. The plaintiff alleged in the plaint that it was agreed that the rent should include the goods which might be brought into the shop subsequent to the date of the mortgage as well. It was found that the mortgage deed though registered was drawn up not by a lawyer, but by a petty scribe. *H. 1* that in considering the degree of formality of the document the fact that it was not drawn up by a skilled lawyer was of much more importance than the fact that it was registered and that evidence of the alleged oral agreement was impossible under section 92, proviso, (2), of the Evidence Act. *Sothi v. Chabhai*, 11 L. B. R. 240-11 Bar L. 7 271.

When the informal and incomplete document is silent. Where the plaintiff's evidence proved that the written agreement about supply of consignments by defendant was

agreement. Held that that there should be sent when the plaintiff the defendant was *Sothi v. Chabhai*

Where a deed of lease does not mention the place fixed for payment of rent, it is open to the plaintiff to show that it was subsequently agreed between the parties that rent was to be paid at a particular place. *Onkur Prasad v. Baidi Das* 8 N. L. J. 61-83 Ind. Cas. 273-A I. R. 1926 Nag. 281. Under this proviso the existence of any separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved. This proviso applies where the document is of an informal character, *Jallora v. Jaram*, 7 N. L. J. 25-53 Ind. Cas. 309. Following on a contract for sale of goods, the vendee gave a *Parthanaman* reciting the payment of a sum of money, and the varying terms of the contract, i. e., the quantity of goods, its price and the term of performance. It was signed only by one of the parties

evidence of the real meaning of the words used. *Summa v. Abu*, 93 Ind. Cas. 193-A I. R. 1926 Nag. 301

Document is silent—and terms not inconsistent with the terms of the

2. Where a sale deed was executed for a consideration of Rs 35,000 but in fact settled by oral contract to be Rs 35,000 and the discharge or a mortgage for Rs 1,000, held that the oral contract is inadmissible in a suit for cancellation of the mortgage or for damages for breach of the oral contract under proviso 2 or 3 of section 92 of the Evidence Act *Ramalrishna v Adityam Iyer*, 14 M L T 385 = (1913) M W N 850 = 21 Ind Cas 463 A partition suit between two brothers was compromised and decree drawn up accordingly. The property was thereby divided between them in certain proportions. The plaintiff alleged that part of the terms of the compromise was that he should receive a certain sum of money from his brother in order to equalize the loss. The compromise

to pay the money was not a separate agreement, but part and parcel of the contract the under proviso (2) to section J 770 = 21 Ind Cas 305 with H) of the promissory ly agreed that his liability on evidence of such an agreement of the Act—being a separate agreement on a matter on which the promissory note was silent and not inconsistent with its terms *Motabhai v Mulji*, 19 C W. N 713 = 25 M L J 589 = 13 A L J 529 = 39 B 399 Where a *hatchita*, on which a suit was brought, was virtually a memorandum of the loan without any mention of the rate of interest, section 92 sub section (2) of the Evidence Act did not the rate of interest agreed *Chandra v Debendra*, ment entered in a *bahi* to on 92 of the Evidence Act, and the existence of such an agreement is a question of fact which cannot be considered in second appeal *Bhan Singh v Gokul*, 53 Ind Cas 137 A mortgage bond contained the following stipulation for interest 'I have borrowed from you Rs 300 I shall pay for the aforesaid sum every year

..... of the Evidence Act to pay a Instru -56 Ind payable If it is it does Mouster writing it was stated therein that whatever award was made by the arbitrators would be binding on the parties to the reference. The award was made only by a majority of the arbitrators and it was sought to be proved that there was a separate contemporaneous oral agreement between the parties to the effect that the be binding on the parties. Held section 92 proviso (2) of the O L J. 471 = 47 Ind Cas 900 the holder of a certain document executed a registered deed by which not fit for here was dlord was dmissible to which orcement

Babal Ram v. Jhul, 19 A. L. J. 816—(3 Ind. Cas. 86). The interlined words and figures in an *ekran* were written after it had been signed by the defendant. The plaintiff's allegation was that there was an agreement made before the execution of the *ekran* which justified the alterations to the document which do not alter it in the least but merely explain it. *Hell*, the effect on the document will be as if no alteration had been made, and the plaintiff would be entitled to produce oral evidence of the oral agreement. *Ganga Prasad v. Mohan*, 13 Ind. Cas. 268—(1922) Nag. 191. It is open to a party to a partition to prove that a "share list" of properties is not the final partition but that it was orally agreed between them that a formal partition deed should be executed later on. If such agreement is proved the share list would be admissible without registration. *Suntyram v. Gunjapannam*, 16 L. W. 784. A reference in a partition suit related to the matters in dispute in the suit. At that time there was no dispute whatever as to the method of division of the property. The only dispute was whether the family was joint and whether the several valuable properties held by the defendant first party were liable to be partitioned. When the actual method of partition came to be discussed, it was suggested that certain people who were already parties to the suit might be brought in for the purpose of division of the property and an arrangement was made to this effect by the consent of all parties. *Hell*, that oral evidence was not inadmissible to prove the fact of this separate arrangement as to the method of division of the property. *Tulsi Ram v. Budeo*, 21 A. L. J. 705—95 Ind. Cas. 731—A. I. R. 1923 All. 667. Oral evidence is permissible under this proviso, to prove a separate oral agreement as regards interest where the bond is silent as to payment of interest. *Rozario v. Harballath*, 103 Ind. Cas. 791—A. I. R. 1927 Nag. 195. An oral agreement between the endorsee and the endorser of a negotiable instrument that the endorsee will recover the amount of the instrument for the drawer only is admissible under proviso 2 to section 92 of the Evidence Act. *Suntery v. Abigail*, 22 S. L. R. 219—105 Ind. Cas. 717—A. I. R. 1923 All. 667. An oral agreement between two brothers was com-
 The property was thereby divi-
 plaintiff alleged that part of the
 receive a certain sum of money
 The compromise was however, for
 the defendant for that sum of
 oral evidence of the agreement,
 the property between the brothers was one of consequence the importance and the
 alleged oral agreement to pay the money was not a separate agreement, but
 ng, and the case did
Abdul Hamid v.

PROVISIO (3).

Scope of the proviso (3) This proviso is based on the English rule which does not exclude evidence of oral agreement, which constitutes a condition on

the defendant's plea that the property was divided by a compromise, and the defendants could not
 m, it was expressly

Abernethy's approval being obtained, and of the machine. It was held that such evidence written document was not operative. *Pym*

2. *Chester v. Turner* (1853) 13 Q.B. 681. In delivering his judgment, *Erle J.* said "The face of it, and that had been so, the evidence showed that it would have been so, in fact there was never any agreement at all. The production of the paper with his signature attached, afforded no evidence that a jury should if it be proved that in fact the paper was signed with the express intention that it should not be an agreement at all, and that the agreement does not vary an agreement and is admissible." *Lord Campbell* C.J. said "No addition to or variation from the terms of a written contract can be made by parol; but in this case the defence Evidence to that effect was overwhelming." Another case was *S. 369*, in which evidence was allowed of a verbal arrangement that a written agreement of the landlord The Court said "an escrow; it never nment of the obligation to operate by parol was not intended by way of and, been, ween until agree- and ill be 17 C. 370, until it all. But had not only rtion of the stipulation was intended words 'any act, and not he contracts nent signed

ies to operate in a present e happening of an event L J Q B 277; *Wallis v. Main* conduct or writing is

put forward against a party as his purporting act, no principle prevents him from showing that there never was a consummation of the act. *Wigmore* § 2403. "The truth is that the rules excluding parol evidence have no place in any inquiry in which the Court has not got before it some ascertained paper binding and of full effect." *Per Wille P J in Guardhouse v Blackburn* 1 L R 1 P & D 109; *Wigmore* § 2403.

"On the one hand", says *Prof Wigmore*, "it is well accepted that the handing of the deed to a third person is not necessarily final, the document may still be withdrawn, or (less correctly) 'revoked'. On the other hand, the maker's retention of the document does not necessarily negative the act's finality, this too, may be deemed unquestionable law since *Mr Justice Blackburn's* masterly exposition *Doe v Knight*, 11 B & C 671." *Wigmore* § 2403. In *Zenos v Wickham*, 2 H L C. 296, *Blackburn J* said: "No particular technical form of words or acts is necessary to render an instrument the deed of the party sealing it; the mere affixing the seal does not render it a deed, but as soon as there are acts or words sufficient to show that it is intended by the party to be executed as his deed presently finding on him, it is sufficient." See also *Gudgen v Besset*, 6 E & B, 9-0. The true construction to be placed on this proviso is that the provisions thereof are inapplicable in a case in which any obligation under the written contract has attached and if the effect of the alleged contemporaneous oral agreement is merely to suspend the performance of the obligations contained in the written contract, evidence of such oral agreement cannot be admitted. On the other hand, it is permissible to adduce evidence of a contemporaneous oral agreement under which the parties to the written contract agreed that until the happening of a certain event no obligation whatever under the

agreed to postpone the enforcement of a promissory note. *Subramania v Narayan*, 90 Ind Cas 1020-(1925) M W N 601-A. I. R 1925 Mad 1240

written contract to be varied by a contemporaneous oral agreement, but having regard to illustrations (b) and (j), the proper meaning of that proviso is that a contemporaneous oral agreement to the effect that a written contract was to be of no force or effect at all, and that it was to impose no obligation at all until the happening of a certain event, may be proved. Where an oral agreement purports to provide that the promise to pay on demand in a promissory note, though absolute in its terms, is not to be enforceable by a suit, until the happening of a certain event, or, in other words, that the legal objection to perform the promise is to be postponed, such an agreement does not fall within the proviso 3 of the Indian Evidence Act. *Ramjibun v Oghore*, 25 C 401-2 C W N. 188, see also *Jaimal v Nandlal*, A I R 1933 Lah 549-33 P L R 712.

Where a certain property was sold by the defendant to the plaintiff for Rs 480 and it appeared that there was a separate arrangement between the

parties for the payment of a certain amount to the defendant which would be a condition precedent to the sale taking effect, held, that proof of such an agreement was not barred by section 92. *Maung Mon v Ma Kin Oh*, 5 Rang 636. See also *Lal Hia v Bharadwaja* 4 Bur L J 38=88 Ind Cas 336=A I R 1925 Rang 256. Failure of condition precedent to written agreement as fixed by oral agreement can be proved but oral agreement as to getting off amount due to the executant of the promissory note on a separate account can not be proved. *Ram Singh v Ibrahim* 18 S L R 39=A I R 1925 Sind 136. The admissibility of an oral agreement contemporaneous with a written document will depend to some extent upon the way in which the case is presented. *Anderson v. Walter*, 29 C W N 670=88 Ind Cas 435=A I R 1925 Cal 800.

Any obligation The true meaning of the words "any obligation" in this proviso is any obligation whatever under the contract and not some 'particular obligation' which the contract may contain. *Irfan v Jogendra*, A I R 1932 Cal 708=36 C W N 451=59 C 1111, *Kadhalishen v Durga Prosad*, 59 C 106=A I R 1932 Cal 328.

Escrow That specific variety of delivery to a third person which consists in naming a condition precedent to be performed and making the act final except for the happening of the condition—the usual meaning of *escrow*—, has

will be received to show that a deed was delivered in escrow, and when an agreement was without consideration and was delivered on conditions such conditions may be proved. *Pym v Campbell*, 6 L. & B 370, *Pattle v Hornbrook*, (1897) 1 Ch 25. 'The manual delivery of an instrument may always be proved to have been on a condition which has not been fulfilled in order to avoid its effect. This is not to show any modification or alteration of the written agreement, but to show that it never became operative and that its obligation never commenced.' *Wilson v Powers*, 131 Mass 537, *Burr Jones* § 971. It is not necessary that the restrictive delivery should be express all the circumstances of the case. *Bessel* 11 E & B 561. *Ev 7th Ed* 561. riding power grantor's death. *Hospital v C* in whose favor intended to o. 576, but see *Bell v Ingestre*, 12 Q B 317, *Watkins v Nash*, L R 20 Q B 266; *London v Subfield*, (1897) 2 Ch 608, *Johnson v Clark*, (1908) 1 Ch 303, 319.)

Parol proof as to execution and delivery and suspension of operation On the principle so often referred to that parol evidence is admissible to show that there never was any actual agreement it may, of course be shown that there was no proper execution or delivery of the apparent agreement. (*Vide* *proviso 1*). When the execution of a deed is in issue, what was said and done at the time and by whom done are the very vital facts. *Burr Jones* § 471. If a deed has never been delivered, or if a party to an instrument obtains possession thereof by fraud or in any improper manner this of necessity must be shown by parol; and such evidence is no contradiction of the writing. The act and fact of delivery is independent of the language of the instrument. Delivery consists of an act of the hand joined with a purpose of the mind. It comes after the scrivener has done his work, and after signing of the paper. Whether or not a deed was delivered is an issue frequently made in the Courts and has been refused delivery. It is shown that the deed of the other party, or that by mistake of both parties a wrong paper was delivered. *Burr Jones* § 471. A and B enter into a written agreement for the sale of an interest in a patent, and at the same time agree verbally that the agreement shall not come into force unless C approves of it. C does not approve. The party

interested may ... A may prove the condition as to C's consent, and the fact that he does not consent. *Hallie v Lutell*, 11 Com B N S 369-31 L J C P 100

In a suit on a promissory note the defendant pleaded an oral agreement that plaintiff should discharge a mortgage that was subsisting on the property sold to him by the plaintiff before he could enforce payment of the amount due on the promissory note. Held that the agreement pleaded is not admissible in evidence under s 92, proviso (3). The proviso will apply to the case of a non-attachment of an obligation under the written contract until the event provided for in the oral agreement happens and not to the case of a mere postponement of the performance of the legal obligation until the happening of the event. *Muniamma v Surappa*, 1 Mys L J 71. Where in a suit on a promissory note, the defendant pleads an oral agreement at the time to set off money due to the executant under some other account, the agreement is not in the nature of the document and is not admissible in

suit on a promissory note, executed by P N in respect of which P H stood surety without mentioning the terms of the contract in the plaint. P H contended that he was not a party to the transaction and that the oral agreement could only be determined by the evidence of the executant, which was upheld. Evidence Act, the oral evidence as to the surety's part in the transaction is admissible to the written and the oral agreement to the attaching of any liability surety and that it is not open to the

plaintiff to treat the promissory note as a separate contract and to enforce it without taking the whole contract into account. *Maneckjee v Maung Po Han*, 2 Rang 100-102. An attempt to show that the agreement reduced

135 It is open to a person who admits the execution of a promissory note to plead want of consideration therefor. *Lallu Mal v Reoti Ram*, 45 A 679-21 A L J 669-71 Ind Cas 353 (1). In a suit on a promissory note the defence was that the promissory note in the suit was passed to secure the plaintiff mort-

which the high it was be proved *Ubhaya*,

Proviso 3 is intended to embody contract being entered into it is written agreement shall not be of a precedent has been performed, possible to show that the condition has not the written contract has not become binding there is in fact no written agreement. 90 L J 273-4 U P L R (O C),

270 The proviso cannot help a defendant who wishes to prove a separate oral agreement, as to the rate of interest between him and the plaintiff, when the document provides for interest at a specific rate. *Ibid*. A person is not permitted to vary the terms of a written contract by proof of a contemporaneous oral agreement under this proviso; a contemporaneous oral agreement to the effect that a written contract was to be of no force at all and that it was to impose no obligation at all, until the happening of a certain event may

be proved. It may be shown that the instrument was not meant to operate until the happening of a given condition; but it cannot be shown by parol evidence that the agreement is to be defeated on the happening of a given event. *Ali Jauad v Kulnan*, 41 A 421=20 A L J 247=66 Ind C 131.

Under this proviso, a party is entitled to prove the existence of a separate oral agreement constituting a condition precedent to the attaching of any obligation under the contract and consequently, to show that the contract is to be considered as binding only when confirmed by the principals themselves. *Dinanath v Metharam*, 33 C L J 577. In a suit on a promissory note payable on demand, it is not open to the defendant to plead by way of defence a contemporaneous oral agreement where the plaintiff has agreed that he will not present the note although it is payable on demand until he has discharged certain incumbrances on the property he has sold to a stranger. *Vishnu v Ganesh*, 45 B 1135=23 Bom L R 498=63 Ind C 673.

478=50 Ind Cas 918

In a suit on two promissory notes, which contained the words "I promise to pay you hereafter", the defendant pleaded that there existed a separate oral agreement constituting a condition precedent to the attaching of the obligation and that the word "hereafter" in the two notes referred to that agreement. Held that the alleged oral agreement was admissible in evidence under proviso 3 of section 92. *Kinlock v Isa Ram*, 51 P R 1877. Where the plaintiff purported to sell certain land to the defendants under a deed of sale, and there was an arrangement that the deed should take effect only if the defendants succeeded

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the defendant tendered upon the understanding condition precedent was admissible. *Kishen v*

PROVISO (4).

Scope of the proviso (4). Parol evidence is admissible to prove any substance of such document, enforce of such B 127= ing the judgment of the Court, which consisted of *Taunton, Littledale, Parke and Patteson JJ*) said 'By the general rule of common law, if there be a contract which has been reduced into writing verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation so as to add to or subtract from, or in any manner to vary or qualify the written contract, but after the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either

partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement. And if the present contract was not subject to the control of any Act of Parliament, we think that it would have been competent for the parties, by word or mouth, to dispense with requiring a good title to be

made to the lot in question, and that the action might be maintained. But the Statute of Frauds has made certain regulations as to contracts for the sale of lands. (50) We think the object of the Statute of Frauds was to exclude all oral evidence as to contracts of the sale of lands, and that any contract which is sought to be enforced must be proved by the writing only. This proviso deals with two points. In the first place, it lays down that if a transaction has been reduced into writing, not because the law requires it but because the parties find it convenient, then since there is nothing in general law, which prevents them from subsequently modifying it or rescinding it altogether by oral agreement, there is nothing in the rules of evidence, which prevents them from proving the alteration or rescission. But a matter which the law requires to be in writing can no more be altered by a subsequent than by a contemporaneous oral agreement, because the rule of law prohibits it. *Markby, F. 73*. It was contended in a case that the word "or" should be interpreted as "and" and as such oral evidence should be admissible in cases of documents which are not compulsorily registrable but which have been registered. This contention however was negatived. *Docon v. Shutooth*, 9 C. W. N. cxxiv. Under this proviso evidence of a subsequent oral agreement rescinding or modifying a contract, etc. in writing is not admissible but the proviso does not exclude a distinct subsequent new oral agreement superseding the old contract in toto. *Lakshmi v. Amir Khan*, 11 P. R. 1689. Under proviso 4 in certain cases a subsequent oral agreement to modify previous contract may be proved but this is not permitted where the law required that the terms of the contract should be proved by the terms of the contract. Evidence is entirely inadmissible. *Collector of Estate v. Gobinda*, 1193. But where the mortgagor pleaded a subsequent oral agreement whereby the mortgagee

proviso 4 to section 53 of the Transfer of Property Act, 1882, whether executed or executory. M. 368. The provisions of this evidence to prove the discharge of a mortgage bond. *Amir v. Gobinda*, 4 C. W. N. 301.

Parol proof of subsequent agreement. The general rule under discussion however does not prevent the proof of the existence of any distinct subsequent oral agreement to rescind or modify any such contract grant or disposition of property, provided that such agreement is not invalid under the Statute of Frauds or otherwise. *Steph. Ev. Art. 90*, *Goss v. Nugen*, 4 Barn. & Ad. 58. The general rule does not purport to exclude negotiations respecting written

changed, that performance has been prevented or waived by the other party,

portion of the rent renewed under a *Kabuliat* by means of an agreement subsequent to the date of the instrument. *Held*, that the acts and conduct of the parties were not admissible in evidence to prove that the terms of the agreement had been varied. *Lakshmi v. Nabadurip*, 116 Ind. Cas. 733-56 C. 201-A. I. R. 1929 Cal. 437. So an agreement by conduct, or an equity arising from the circumstances though no amounting to an agreement, will

have the same effect *Hughes v Metropolitan Ry Co*, 2 App Cas 439; *Morrell v Studd*, (1913) 2 Ch 648; *Phip Ex 7th Ed* 364; *Roscoe C. Ex* 267; *Taylor* §§ 1141—1146. The expression "oral agreement" as used in this proviso is wide enough to include all written agreements whether they are oral or they are implied from acts and conduct of the parties *Kumau v Radhika*, 10 Pat L T 669 = A I R 1929 Pat 717, *Mayandi v Oliver*, 22 M 261; *Radha Raman v Bhabani*, 12 C L J 439 = 6 C 12 C L J 646, see also *Morell v Studd*, (1904) 1 Ch 305 (312), *Hughes v Metro Ry Sundari*, 20 C W N 680 = 32 Ind Cas is used in the sense of "not committed to agreements whether come to by word conduct of the parties *Mayandi v Oliver* regards the alternative claim of the plaintiff claiming the property whereby she alleged plaintiffs under the Evidence Act was no bar to an enquiry into the merits of the latter defence based on the agreement, for the subject of the alleged oral agreement was not to rescind the original transaction, as affected between the plaintiffs and their vendor, but to transfer any right acquired by the plaintiffs to the defendant *Rakhamabai v Tukaram*, 11 B 47.

Parol proof of subsequent agreement, in case where the document has been reduced into writing. The exclusion of evidence by section 92, is it self excluded by proviso 4, and a notification of a written agreement to submit matters in dispute to arbitration can be proved by oral evidence *Pyarilal v Ghanaram*, 83 Ind Cas 22 = A I R 1925 Nag 203. In a written lease for a period of 5 years there was a condition that if the lessee desired a renewal he should give a written notice three months before the expiration of the term of the lease. The lessee alleged that one of the lessors had told his wife that there was no need to give a written notice as provided for by the lease.

rescission of the contract of lease within s 92 proviso 4 of the Evidence Act *Marx D' Cruz v Jitendra Nath*, 46 C 1079 = 30 C L J 94 = 53 Ind Cas 681. Under proviso 4, a party is entitled to prove the existence of any distinct subsequent oral

is neither req the law in parties, who have bound themselves by a written agreement, depart from what has been so agreed on in writing and adopt some other line of conduct, it is incumbent on the party insisting on and endeavouring to enforce a substituted

5 Prior to the due with interest, the agreement whereby towards the discharge of the bond debt. In a suit by obligor, to recover the property to the second defendant under the power of sale contained in the mortgage deed. The plaintiff mortgagor sued for a declaration that the sale was

void and for redemption contending that, on the day before the sale took place, the first defendant orally agreed to give him four days' time within which to pay off his mortgage debt and to postpone the sale, and that the second defendant had not entered into a purchase. *Hell* that oral evidence of it did not fall within proviso 4 of section 17 (b) of the Registration Act, 1908, being an agreement to modify any of the provisions of the Act. *lagu in Dar*, 26 II 318. Oral evidence of an agreement subsequent to the execution of a promissory note payable on demand varying its terms as regards its exigibility on demand is precluded under this section. *Sheikh Jamu v. Muhammad*, 90 Ind Cas 378. Where a partnership is formed in 1921 between P and D to carry on certain business and under the terms of the contract which are reduced to writing and registered, the partnership is to continue for five years, an oral evidence to prove that the partnership had in spite of the terms in the contract, been dissolved in June 1922 and P was paid his share of the assets is admissible. *Nurul Hasan v. Imambur*, A. I. R. 1932 Nag 12.

Parol proof of subsequent agreement in cases of transaction which is required by law to be in writing and registered. Where the parties enter into a contract, they can substitute another in its place and the substituted contract is the one to be looked to, not the one which was first entered into. If the law requires that the substituted contract shall be made only in a certain way and in compliance with certain formalities such as writing and registration then unless it is so made, it cannot take effect and the old contract subsists. *U Kyo v. My Pan Yo*, 74 Ind Cas 151-1923 Rang 102. So when an agreement modifying

registered, it is not open to the defendant to prove by oral evidence that the lease was surrendered under a later oral agreement of the parties. *Doda v. Muttayya*, 2 Mys L J 124. An oral agreement to receive lesser amount than was due on a registered mortgage deed in full discharge of it cannot be proved under s. 92 (4) of the Evidence Act and section 17 (b) of the Registration Act. In *ayan v. Supham*, evidence of an oral agreement to discharge a registered mortgage deed is inadmissible. *Maung Myat v. ang* 322. Even though a tenancy has been created by a registered instrument the termination

existence of a subsequent oral agreement is excluded not only in cases in which the original contract, grant or disposition of property is by law required to be in writing, but also in cases in which the contract or grant or disposition of property has been registered. C. nothing to prevent or of a claim. *Maung Pa*. A. I. R. 1928 Rang 141. A contract of simple money debt is not required by

merely an agreement as regards the mode of payment but an alteration of the character of mortgage itself such as changing the original mortgage which was without possession into a usufructuary mortgage, it is not admissible. *Chandra v. Akbar*, 110 Ind Cas 261. One of several mortgagors can enter into an oral

2. agreement with the mortgagee for the redemption of his share only of the mortgage and proof of the oral agreement under which money is paid for redemption is not precluded by section 92, proviso 4 of the Evidence Act. The proof of oral agreement and payment does not amount to a rescission of the contract of mortgage but discharged to that extent.
 I R 1928 Mad 1050.
 evidence is inadmissible.
 Bom 522, *Mahomed v Nanhe Mal*, 27 A L J 924=119 Ind Cas 197=A I R 1929 A 615. An oral agreement, between the mortgagor and the mortgagee where the p
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Held, that the evidence was inadmissible under section 92, proviso 4 of the Evidence Act, the defendant's or
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 on the mortgage. *Jagannath v*
 Ind Cas 689. Eve
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Sens, 47 C 129
 Rs 100 is created by a registered instrument it will not preclude the admission in evidence of an unregistered instrument to show that the interest has been relinquished. A relinquishment for consideration may be recorded as a conveyance and in the view of a document by which an interest in immoveable property of the value of less than Rs 100 is relinquished does not require registration. *Sorman v Molla*, 37 Ind Cas 949.

Under this proviso any variation of rent reserved by a registered lease must be made by a registered instrument, and oral evidence is inadmissible to prove such variation and an agreement is nonetheless oral because it is inferred from the conduct of the parties. *Manindra v Dunga*, 20 C W N 680=32 Ind Cas 185. Evidence that since the execution of the *Kabuliyat*, the tenant paid rent at a lower rate than that stated in the *Kabuliyat* is admissible to show that the intention of the parties was that the *Kabuliyat* from the
 been a waiver of the
 rs, 20 C W N 680=32
 mortgage or sale-deeds

was no law which required a sale deed of immoveable property to be in writing. *Jang Ram v Sheoraj Singh* 30 Ind Cas 234. This proviso precludes evidence of an oral agreement to
 27 Ind Cas 269
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 I R 1930 Nag 235. Although a mortgage deed has been duly executed and attested and no obligation attaches thereunder till certain conditions have been fulfilled, upon fulfilment of the conditions, the obligation attaches from the date of its execution and not from the date of registration or delivery of the deed. *Jadunandan v Kalyan Singh*, 15 C L J. 61=16 C W N 612=13 Ind Cas 653. Section 92 (4) does not exclude evidence of oral agreement substituting a new contract for a previous one in writing and registered. That clause refers only to an oral agreement to rescind or modify such contract. *Jagat Sing v Devi Datta Mall* 169 P. R. 1883. In a suit for redemption of the mortgage, the defendant pleaded a sale of the mortgaged property. *Held* that section 92, clause (4) does not exclude evidence of sale; for the new contract does not rescind or modify the former one which is merely

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merged in the new one : *Balbhouch v Hira*, 70 P. R. 1891. Evidence of conduct showing cancellation of a registered mortgage : *Srinivas Srinani v Athmaram*, 5 M. L. T.

A parol agreement between a mortgagee and the assignee of his interest, whereby the latter was to pay the consideration for the sale to a third party to the credit of the mortgagee, is a law to be in writing, by a subseq

(4) of the Evidence Act and 7 Ind Cas 310; see also *Kallika*

Where the lessee under a registered lease-deed contend that they were cultivating an additional area by virtue of an oral agreement. *Held* that evidence of a simultaneous oral agreement was barred by s 92 and that evidence about subsequent oral agreement was not admissible. *See also* *12 C. L. due for*

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and the defendant was not bound to pay at the rate stipulated in the lease

arrangement does not in any way affect the mortgage or where it does not modify or vary the terms of the mortgage, it is not inadmissible under this proviso. *Kedar Singh v Sumer Singh*, 10 Ind Cas 196. An oral agreement to take less than what is due under a registered mortgage bond would be inadmissible. But a discharge extin-

to a party to a registered sale deed to prove an oral agreement by evidence either oral or documentary contemporaneous with the sale-deed, that in spite of a certain property, belonging to the vendor, being entered in the sale deed, title to it would not pass to the vendee. *Kumcar Ram v Ananda Krishna*, 118 Ind Cas 589 = A. I. R. 1929 A. 578, *Umedmal v Davu*, 2 B. 547; *Dicarka v Bhogaban*, 7 C. L. R. 577

English law—A contract required by law to be in writing, may whether before or after breach, be wholly rescinded by an oral agreement, even though the latter be not itself enforceable. *Morris v Baron*, (1918) A. C. 1 (disapproving *Williams v Moss's Empries* (1915) 3 K. B. 243), *British and Beningtons N. W. Cachar Tea Co.*, (1923) A. C. 48, *Goss v Nugent*, 5 B. & Ad. 58, 65, *Noble v Ward* L. R. 2 thereby (*Ibid.*, *Stead* En 234, *Vexey v Rat* the original contract *Stowell v Robinson*, 3 contracts by deed could neither be rescinded nor varied by parol (*West v Blakeau* 2 M. & Gr. 729; *Steads v Steeds*, 22 Q. B. D. 539). Now however following the equitable rule, (*Webb* cannot technically be released, may *Ambegate Ry Co* 17 Q. B. D. 127, Whether they can also be varied seem *Contracts* 7th Ed p 599 and *Kelle* Ed 565

PROVISO (5)

Scope of proviso (5) Parol evidence of usage or custom is always admissible where the object is to render intelligible to the Court the meaning in which parties have used language. *Nort. Et. 277* So parol evidence may be given in order that it may be a plain written transaction, unless it is

Dalton v. S. M. L. C. 200

in a case which was a case of an agricultural of a custom whereby, contrary to the general law the tenant, on leaving in the end of his term, was allowed to take away his 'way going crop' that is to say, all the corn growing upon the said land which hath before the expiration of such term been sown by such tenant upon any part of such lands, although the lease was in writing and no mention was therein made of such custom. *Vanfield v. C. J.* said 'This contradicts the agreement

though not mentioned in *Wignine, (1831)* cutting of timber was being taken to have *Cas. 352* So it is to show that thing

are by usage or custom in particular cases treated as incidental and accessory to the principal thing. *Nort. Et. 277* Thus, it may be shown that day of that a contract of hiring is but the outgoing tenant shall always be admissible to prove as to the obligation of the

parties in such transactions as that in question, or as to the meaning of words or terms used, in order that it may be applied to the subject matter and bind the parties to a written transaction unless it is inconsistent with the writing. *Cockle v. Cas. Et. 352* In *Brown v. Byrne* 3 E. & B 703 = 23 L. J. Q. B. 313 - *Cockle v. Cas. Et. 352* - *Thayer v. Cas. Et. 911* a bill of lading specified a certain amount payable for freight. Parol evidence was offered of a custom whereby three months' credit of discount was allowed for freight. The evidence was held

Court, *Coleridge J.* said 'The are perfectly clear, the difficulties Mercantile contracts are very merchant's, the intention of the world is defeated if the world is in order as to the proceed with

the tacit assumption of these usage, they commonly reduce into writing the special particulars of their agreement but omit to specify these known usages

or the ordinary words for in during evidence only freight

on delivery at a certain rate per pound is inconsistent with this to allege that, by the custom, the ship-owner, on payment is bound to allow three months' discount? We think not. *Wells v Plummer*, 2 B & Ald 716, and *Hutton v. Warren*, 1 M. & W. 486, are cases which illustrate this principle. In the first of these, by the custom of the country the outgoing tenant was bound to do certain acts, and entitled to receive certain compensation, but the lease which formed the written contract bound him to do the same acts in substance, and specially provided for his payment as to some of them, omitting the others, and the Court held that the expression as to some excluded the implication as to the remainder, and the language of the lease was equivalent to a stipulation that the lessor should pay for the things mentioned and no more. The custom therefore would have been repugnant to the contract. But in the latter case, in which the former was expressly recognized, the Court held that a specific provision, as to a matter *de hors* the custom, left the custom untouched and in full force. The contract was not repugnant to the custom, but was based on the

well summarized by an eminent author, thus — (1) To annex incidents to contracts and Wills. (2) To explain the meaning of peculiar or technical terms. (3) To furnish standard of comparisons on questions of negligence, etc. (4) To fix a party with knowledge or notice of this subject matter of the usage. (5) To rebut a fraudulent intent. *Cochle Case* 351.

To annex incidents to written instruments. Extrinsic evidence is admissible to annex incidents to a written instrument, where the inclusion of such incidents is consistent with the writing, and carries out the intention of the parties. In such cases the notoriety of the usage makes it probable and reasonable that the parties intended it to be a term of their contract. Thus, where a written contract contained a stipulation that a party should 'lose no time on his own account, and do his work well and behave himself in all respects as a good servant,' extrinsic evidence was received to show that, by the custom of his trade such a party was entitled to certain holidays. *R v Stole Upon Trent*, 5 Q B 803, *Pouell Ex* 190. In *Hutton v Warren*, 1 M & W 476, *Parke B* said, 'It has long been well settled that in commercial transactions extrinsic evidence of custom or usage is admissible to annex incidents to written

of presumption that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages.' So in the case of mercantile contracts, the evidence is not confined to the explanation of the written terms. Provided they are not inconsistent with the contract, it is allowed to supply

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this condition, both may be received for certain purposes. To use the language of *Mr Phillips*, (in Vol II, p 415, 10th Ed) — 'Evidence of usage has been admitted as to contracts relating to transactions of commerce and trade, farming, or other business, for the purpose of defining what would otherwise be indefinite, or to interpret a [] what was equivocal mentioned in the contract out of them, and .

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2. effect, as far as can be done, to the present intention of the parties' Now here the plaintiff did not seek by the evidence of usage to contradict what the tenor of the note primarily imports, namely, that this was a contract which the defendants made as brokers. The evidence is based on this the usage can have no operation except on the assumption of their having acted as broker, and of there having been a contract made with their principal. But the plaintiff by the evidence seeks to show that according to the usage of the trade and as those concerned in the trade understand the words used, they imported something more, namely, if the buying broker did not disclose the name of his principal, it might become a contract with the broker as principal, if the seller pleased. Whether this evidence adds a tacitly implied meaning to the words as expressed, is not material.

it labours under the objection of introducing something repugnant to, or inconsistent with, the tenor of the written instrument; and, upon consideration of the sense in which that objection must be understood with reference to this question, is added to what it appeared that it appeared written contract two would seem Take a familiar

instance by way of illustration. On the face of it, one of the exchange, at three months after date, the acceptor will be taken to bind himself to the payment of the bill, and to be bound to do so in any country in which the bill is payable, and that the principle is not set down on the face of the bill.

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and moving in a narrow circle, and meeting each other daily, desire to write little and leave unwritten what they take for granted in every contract. In spite of the lamentations of Judges they still continue to do so; and, in a vast majority of cases of which Courts of law hear nothing, they do so without loss or inconvenience; and upon the whole they find

considered to be a contract is a contract. *Goodere Ev p 313-314.*

So the true and appropriate office of a usage or custom is to interpret an otherwise indeterminate intention of the parties, and to ascertain the nature and

extent of their contracts, arising not from explication and presumptions, and acts of a doubt. Hence, it is that in respect

contract, unless they expressly exclude them. It is on this principle that, in a great number and variety of cases in England and in this country, parol evidence has been admitted of local or general usages of trade and commerce to ascertain the true meaning of written contracts. *Southwell v. Boreditch*, 1 C. P. Div. 374; *Fleet v. Murton*, L. R. 7 Q. B. 126, *Humphrey v. Dale*, 7 Ill. & N. 266; *Imperial Bank v. Smith & Wilson*, 3 B. & Ald. 728, *Brown v. Starkie*, 210, *Boices v. C. W. N.* 365, *K. M. P. R.* 299, *Parker v. Ibbetson*, 26 L. J. C. P. 236; *Hutton v. Warren* 5 L. J. Ex. 231, *Gibson v. Small*, 1 H. L. C. 396. In a *doul kahuliyat* creating a tenancy for a term of years there was an express statement that the tenant had no right of sale, gift or transfer without the landlord's consent and the only right shown was an option in the tenant to take a renewal of the lease within one year after the expiry of the term at the rate of rent prevalent in the *pergannah* failing which the tenancy would pass into the landlord's possession. Held, that the tenancy created by it was neither heritable nor transferable and that no evidence of custom was admissible on those heads. *Mahomed v. Prodyot*, 18 C. 379-25 C. W. N. 13-61 Ind. Cas.

A. L. J. 29-9 Bom. L. R. 1

To explain the meaning of Peculiar or technical terms. Peculiar expressions or terms are to be given the meaning which they have acquired in such business by common usage, unless, by the express terms of contract, such usage is excluded, or is inconsistent with the contract. *Burr Jones* § 457. Proof of usage, say *Dr Greenleaf*, is admitted either to interpret the meaning of the terms of the contract, or to ascertain the nature and extent of the

R. v. Newcastle Burr 669, *R. v. Sayer*, 10 H. & C. 486, *Myer v. Sari*, 3 E. & E. 306. Where in a mortgage deed, it was stipulated that the mortgage should not be redeemed "from 1287 to 1298 *Fash*, for 12 years" alluded to was not the *Fash* year as commonly understood, but agricultural year. *Sheoboran v. Bisheshar*, A. W. N. 1892, 236. The question whether a specification of a

The usage must be known. Closely allied to the requisite of long establishment of a usage, that of its being known is of equal and far reaching

importance. Judicial notice is taken of the general custom of the country and there are certain commercial customs and usages of which every person in the community is deemed to be cognizant such, for example, as those belonging to the law merchant. But the usages of special trades and those local usages which may be limited to certain communities cannot, of course, be presumed to be known to all. *Sleight v Hartshore*, 2 Johns (N Y) 531. These have been called usages, as contradistinguished from the generally recognized customs of business. *Clark v Baler*, 52 Mass, 186. In respect to these usages there should be either proof of actual knowledge on the part of the person to be affected, or proof of circumstances from which such knowledge may be fairly implied. *Byrd v Beall*, 150 Ala 122, 124. If a usage is special, and confined to a particular business, or has reference to a particular place only, there is no such presumption and it is manifest that it would be unjust to admit it in order that both

by it. E particular places there is a presumption that parties who are engaged in trade contract in reference to the particular custom this presumption is at best but a *prima facie* one liable to be rebutted by proof that it was unknown to the party against whom it is set up, and, on that being proved, no weight ought to be given to it. *Isaksson v Williams*, 26 Fed 642. The customs of an individual in his private business are not binding upon others unless known. *Burr Jones* § 464, see also *Mana Vikaram v Pattar*, 2 M 275. The law of the country is applicable to the contract which the parties making the instrument N 365-35 In!

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Custom of usage is the contract,

reference to such usage it is clear that proof of the usage should not be received if it contradicts expressly or by implication the language of the contract. As may be admissible to explain what is plain. *Blackett v Royal Tyr* 266, see also *Indar Chandar v Nandalal v Gurupada* 51 C 558, *ones v Shand*, 46 L J Q B 561, *Iohan v Kaisri*, 11 M 1 A 260, 1 Cas 268, *Macfarlane v Curri*, 8 B 2 App 1, *Norris v Panchanandi* r is expressed to be subject to cond or custom which is repugnant to the documents. *Ahoo v Nanigram*

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England, and those customs, which have been universally and notoriously prevalent amongst merchants, and have been found by experience to be of public use, have been adopted as a part of it, upon a principle of convenience and for the benefit of trade and commerce, and when so adopted it is unnecessary to plead or prove them. *Barnett v Branduo* G M & L 630. But the usages of special trades, and those local usages which may be limited to certain communities cannot of course, be presumed to be known to all. Such customs or usages, must be proved, either (a) by direct evidence of witnesses (which must be positive and not amount to mere opinion), (b) by a series of particular instances in which it has been acted upon (c) by proof of similar customs in the same or analogous trades in other localities. *Cockle Cut*

PROVISIO (6).

Scope of proviso (6). "The Privy Council have decided in an unreported case (*Pray* decided on 5th May, 1924), *Tenkata Sudhadraay* 1921 P. C. 162-80 Ind Cas 807-52 I A. 1-48 M. 10 P. C., that where a written contract was doubtful in its meaning, the surrounding circumstances existing at the creation of the contract and the subsequent matter to which it was designed and intended to apply could be looked into. Again their Lordships held in another unreported case (Privy Council Appeal No. 10 of 1923, decided on 18th December, 1923) *M. Thangay, M. Than*, A I R 1921 P. C. 88-80 Ind Cas 1031-51 I A 1-51 Cal 374-5 Rang 175 (P C) that where a written contract was of doubtful import the conduct of the parties might be looked into to help the Court to obtain an explanation of the true meaning of the contract." *Per Mukherjee J* in *Nand Kishore v. Behari Lal*, A I R 1932 All 600-1932 A L J. 329. Upto a certain point, and apart from any question of ambiguity, extrinsic evidence would be necessary to point the operation of the simplest instrument. Thus, were it the case of a deed conveying all the lands at A in the grantor's occupation until it was defined by proof what lands were in his occupation, the operation of the deed could not be known. So, were it a case of a Will, and a bequest to the children, of a party, or even to the testator's own children, to give effect to the bequest it would be necessary to define who the children were. *Goodeve Ex p 355* "Some evidence" says I C Wood in *In the matter of Feltham*; 1 Kay & John 528, "is necessary in any case of a Will, that is to say evidence to show the subject and objects of the gift." *See also section 75 of the Indian Succession Act (XVI of 1925)* "The law" says

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natural construction, but exhaust the whole of those words then the investigation must stop, you are bound to take the interpretation which entirely exhausts the whole of
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what were the intentions of the testator, as contrasted with, or extending or contracting the language which he has used" *Webb v Dyng*, (1855) 1 K & J 580 (595). So in construing a written statement the situation of the parties must be looked at, and the deed must be construed with reference to the situation of
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meaning usually arises, and nothing is more settled than that evidence is receivable of all the circumstances surrounding the instrument, for the purpose of throwing their light on its interpretation. It is indeed by these, by a lamp, that the Court reads the document *Goodeve Ex p 356*. This proviso applies whether a writing is required by law or not. It proceeds upon a principle, which has been stated thus—that a person who has to interpret a document, ought to

24 B 510, 515 525 "As it is a leading rule," says *Dr Greenleaf* "in regard to written instruments, that they are to be interpreted according to their subject, it is obvious that parol or verbal testimony must be resorted to, in order to ascertain the nature and qualities of the subject, to which the instrument refers. Evidence which is calculated to explain the subject of an instrument is essentially different in its character from evidence of verbal communications respecting it. Whatever, therefore, indicates the nature of the subject, is a just medium of interpretation of the language and not a foundation for giving it a relatively, different from that. Thus, where certain premises and bounds, and the question was, whether a cellar under the yard, was or not included in the lease, verbal evidence was held admissible to show that, at the time of the lease, the cellar was in the occupancy of another tenant, and, therefore, that it could not have been intended by the parties that it should pass by the lease. *Doe d. Freeland* mill, or a factory is conveyed, and parcel thereof, and so passed admitted" *Greenl. Ev.* § 236

So it is clear that extrinsic evidence of every material fact which will enable the Court to ascertain the intention of the parties to the instrument, or in other

Mumford v. Gettling, 29 L. J. C. P. 105, *Chambers v. Kelly*, 1 R. 7 C. L. 231, *McCollin v. Gilpin*, L. R. 6 Q. B. D. 516, *Bank of New Zealand v. Simpson* (1900) A. C. 182. Whatever be the nature of the document under review, the object is to discover the intention of the writer as evidenced by the words he

admitted to show what property is known by that name (*Ricketts v. Turquand*, 1 H. L. Cas. 472) *Taylor* § 1191. But it is well settled that the terms of an unambiguous document cannot be controlled by the conduct of the parties. As *Lord Halsbury* said in *North Eastern Railway v. Hastings* (1900) A. C. 290 no amount of acting by the parties can alter or qualify words which are plain and unambiguous, but it is otherwise when we have to determine the true construction of an obscurely framed document. *Herbert v. Purches*, L. R. 3 P. C. 305. *Per Mookerjee J.* in *Kiransashi v. Ananda*, 32 C. L. J. (18), *Nirod Chandra v.*

different from what it appears to be. Otherwise there could be no certainty as to the proper construction to be placed on a document which to all appearance is unambiguous. *Montland v. Amrit Rao*, 19 B. 662-27 Bom. L. R. 951-A

I R 1925 105 - *Maung Tun* 8 Bur L J. 195-105. S.
 Ind Cas - *ajassa*, 107 Ind Cas 201-A I R
 1928 Nr , 117 Ind Cas 907 (2)-A I R 1929
 Lah 875 (2) - *where the terms are unambiguous and clear, there can be no question that the evidence to prove that the terms of the contract were used in a different sense must be excluded under section 92; nor is the Court in such a case entitled to speculate as to the meaning of words in the contract. But where the wording of the contract is capable of different interpretations the Court is justified to put a proper construction upon the terms of the contract and is justified in finding with what intention a particular expression was used as a matter of pure construction. Juran v Ram Mondal, 55 C 808-A I R 1928 Cal 137. Parol evidence is admissible to prove that the name of the creditor was through mistake put down as K instead of R in a deed containing acknowledgment of liability. Isfar v Ram, A I R 1931 Oudh 51-130 Ind Cas 347. Importation of extraneous matter is forbidden unless required to show relation of language to existing facts. Irfan Ali v Official Receiver, A I R 1930 All. 837-1930 A L J 978. Oral agreement showing the nature of document is not admissible but the Court can take into consideration circumstances if document is of doubtful tenor. Lakshmaya v Munahari, A I R 1930 Mad 517-31 M L W 516.*

Application of the rule in Will cases. The question has more often arisen upon Wills than upon other documents, and it is from cases on these, accordingly, that the law has mainly to be taken. The law on the subject as regards Wills is contained in section 75 of the Indian Succession Act (XXXIX of 1925). That section is based upon the first paragraph of Justice Hyam's proposition V which is as follows: "For the purpose of determining the objects of a testator's bounty, or subject of disposition, or the quantity of interest intended to be given by the Will, a Court may enquire into every material fact relating

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Hyam v Hyam, 24 M L J 410, Overland v Ganga Daksh, 86 A 101, Kulasan v Khembar, 13 L W 657 (P C); Bhagobutty v Gooroo, 25 C 112; Indubala v Manmatha, 41 C L J 258. "In considering questions of this nature, it must always be remembered, that the words of a testator, like those of every other person, tacitly refer to the circumstances by which at the time of expressing himself, he is surrounded. If, therefore, when the circumstances under which the testator made his Will are known, the words of the Will do sufficiently express the intention ascribed to him. The strict limit of exposition cannot be transgressed, because the Court, in aid of the construction of the Will refers to those extrinsic collateral circumstances, to which it is certain that the language of Will refers. It may be true, that, without such evidence, the precise meaning of the words could not be determined; but it is still the Will which expresses and ascertains the intention ascribed to the testator. A page of history (to use a familiar illustration) may not be intelligible till some collateral extrinsic circumstances are known to the reader. No one, however, would imagine that he was acquiring a knowledge of the writer's meaning from any other source than the page he was reading, because, in order to make that page intelligible, he required to be informed to what about between

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only to a right understanding of the words used by the testator in his will and as such it is explanatory only of the words themselves. But the evidence which is introduced to prove the intention of the testator is quite a different sort of evidence. In this section we are concerned with the former kind of evidence. "It does not *per se* approach the question of intention. It is wholly collateral to it. It explains the words only by removing the cause of apparent ambiguity, where, in truth, there is no real ambiguity. It places

2. the Court which expounds the Will in the situation of the testator who made it

111. *Louell v Wall*, 104 L T 85; *Great Eastern Ry Co v Bristol Corporation*, 87 L J Ch (H L) 417, 424, 423, *Samuel v Osner*, (1909) 1 Ch. 61; *Selwood v Midway*, 8 Ves 306. "The general rule is that, in construing a Will the Court is entitled to put himself in the position of the testator and to consider all material facts and circumstances known to the testator with reference to which he is to be taken to have used now in the Will, and then to declare what is the intention evidenced by the words used with reference to those facts and circumstances which were (or ought to have been) in the mind of the testator when he used those words" *Per Blackburn J in Allgood v. Blake*, L R 3 Ex 160, *Re Skillen* (1916) 1 Ch 518, *River Wear Commissioners v Adamson*, 47 L J Q B 193, *Harrison v Higson*, (1894) 1 Ch 561. In *Boyes v Cook*, 14 Ch D 53 (56) *James L J* used the following expression "You may place yourself, so to speak in his (testator's) arm chair" *Charter v Charter*, L R 7 H L 304 (377). The object in all cases is to discover the intention of the testator. The first and most obvious mode of doing this is to read his Will as he has written it and collect his intention from his words. But as the words refer to facts and circumstances respecting his property and his family, and others whom he names or describes in his Will, it is evident that the meaning and application of his words cannot be ascertained without all those facts and circumstances." *Per Lord Abinger in Doe d Hiscocks v Hiscocks*, 5 M & W. 363 (367), see also *Bernasconi v* 100, 25 C 112 (124), *Paton v* 2 Ch 314; *Bhagabutti v* Lakram, 14 B 1; *v. Ganga Buks* Sher Bahadur 36 C 1, Mathur 7 A 193; *Sukram v Kai* 973-24 M L J 418, Meha a testator's knowledge or acquaintance is also important. In the words of Lord Cairns L C in *Craien v Errington*, 3 L T 333 (339), "In construing the Will of the testator we should put ourselves as far as we can in the position of the testator and interpret his expressions as to persons and things with reference to that degree of knowledge of those persons and things which so far as we can discover, the testator possessed." See also *In re Vaughan*, (1901) 17 T L R 278; *Marlain v Harding*, (1907) 1 Ch 465. But this proposition must be accepted with severals. The Will cannot The meanin

but where a testator has left no uncertainty as to the person to be benefited or the property by which the benefit is to be conferred, then the Courts are precluded

from going outside the actual words used by the testator. Judges should not, where the language is ambiguous, enquire into those things which the parties intended. *Lakshmi Bai v. R. 71, Kulsambai v. Ramasundari*, 12 M I A 11; 19 C L J 563 (P. C.).

Sathuram, 14 B L R 60, Radha v. Rani, 35 (19 C L J 563 (P. C.))

the parties enjoyed when the contract was executed, and in that view, they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge the meaning of the language to the things described. *Tindal C J in Atk v. Shore*, 11 Sam 330, 331, and the general rule I take it to be, is that where words of any written instrument are free from ambiguity in themselves, and

elves; and that, in such case evidence *dehors* the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible. If it were otherwise, no lawyer would be nor any party in the clearest title articulating meaning in making the

instrument or of the objects he meant to take benefit under it, might be set up to contradict or vary the plain language of the instrument itself. The true interpretation, however, of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered as an exception, or perhaps, to speak more precisely, not so much an exception from, as a corollary to, the general rule above stated, that, where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning or the language may be investigated and ascertained by evidence *dehors* the instrument itself, for both reason and common sense agree, that by no other means can the language of the instrument be made to speak the real mind of the party. Such investigation does, of necessity, take place in the interpretation of instruments written in so of time a different uses where instances

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detailed" *Wigmore* § 2461. So in order to construe a term in a written instrument where it is used in a sense differing from its ordinary meaning, evidence is admissible to prove the peculiar sense in which the parties understood the word; but it is not admissible to contradict or vary what is plain. *Per Lord Chelmsford*, in *Beacon, L. & F. Ass Co* 1 Moore P. C 73, 98

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It is frequently necessary, in order to construe written instrument to receive evidence of other accompanying facts than those which serve to apply the instrument to the subject matter or the person intended. Under some of the parties, but their act, and no facts

at other terms than those are to be not only the relations of the property, but also the acts of the means of showing their *id Worsted Co., 2 Cus* under a lease as *or le see, parol evidence*

of the subsequent dealings of the such evidence is received must always be borne in mind—to elucidate the meaning of the words used and not to import into the writing an unexpressed intention and in its admission, the line, which separates evidence which aids the in view,—the duty of the written in the instrument not *3; 2 Phill Ev 277: Grant* not admissible for the purpose of *Balkishen Das*

Evidence Act (with which the plaintiff considered) from relying upon the evidence furnished by their conduct, which *Act might be* *and out sale*

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 of B. Suboodra v Ram Ruttan, Marsh 3=1 1113 11; *of B. Suboodra v Ram Ruttan, Marsh 3=1 1113 11;* *1 Parol evidence is admissible to prove* *transaction between the parties to a written* *R 515 An obscure pottah can be elucidated* *Urpoopoorna, 9 W R 556 But this proviso* *importing into a letter an acknowledgment* *which is not contained in it even by implication* *84 Where the document is silent as to interest* *of subsequent conduct is not barred as between* *1860 Vol 1 590*

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two garhs of the *two garhs of the* *for decision was whether* *was also mortgaged to* *under section 92(6) and*

the plaintiff *the plaintiff*

section 98 of the Evidence Act, because it showed how the plaint document was related to existing facts and because the nature of the land tenure was a special matter which could not be stated off hand but required to be elucidated by a reference to the particular fact. *Raja Gour Chandra v. Rajah Mulunta Deb*, 9 C. W. N 710. Where a mortgage-bond

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L. R 768

The short exposition of the whole matter is, that the knowledge of the external circumstances of which their proof puts the Courts in possession, places the Judge in the position of the donor settler, or other party to the instrument, and it is upon the survey which that position affords him, that he exercises the office of an expositor *Goodale v. 389* But contemporaneous exposition as a guide to the interpretation of law is not a safe course to follow with danger and great care must be taken

Lakshmai rao, 16 C. W. N 1058 (P. C.)—

17 C. L. J 17—36 B 639 (P. C.) In *Section*

(Eng) the question arose on a

the subject of purchase, was no

'Your wool' The contract was

to purchase—"Your wool, 16 per

another letter of the offer, and evidence was received to fix the quantity, the subject of the bargain "I am quite clear" said *Lord Campbell, C. J.*, "from the letters which were put in at the trial that there was a contract between the parties. An offer was made, and was accepted, and the only question is as to the subject matter of the contract. I am clearly of opinion that when a specific thing is the subject of a contract and it is doubtful upon the contract what the

The defendant says, I will buy your wool. Now it is the universal practice of a matter of a contract, as no Judge

defendant had been employed by the plaintiffs, who were tradesmen, as a traveller to solicit custom for them, over certain districts in which their commercial connection lay, and he having afterwards left their service, and travelled for other parties, contrary to his agreement with them they sued him on his agreement, which was in writing, to recover damages. The agreement, however, was imperfect on its face, and it becoming necessary to explain the meaning of its expressions 'your employ' and 'the ground that defendant was to travel' parol evidence in explanation, though objected to was admitted *Earle C. J.* said "I am of opinion that the parol evidence is admissible in order to apply the contract to the matter in question. It is not to alter or vary it. The parol evidence is admissible to show the circumstances under which the words were used." In the same case *Byles J.* said "It does not appear from the face of the document what the employment was. It does not appear what the 'ground' was. The subject therefore, requires to be identified. The contract is to be

2. is not admissible for the purpose of contradicting the terms of a document, but they may be admissible only for the purpose of explaining and giving effect to the document itself. *Arahan Rai v Chalcorn* 11 Ind Cas 101. In a plain, straightforward case, in what manner the language of the document related to existing facts. There may be cases where such extrinsic evidence is required and it will therefore be admitted. But it can only be in such cases where the terms of the documents themselves require explanation and then evidence can be led within the restrictions laid down by proviso 6 to section 92 of the Evidence Act. Where a document has stood more than fifty years it is extremely undesirable to allow evidence to be led to show that the document is not what it appears to be on the face of it. *Ganpat Rao v Tukaram* 41 B 710-22 Bom L R 831-58 Ind Cas 576. Where a vendor agrees to sell land to several named persons and in drawing up the agreement of sale the name of one person is mentioned and without naming the rest the word 'others' is used, there is nothing in the Evidence Act to prevent the evidence from being led in a conveyance. *Veda Murthi* 185-(1922) Mad 100. Where the extent of the land leased, the Court cannot look at the correspondence between the lease and the deed. *Sital Prasad v Badri Prasad*, 20 A L J 907-L R 34 623. Where a promissory note recited that interest at the rate of 1½ per cent was payable but it was not mentioned there as to whether the rate of interest aforesaid will be per mensem or per annum. Held, the document was therefore ambiguous and under this proviso, no evidence could be given to clear up the ambiguity. *Sargu v Sukh* 4 Pat L T 577. In an action for a declaration that certain alluvial accretions formed part of settled land antecedent document is admissible under this proviso for the purpose of identifying the property demised but not for contracting the terms of the settlement. *Tilakdhar v Kesho* 83 Ind Cas 103-27 Bom L R 819-48 M L J 611 (P C)-41 C I J 386 (P C). If in a deed of mortgage, the boundaries of the land mortgaged are not clearly defined, they should generally be taken from the deed. *Nga Clo v A contract reduced to writing* 11 Ind Cas 101. A contract reduced to writing, with only the document itself, with only the relation of the written language to existing facts. *Ebrahim Goolam v A M Chetty* 30 Ind Cas 597. Where the question is whether certain properties are indeed in the trust deed the conduct of the parties can be looked into in construing the meanings of the expressions used therein. *Subramania v Rajeswar*, 40 M 1016-38 Ind Cas 627. Where a deed of transfer raises an ambiguity as to the nature of interest in the property it purports to convey extrinsic evidence (including evidence as to the course of dealing with the property) is admissible. *Mannulal* Vol II 62 Ind 359. In this case, the court held that the deed itself, with only the relation of the written language to existing facts, is admissible. *Venka* 1925 P C 75 follows the same principle. *stances which will show to existing facts is* Cas 736. In the case of a registered mortgage deed, oral evidence cannot be led in that the property really meant as security is other than what appears in the deed. *Musi Karim v Haji Mutasaddi*, 90 Ind Cas 841. Oral evidence to show that one of the executants of a bond was to be regarded only as a surety is inadmissible in view of section 92. *Radha v Durga*, A I R 1932 Cal. 323-59 C 106. Where at the time of the sale by the Government of a certain estate some thing referred to in a written agreement, as for instance, in a contract to deliver a

quantity or grain (*galla*) at particular time, parol evidence is admissible under certain restrictions to show what kind of grain the contracting parties had in their view at the time the contract was made. *Talla v. Sidoti*, 5 B H A C 87. Where a mortgage deed does not indicate by name the property mortgaged, evidence may be adduced to prove what property was mortgaged. *Bimlat v. Harrison*, 2 A 832.

Illustrations *Illustration (a)*—This illustration is based on *Western v. Fines*, 1 Taunt 115.

Illustration (b)—This illustration relates to proviso (3); vide also *Ramjiban v. Oghur Nath*, 2 C W N 1b3

Illustration (c)—“So where a deed conveyed the meesage and land called Gotton farm, consisting of particulars specified in a schedule, and delineated in a map drawn thereon, evidence that a close, not included in the map and schedule had always been occupied and treated as part of Gotton farm rejected.” *Taylor* § 1152 citing, *Darton v. Druce*, 10 Com B 261; *Llewellyn v. La Jersey*, 11 M & W. 183

Illustration (d)—Vide proviso (1)

Illustration (e)—Vide proviso (1)

Illustration (f)—Vide proviso (2)

Illustration (g)—Vide proviso (2)

Illustration (h)—Vide proviso (2)

Illustration (i)—Vide proviso (3); *Srinat v. Naresh* A I R 1932 P. 332—13 P. L. T 545.

Illustration (j)—Vide proviso (3)

93 When the language used in a document is, on its face,

Exclusion of evidence to explain or amend ambiguous document ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects.

Illustrations

(a) A agrees, in writing, to sell a horse to B for Rs 1 000 or Rs 1,500
Evidence cannot be given to show which price was to be given

(b) A deed contains blanks. Evidence cannot be given of facts which would show how they were meant to be filled

Two sorts of ambiguities according to Lord Bacon. “There be two sorts of ambiguities of

latens, patens is that which is latent; patens is that which is apparent; patens is that which is apparent up out by ma

as patens is never holpen not couple and mingle with matter of averment,

which is of inferior account in law, for that were to make all deeds hollow and subject to averments and so, in effect, that to pass without deed, which the law appointeth shall not pass but by deed. Therefore if a man give land to I D et I S hereditibus, and do not limit to whether of their heirs, it shall not be supplied by averment to whether of them the intention was the inheritance should be limited. But if it be limited to one of them, as if I give land to I D et I S my manor of S to I F upon the deed, but if North S, this ambiguity

averment, whether of I Another sort of ambiguity

spoken of before is, when one name and appellation doth denominate two things; and the second is, when the same thing is called by diverse names. As, if I give lands to Christ Church in Oxford, and the name of the church is Ecclesia Christi in Universitate Oxford, this shall be holpen by averment,

because there appears no ambiguity in the words for the variance is matter in fact. But the averment shall not be of the intention, because it does not stand with the words. For in the case of equivocation the general intent includes both the special, and therefore stands with the words, but so it is not in variance and therefore the averment must be a matter that doth induce a certainty, and not of intention as to say that the precinct of Oxford and of the University of Oxford is one and the same, and not to say that the intention of the parties was that the grant should be to Christ Church in the University of Oxford. Sir Francis Bacon's Maxim, rule XXV (Works, Spedding's edition 1861, Vol. XIV p. 273). Much has been said by *Di Schouler* of latent and patent ambiguities in this connection, an expression borrowed from Lord Bacon, whose oft quoted canon, though *Higram* and *Jarman* has disputed it (*Higram* *Halls* p. 196, 1 *Jar* *Halls*, 429, 430) the Courts do not seem quite ready to discard. This canon regards ambiguities of words as of two sorts—patent and latent, the one where the instrument

appears ambiguous, the other breed the ambiguity, since the In a patent ambiguity the words in proof with the lower or latent ambiguity (which in fact to facts and circumstances) removed by the same means presently find that writings rather uncertain) on their face with explanatory proof to make their we have just seen the latent ambiguity by merely explanatory proof, or And again by ambiguity the idea is conveyed that words are capable of more senses than one but the use of extrinsic evidence must be taken in a broader sense and applied where it is inconsistent. The argument more or equal quality, antedating as it does modern policy of

were good but practice carried the force of his rule beyond his own examples and his distinction of patent and latent though convenient in some respects can hardly serve as a criterion. For in every case, as *Mr Jarman* has truly

entitled to be placed, as possible in the

Our Courts to day are patent where the

uncertainty arises upon the words of the Will before any attempt is made to apply them to the object which they describe and parol evidence is not admissible to explain such ambiguities, but is admissible in case of a latent ambiguity whereon supplying the Will to the subject matter it is uncertain what is its meaning. So extrinsic evidence may be admissible to determine the existence of latent ambiguities in the Will. *Schouler's Law of Wills* § 925

's rule as to ing, although by *Dalrymple* present day the general

not the to

been quoted in this as that 'We should philosopher if complete dissection of legal

date subject both of the maxim and the commentary, is not evidence but pleading and although no doubt, the feelings would guide the judge as to

be a repre-

the issue upon which evidence would be received, they would not necessarily determine the nature of the evidence admissible upon each issue." (17 W. Nichols' *Extrinsic Evidence in the Interpretation of Wills* 2 *Am. Soc. Pap.* 35, 378, December, 1860) *See Treatise* pp 425-426. So this rule cannot be relied on as a test of the admissibility of evidence, for it is still commonly said that parol evidence may not be given to explain a patent ambiguity, yet this is not generally true. *Walchman v. Ill. Gen.* (1919) A. C. 533, *Re Alaj*, (1912) 56 S. J. 111, *Plowd.* 1: 7th Ed. p. 590.

Difference between patent and latent ambiguities. A good test of the difference is to put the instrument in the hands of an ordinary intelligent, educated person. If he is nevertheless uncertain as to the meaning of the instrument, the ambiguity is patent. If, on the other hand, he detects the ambiguity only after consultation with counsel or other persons, the ambiguity is latent. In the illustration (b), the ambiguity is latent. It could not be filled by parol testimony as to the intention of the parties, etc. In the illustration to section 95 no one could detect any ambiguity from merely reading the instrument. The ambiguity does not consist in the language, but is introduced by extrinsic evidence. *North Pl. 279.*

Similar law *Vile s 81 of the Indian Succession Act, (XXXIX of 19 5)*

Principle The province of the Court is to interpret—not to make. It is to construe others. For from the nature of construction, to insert in the blank the property or thing omitted, which of the sons was meant by the gift to one or who was the Lady—this would be to mis evidence to explain, it is to lay down that in cases

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impossible to comprehend and therefore to enforce cannot be deemed a jurat act
Higmore § 2407. But even the above proposition sometimes too broadly
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language may be not only inartistic composition, and that in which it is one of omission of subject matter, but may be not only inartistic but confused, visible, or it may exhibit a capacity for solution as to which no one has been led or to man, some of art or terms otherwise not

ordinary rules of legal construction. In a medium of total darkness the eye could not exercise its powers of vision and the mind would not be allowed to speculate on what he could not see. In the latter case, the instrument may omit the very essence of its intended operation. Thus blank may have been left for the subject or person to be dealt with or to take, say—in a deed the property intended to be passed—in a Will the legatee—in a contract the thing bought or if not a total blank what is tantamount to it as in a devise to one of the sons of J. S.

what Lady H.

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expressions admitting interpretation. On the first, beyond signing a meaning to expression extrinsic evidence could have no bearing, and it is unnecessary to discuss its admissibility. From the second it would be excluded. *Goodell v. Goodell* 391-392.

writing is requir-

cannot be asce-

disregarded or used as an admission, and oral evidence given. *Markby v. P.*

7470. A mortgage document was very imperfectly drawn up. It was un-

grammatical and could not be read literally so as to give any clear meaning. In

order to give the construction contended for by one party or the other some

words had either to be supplied or removed. Held that there was patent ambi-

guity in the document and no evidence could be given to supply the defect. *Pam.*

Gareth v. Rup Narain, 80 Ind. Cas. 914 = L. R. 5 A 542. Section 93 of the

Evidence Act does not prevent evidence being given that the municipal number

given in rent receipt which is different from the present number of the holding

was in fact the old number of the same holding. *Golstaun v. Profulla* 36 C.

W. N. 583.

Rule III laid down in *Colpoys v. Colpoys*. In *Colpoys v. Colpoys*, Jacob, 465.

Sir William Grant says. In the case of a patent ambiguity, that is one

appearing on the face of the instrument, as a general rule a reference to mat-

terials is forbidden. It must if possible be removed by con-

struction and not by averment. But in many cases this is impracticable where

the terms used are wholly indefinite and equivocal and carry on the face of

them no certain or explicit meaning, and the instrument furnishes no materials

by which the ambiguity thus arising can be removed. If in such cases the

Court were to reject the only mode by which the meaning could be ascertained

viz., the resort to extrinsic circumstances, the instrument must become inopera-

tive and void. As a minor evil therefore common sense and the law of England

(which are seldom at variance) warrant the departure from the general rule

and call in the light of extrinsic evidence. The books are full of instances

sanctioned by the highest authorities both in Law and Equity. Where the

person and the thing are designated on the face of the instrument by terms

imperfect and equivocal admitting either or no meaning at all by themselves, or

of a variety of different meanings referring tacitly or expressly for the ascertain-

ment and completion of the meanings, to extrinsic circumstances it has never

been considered an objection to the reception of the evidence of those circum-

stances that the instrument was not made for the purpose of the instrument.

It is a rule of law that evidence of the meaning of a word or phrase in an instrument is admissible when the word or phrase is ambiguous.

It has different meanings when used by a farmer and a merchant. So, with a

bequest of jewels, if by a nobleman, it would pass all; but if by jeweller, it

would not pass those that he had in his shop. Thus the same expressions may

vary in meaning according to the circumstances of the testator. See also *G.*

W. Ry Co v. Bristol Cor 87 L. J. Ch. H. L. 414, 429. So not only in the case

of an ancient deed or other document but also in the case of a modern document

in which there is a latent ambiguity evidence may be given of user under it to

show the sense in which the parties to it used the language which they have

employed and their intention in executing the instrument as revealed by their

language interpreted in this sense. Such evidence can also be adduced for the

same or a similar purpose where the ambiguities in the language of the instru-

ment is patent and not latent as for instance where the description by boundaries,

of the property granted by the instrument conflicts with the description by acreage. *Witcham v. A. G.* (1919) A. C. 533—(1918) 87 L. J. Pr. Cr. 150

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principle on which the rule is founded is, that the intention of the parties should be construed, not by vague evidence of their intentions, independently of the expressions which they have thought fit to use, but by the expressions themselves. Now those expressions which are incapable of any legal construction and interpretation by the rules of art, are either so because they are in themselves unintelligible, or because being unintelligible, they exhibit a plain and obvious uncertainty. In the first instance the case admits of two varieties; the terms, though at first sight unintelligible, may yet be capable of having a meaning annexed to them by extrinsic evidence, just as if they were written in a foreign language, as when mercantile terms are used, which amongst mercantile men bear a distinct and definite meaning, although others do not comprehend them; the term used may on the other hand, be capable of no distinct and definite interpretation. Now, it is evident that to give effect to an instrument, the terms of which though apparently ambiguous are capable of having a distinct and definite meaning annexed to them, is no violation of the general principle, for in such a case effect is given, not to any loose conjecture as to the intent and meaning of the parties, but to the clear and established usage of the trade, where either
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ambiguity, therefore must be understood an inherent ambiguity, which cannot be removed either by the ordinary rules of legal construction or by the application of extrinsic and explanatory evidence, showing that expressions *prima facie* unintelligible are yet capable of conveying a certain and definite meaning." *Starkie on Evidence* p. 653

Starline on Evidence p 653

Blanks and ambiguities "A document may be void for intrinsic indefiniteness of terms, or it may be, though definite impossible to enforce extrinsically, because there are no objects existing upon which its terms can operate. There are simple principles, well established in their sphere; but in concrete application both of them require discrimination from the foregoing principle concerning equivocations. Is a blank space an equivocation? It certainly fits two or more objects equally, and where it represents merely an insufficient term in an attempted description it may be treated as an equivocation, because the writer has fixed upon an object, but his words do not carry the description far enough. On the other hand, where a blank space represents a failure to make a final expression of will, the act is incomplete, to supply declarations of intention would be to set up a rival Will; there can be no interpretation, for there is nothing to interpret. It therefore depends on the particular do u

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93. L R 2 P D 66 (69) where an executor named Percival of Brighton Esq the father applied to William Percival Boxall who was general agent of Wignmore § 2173. The testator had no legitimate or devise and the principle one who can claim the legacy, and to give to A B— leaves therefore no one who can claim the legacy, and in either case the testator likely enough had resolved upon a gift definitely, though turning it over in his mind as to the subject or object. *Miller v Frater* 2 Atk 239. *Talbot v Talbot* 10 B & Alc 1. *Jarm Wills* 441. But partial blanks may construction not perhaps by direct verbal

be identified, and so too. £1000 was given to A and other of £700 to B a third of £1000 to C might well be supposed to mean six hundred pounds. Upon partial blanks on the other hand which leave the sense defective, no valid gift can be based. *Mason v Bateson* 20 Beav 404. And if besides a blank there is an uncertain description the Will becomes doubly inoperative. *Gill v C* (1909) P 157, *Hubbuck's Estate* (1905) P 129, *Harby v Wall* 1 B & Alc 103. Moreover a devise or bequest, wholly omitted by mistake is not to be inserted in a Will (*Neuborough's Case* 5 Madd 361), yet some part of omission might not exclude a sensible construction.

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due to a clerical mistake that the words per cent had been omitted from the mortgage deed. *Hell* that it was not a case of patent ambiguity as is contemplated by § 93 of the Evidence Act. *Pari Bhorosay v Jani* 1 A I R 103 Oudh 93-120 Ind Ca 175. This rule is not applicable where the amount of legacy is expressed by words.

Extrinsic evidence. Mr Wigram lays down the following proposition: Where the words of a Will aided by evidence of material facts of the case are insufficient to determine the testator's meaning no evidence will be admitted to prove what the testator intended and the Will (except in certain special cases. See Prop VII) will be void for uncertainty. (*Proposition I*—*The Wignmore* p 91). This proposition has been quoted by Lord Russell C J in *Pe Styler* (1897) 1 Ch 79 and is there well founded. It establishes the right of every claimant under a Will to bring under the view of the Court, which is to expound it every material fact to which the Will expressly or tacitly refers, it establishes that Courts of law recognise that natural dependence which exists between language and the circumstances necessary to a right interpretation of the language, and consequently that a reference to such circumstances in expounding a Will is strictly consistent with the office simply of determining the meaning of the testator's words. But if the testator's words aided by the facts derived from the circumstances with reference to which they are used do not express the intention ascribed to him evidence to prove the sense in which he intended to use them is, as a general proposition inadmissible—in other words that the judgment of a Court.

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one who can claim the legacy; and to give "to A. B—" leaves nothing to be claimed as a legacy; and in either case the testator likely enough had never resolved upon a gift definitely, though turning it over in his mind, as to the subject or object. *Miller v Tra* 1 Jarm Wills 441. But parties construction, not, perhaps by but at all events, where the cor

val of Brighton Es answered the description ill for the name of a competent to fill it up relates to the subject 100" leaves therefore no one who can claim the legacy; and to give "to A. B—" leaves nothing to be claimed as a legacy; and in either case the testator likely enough had never resolved upon a gift definitely, though turning it over in his mind, as to the subject or object. *Miller v Tra* 1 Jarm Wills 441. But parties construction, not, perhaps by but at all events, where the cor

be based *Mason v Bateson* 2b Beav 404. And if, besides a blank, there is an uncertain description, the Will becomes doubly inoperative. *Gill v Gill* (1909) P 157, *Hubbuck's Estate* (1905) P 129, *Harby v Wall* 1 B & All 103. Moreover, a devise or bequest, wholly omitted by mistake is not to be inserted in a Will (*Newboogh's Case*, 5 Madd 361), yet some partial omission might not exclude a sensible construction of the gift with the aid of term indicating the identity employs an uncertain term Ky 80. The Court may go further and where a person is partially described as beneficiary, but the

the rate of interest agreed upon was Re 1 per cent per month and that it was due to a clerical mistake that the words "per cent" had been omitted from the mortgage deed. Held that it was not a case of patent ambiguity. 11 is contained by s 93 of the Evidence Act. *Ram Bhoroosay v Janki*, A I R 1911 Oudh 93-125 Ind Cas 175. This rule is not applicable where the amount of legacy is expressed by cypher (*Kell v Charmer*, 23 Beav. 195), nor when property is conveyed by inconsistent description (*Both v Rattle*, 15 App Cas 183). Where there is a discrepancy between sums expressed in words and figures the former will prevail. *Saundessar v Piper*, 5 Bing N 525, Phip Ev 591

Extrinsic evidence. Mr Higram lays down the following proposition "Where the words of a Will aided by evidence of material facts of the case, are insufficient to determine the testator's meaning no evidence will be admissible to prove what the testator intended and the Will (except in certain special cases See Prop VII) will be void for uncertainty. (Proposition VI—*Re Higram*)

that Courts of law recognise that natural dependence which exists between language and the circumstances necessary to a right interpretation of the language and consequences that a reference to those circumstances in expounding a V meaning derived express t

trustee no 1, out of the trustees, appointed by me, my trustees should entrust to Haridas Rs 5000 that may be received from my life policy and the share of Tata & Co also should be transferred to the person whose name will be disclosed

by Haridas." The evidence of Haridas as to the private instructions given to him by the testator was held admissible. *Biyibai v Haridas*, 17 Bom. L. R. 115 = 27 Ind. Cas. 916 = 40 B. 1. In *Vinmutha Nithichoudhury v Nabin Chandra*, 14 C. W. N. 1100 = 14 C. L. J. 97, the appellant sued on a handwritten executed by him in favour of the respondent for the sum of Rs. 350 ' with interest at

379, it was held by this Court that where a note of hand promised repayment of a loan with interest at 5 per cent without stating either per mensem or per annum, the construction that interest must be calculated without reference to time was contrary to all practice and the ambiguity was one which might fairly be explained by previous transactions between the parties and by custom. This case, if it is any authority at all, is obviously in point; but, as the learned J^l for the Appellant has pointed out it was decided before the enactment of the Indian Evidence Act. We believe however, that the Evidence Act made no change whatever in the law on the subject and we are of opinion that there is no sufficient reason for coming to a different decision in this case. In our view the words 2½ per cent in the bond before us clearly means 2½ per cent per mensem. See also *Mohamed v. Zafar*, 62 Ind C^o 702, *Indro Deb v. Asitpur*, 16 C W N 937, *Dissessur v. Bhagban* 5 A W N 41. In *Protab Chandra Sha v. Mohammad Ali Sircar*, 19 C L J 67-41 C 342, a *lahulyat* recited that interest would be paid by the tenant upon rent in arrears at the rate of one anna per rupee. It did not expressly state whether interest at the rate was payable monthly or annually. The only point in that case was whether evidence could be given as to what was intended. In holding that under sections 92 and 93 of the Evidence Act oral evidence is not admissible to show the intention of the parties *Mr Justice Mookerjee* said "In view of the provisions of sections 92 and 93 of the Indian Evidence Act, it is plain that oral evidence was not admissible to show what was intended by."

be payable at the rate of 1 anna per month

merit to be filled." See also *Ram Ganesh v Rup Naram*, A I R 1925 All. 34-80 Ind Cas 944, *Sorju v Sulhi*, 4 P L T 577

Where a lease is ambiguous, evidence of user under it may be given in order to show the sense in which the parties used the language and their intention in executing it. *Prasanna v Ma* *Witcham v Ali* *don't* denies his *attesting witness* hence liable under *mad v Jaichand*, A I R 1930 All 100.

L R 2 P D 66 (69),
the father applied
Wignore § 2473 The

Percival of Brighton Esq
he answered the decript on
he Will for the name of a

resolved upon a gift definitely, though turning it over in his mind, as to
subject or object *Miller v Traverse*, 2 Atk 239, *Taylor v Richardson* 2 Drew 19
1 *Jarm Wills* 441 But partial blanks may in a suitable case, be supplied
construction, not, perhaps by direct proof evidence of what the testator intended
but at all events where the context, with or without the aid of extrinsic cir-
stances, supplies a definite thing or per-
a legacy to "Mr B, or to 'John' or to
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'600' to C, might
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Extrinsic evidence *Mr Higram* lays down the following proposition
"Where the words of a Will aided by evidence of material facts of the case, are
insufficient to determine the testator's meaning no evidence will be admissible
to prove what the testator intended and the Will (except in certain special cases
See Prop VII) will be void for uncertainty (*Proposition VI—Title Higram*
p 91) This proposition has been ... *Re Steyler*
(1897) 1 Ch 79 and is there we
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(*Chouhan v Nabin Chandra*,
see on a handnote executed

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by him in favour of the respondent for the sum of Rs. 350 with interest at 2½ per cent the stipulation as to interest stopping short at the rate and there being nothing expressly stated in the document as to whether the interest should be calculated annually or monthly or otherwise that the words used meant that the interest

Court observed. In *Mahomed Samsoodeen*

379 it was held by this Court that where a note of hand promised repayment of a loan with interest at 5 per cent without stating either per mensem or per annum the construction that interest must be calculated without reference to time was contrary to all practice and the ambiguity was one which might fairly be explained by previous transactions between the parties and by custom. This case, if it is any authority at all, is obviously in point, but, as the learned JUDGE for the Appellant has pointed out it was decided before the enactment of the Indian Evidence Act. We believe however, that the Evidence Act made no change whatever in the law on the subject and we are of opinion that there is no sufficient reason for coming to a different decision in this case. In our view the words 2½ per cent in the bond before us clearly means 2½ per cent per mensem. See also *Mohamed v Zafar* 62 Ind. C. 702, *Intro Deb v Asim*, 16 C. W. N. 957, *Bissessur v. Bhagban* 5 A. W. N. 41. In *Irotal Chandra Sha v Mohammad Ali Siroar*, 19 C. L. J. 67=41 C. 31, a *tabuljat* recited that interest would be paid by the tenant upon rent in arrears at the rate of one anna per rupee. It did not expressly state whether interest at the rate was payable monthly or annually. The only point in that case was whether evidence could be given as to what was intended. In holding that under sections 92 and 93 of the Evidence Act oral evidence is not admissible to show the intention of the parties *Mr Justice Mookerjee* said "In view of the provisions of sections 92 and 93 of the Indian Evidence Act, it is plain that oral evidence was not admissible to show what was intended by from the language used by them in *Nath v Nabin Chandra*, (*supra*) is who decided the case did not specify to interpret the instrument, they relied *Samsoodeen v Moonshee Abdool* (1864) before the Indian Evidence Act was placed in the statute book. It may

case before us no such consideration arises because the only evidence upon

Extrinsic Evidence when not admissible A district Judge held, that, a contract, compensation for breach of which was sued for, was ambiguous on the face of it. But he held that evidence was admissible to show the intention of the parties, and he acted upon such evidence. *Held* this was in contravention of section 93 of the Evidence Act and illegal within the meaning of s. 622 of the Civil Procedure Code. *Joman v. Ah Yu*, 14 Bur L R 58. Under section 29 of the Contract Act, an agreement is void if its meaning is not certain or capable of being made certain, and under section 93 of the Evidence Act, where the language of a deed is, on its face, ambiguous or defective, no evidence can be given to make it certain. *Deoquil v. Pulamber*, 1 A 275. Where the terms of a document are ambiguous on the face, the intention of the executant is to be ascertained by the language of the document itself, and not by extrinsic evidence.

ambiguities according to its own not to enforce a contract made by the parties but to make a new contract for them. *Beket Ram v. Anant Ram*, 31 Ind Cas 632; see also *Maharashtra v. Bujatal* 71 Ind Cas 436, *Collector of Etawah v. Beli Maharani*, 14 A 169, *Norsingerji v. Penanganti*, (1921) M N W 819.

94. When language used in a document is plain in itself,

and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.

Illustration

A sells to B by deed, "my estate at Rampur containing 100 bighas." A has an estate at Rampur containing 100 bighas. Evidence may not be given of the fact that the estate meant to be sold was one situated at a different place and of a different size.

Scope of the section "The words of a written instrument must be construed according to the meaning of the words as they are used in the instrument itself." *Hastings*, (1100). So far as I insisted upon that must be construed instrument itself' *Hastings*, (1100). In an instrument of the language the parties have deliberately chosen to employ. *Lord Macnaghten in ibid*. So it is a rule of law that extrinsic evidence is not admissible to alter a written contract, or to show that its meaning is different from what it imports. *Ram Lochun v. Inno Poorna*, 7 W R 144. This section embodies the rule of law laid down by *Lord C J in Shore v. Wilson*, 9 Cl & F 55, where he said "The general rule I take it to be, is that where the words of any instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to proper application of these words to claimants under the instrument, or as to the subject matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common sense meaning of the words." In such case, evidence dehors the instrument is utterly inadmissible. If it were otherwise, no lawyer would be safe in advising upon the construction of a written instrument, nor any party taking under it, for ablest advice might be given at some future period, parole affixed to his words, or of his secret objects he meant to take away the plain language of the instrument itself." See also *Lord Macnaghten in ibid*, *Li Po Hui*, A I R 1932 P. C 525-63 M L J 418, where it was approved. In *Webb v. Dyng*, 1 Kay & John. 680 Vice Chancellor Wood said, "The law has become so settled by numerous decisions, as to how far external evidence is admissible, and what that species of evidence must be, that I need only sum up

what appears to be the result of the authorities. Of course in interpreting any instrument which purports to deal with property, some extrinsic information is necessary, in order to make the words, which are but signs, fit the external things to which those signs are appropriate. In reality, external information is requisite in construing every instrument; but when any subject is thus discovered, which not only is within the words of the instrument, according to their natural construction, but exhausts the whole of those words, then the investigation must stop and you are bound to take the interpretation which entirely exhausts the whole of the series of expressions used by the testator, and are not permitted to go any further." So where

are the words which your Lordships have to construe, and I confess that it is to my mind absolutely amazing that any one can entertain the smallest doubt as to what those words mean. I have read the words by themselves because in my view of the meaning of this instrument, they are to be read by themselves. One does not doubt that, where you are construing either a Will or any other instrument, it is perfectly legitimate to look at the whole instrument—and indeed, you must look at the whole instrument—to see the meaning of the whole instrument, and you cannot rely upon one particular passage in it to the exclusion of what is relevant to the explanation of the particular clause that you are expounding." "The true construction of the agreement depends upon the ordinary meaning of the words used, and if those words are plain and

recently understood by the parties themselves and that the omission by the plaintiff and his predecessor for upwards of forty years to claim the rents now sought to be recovered is cogent evidence that such was the case. I grant that if the clause were capable of this construction, one of which supports, and the other of which would defeat the claim, the omission would afford irresistible proof that the latter was the interpretation intended by the parties. No such ambiguity, however, exists, and it seems therefore to me that, in the absence of any proof to the contrary it must be assumed that the parties knew and understood the language they were using and that in executing the agreement containing that clause they were truly expressing their intentions, and are bound by the writing they have signed. Why the agreement was so framed—what were the considerations which induced it—and why the claim was so long allowed to sleep are mere matters of speculation, but one has no right to act upon speculation to set aside a deed or agreement which is on the face of it clear and definite." So a Court must construe a deed according to the plain, ordinary meaning of its terms, and must not import words into it from any conjectural view of its intention, which would have the effect of materially changing the nature of the estate thereby created. *Mussamat Bhagubai v Choudhry Bholanath*, 2 I A 256=1 C 101, *Millard v Bailey*, 1 Eq 378; *Gibson v Minet*, 1 H Bl 615. In cases contemplated by this section there is

General of Bombay v Hormuz 29 B 375; *Babu v Sitaram*, 3 Bom L R 769; S. *President v Chitakaman*, (1911) 2 M W N 239; *Velappa v Palani*, (1915) M. W. N. 25-29 Ind Cas 201; *Manmatha v. Probodh*, 37 C L J 52 "As

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accustomed to jump at a conclusion as to what a person means by considering what they, under similar circumstances, think they would have done. This is conjecture only, and conjecture on the imperfect knowledge of the circumstances of the case, because the facts known to the testator may not all be before them, and the testator's mind, as regards the attention to be paid to the claims of different parties dependent upon him, may not have been constituted as their minds are constituted, so that it cannot be concluded that he would have acted in the same way as they. We therefore must construe the Will as we should construe any other document, subject to this, that in Wills, if the intention is shown it is not necessary that the technical words which are necessary in some instruments should be used for the purpose of giving effect to it' *Per Cotton L J* in *Halph v Carriel*, 11 Old 873 (878)-49 L J Ch 801. The second regards the intention of the writer as the chief object of concern, and the mere grammatical and lexicographical meaning of the words as not strictly interpretation at all, since it is only (it is said) after the meaning of the words has been ascertained as has failed to explain the meaning of the writer, that interpretation properly so called begins,—i.e., that the gap left by the partial failure of language to express the intention has to be filled by an inquiry into other indications thereof *Phip Ev 7th Ed* 583. Indeed, that the object cannot be to

in *La 355* See also *Doe v Anscot* 5 M & W 365, *Inter Wear Commrs v Adamson*, 2 App Cas 743, 763. In the last mentioned case Lord Blackburn said: "In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language it is impossible to know what that intention is without enquiring further, and seeing what the circumstances were with reference to which the words were used, and what was the object appearing from these circumstances which the person using them had in view, for the meaning of the words is to be ascertained in connection with the facts to which they were used."

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It is not the meaning of the words in the abstract, for the meaning of the words varies according to the circumstances under which they were used, and not the meaning of the writer apart from his words, for the question is one of interpretation, and what he meant to

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we must seek the meaning of the
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L Rev p 323 cited in *Phip Ev 7th Ed* 586.

Meaning to be ascertained from the whole document. In *Boston v Fitzgerald*, (1815) 15 Eust 530, Lord Ellenborough said "It is a true rule of construction that the sense and meaning of the parties in any part of an instrument may be collected *ex antecedentibus et consequentibus* every part of it may be brought into action in order to collect from the whole an uniform and consistent

see, if that may be done" See also *Damodar Das v. Dayabhai*, 23 B 833=25 I A 126=2 C W N 417; *Gray v. Minnethrope*, 3 Ves 105; *Re Venn* (1904) 2 Ch 52, *Kandarpa v. Isander* 12 C I T 201=31 I A 359; *Kalidas v. Kanhaiya Lal*, 11 C 121 (69); *Shookmany Lal*, 24 C 834=24 I A 76; *Mahomed v. Shei George*, 31 M 283, *Inderwick v. Satchell*, (1906) 11 R 649; *Brocklebank v. Johnson*, 20 Bea 213, *Key v. Key* 4 De J M & G 73, *Pande v. Surja*, 25 C W N. 961 (P. C.); *Grey v. Pearson* 6 H L Cas 61

95. When language used in a document is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense.

Illustration.

A sells to B by deed, "my house in Calcutta"

A had no house in Calcutta, but it appears that he had a house at Howrah, of which B had been in possession since the execution of the deed

These facts may be proved to show that the deed related to the house at Howrah

Latent ambiguity Sections 95, 96 and 97 deal with latent ambiguity. These sections correspond to those of 1925. In interpreting a will thus laid down by *Wigra* subject of his disposition (terms which are applicable indifferently to more than one person or thing) evidence is admissible to prove which of the persons or things so described was intended by the testator. Latent ambiguity, in the more ordinary application of the term arises from the existence of facts external to the instrument; and the creation, by those facts, of a question not solved by the document itself.

These instances of latent ambiguity may be divided into two classes. In the first class, the ambiguity is open to the testator, and the evidence, however, to this class of cases we now advert, but to those in which the ambiguity is rather that of description, either equivocal itself from the existence of two subject-matters, or sought to bear

Blackacre, may be given to show that the testator intended two sons. In all would be no doubt (indeed) could be more than a gift to my son John. The embarrassment is raised when it is sought to apply to the gift, and then the discovery is made which did not occur to the testator, namely, that there are two estates Blackacre, or two sons John. In either case accordingly, there is a latent ambiguity.

In the second class, the ambiguity is not open to the testator, but arises from the subject or object in exact correspondence with it, so that it would be uncertain. Thus, in a will, "I give and bequeath unto my son John, my estate in Blackacre, to him and his heirs forever." If there is more than one son, the gift is uncertain. If there is only one son, but the estate is not certain, the gift is also uncertain. If the estate is certain, but the son is not, the gift is uncertain. If both the estate and the son are certain, the gift is certain.

which created the uncertainty, and the question which extrinsic circumstances created, extrinsic evidence was admitted to clear up. The distinction will be obviously between clearing up an ambiguity, and creating a subject *Goodere Ev* pp 395-96

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Principle The process of interpretation is a part of the procedure of the completion of the instrument. It must remain simply manifest, must be enforced. They must be applied to external objects. Somewhere possession must be yielded, or goods delivered or money transferred; and in order that the law may enforce these changes in external objects the relation between the terms of the jural act and certain external objects must be determined, as an indispensable part of the process. In short, the interpretation of the term of jural act is an essential part of the act considered as capable of legal realization and enforcement. The only difference is that the actor alone creates the terms of his act, while the interpretation of it, being a part of the enforcement, comes into the hands of the law. *Wigmore* § 2153. Every agreement must receive its construction from its own terms, without the introduction of any evidence dehors the instrument, unless there be some latent ambiguity. Per *Rooke J* in *Coler v Guy* 2 B & P 565, 569, see also the remarks of Lord Eldon in *Smith v Doe*, 2 B & B 473 (C02). But where the words stand in equilibrium, there it is super in *Strode*) "If you go to explain such C C 835, 841

This section has its origin in the maxim "*falsa demonstratio non nocet cum de*"

1265-66

Construction of the instrument depends upon a latent ambiguity in the constr the V out of Salk 234, Lord Holt said

depart from the *Will* to *Goodings v Goodings*, 1 down much too large by Holt, for in several cases it is admitted it must be allowed,—namely, where the description or thing is uncertain, it must be

nued by Lord Thurlow, whose ruling in *Fonneren v Poyntz*, 1 Bro C C 492 was considered a dangerous innovation. As late as the beginning of the 1800 there were Judges who still thought that the only proper exception was an equivocation. In *Doe v Chinchester*, 4 Dow 65 93, Gibbs C J said "The Courts of law have been jealous of the admission of extrinsic evidence to explain the intention of a testator; and I know of only one case in which it is permitted that is, where an ambiguity is introduced by extrinsic circumstances" *Wigmore* § 9170

Application of the Section "The admission of extrinsic circumstances" says *Plumber M R* "to remove the ambiguity in the instrument, it may be removed, a explained" In the same latent ambiguity same manner, Th

where the terms of a contract has been reduced to writing, no evidence shall be given in proof of the terms of the contract except the document itself, or, in certain cases, secondary evidence of its content. But this rule is subject to the

... 97. *Karuppa Gounden v Peria*
... 397 Parol evidence is admissible to
son to whom, a written instrument
applies or refers; and for such purpose to explain the latent ambiguities. Such
parol evidence may be of the surrounding circumstances, or apparently, of
statements of intention made by parties to a document. *Doe v Needs*, 6 L. J.
Ex 59=Cockle Cas 355 In *Doe v Martin*, 4 B & Ad 770, 785 Parol
said: "It may be laid down as a general rule that all facts relating to the

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Court is at liberty to
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of the persons by whom the deed or will (it matters not whether it was one or the
other) was executed. The Court therefore has not merely a right, but it is
its duty to inquire into the surrounding circumstances, before it can approach
the construction of the instrument itself" *Sugden L C in All Gen v Drum*
... nature of the claim
prove that the claim
under section 63 of

the Contract Act, even though it is conditional and is not supported by con-
sideration. *Mathew v Lodge*, (1910) M W N 191=20 M L J 383 A com-
promise decree provided for interests at 2 per cent and the question arose whether
the interest was payable at the rate monthly or annually. Held that it was open
to the Court to take into consideration the nature of the claim.

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the plaintiff sued for a declaration that he was a mortgagee in possession of
certain plots and alleged that the numbers entered in the mortgage deed were
incorrect, held, that oral evidence was admissible under ss 95 and 96 of the
Evidence Act to prove how the description given in the mortgage deed was
relevant to the existing facts. *Radha Lal v Augue*, 16 P O 230=21 Ind Cas
429 Where the description of property sold is such that one portion of it applies

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hearing *Tauzi No 9907* but it
was found that the mortgagor owned *Tauzi No 9907*, held that it was open to
the mortgagee to prove by evidence what the property actually mortgaged was
and that the mortgagor could not claim any exoneration on the ground of

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deed that the property stood in the *khata* of the mortgagor and that there is
an indemnity clause cannot justify the contention that only mortgage
rights were intended; and if the absence of any assertion in the deed of
absolute ownership on the part of the vendor mortgagee makes it possible
to hold that the mortgagee's rights were sold, there is a latent ambiguity
to remove which evidence can be given, *Diulal v Bahram* 118 Ind Cas
882-A I R 1929 Nag 267. Suit was brought by plaintiff Receiver

appointed under an order of Court with authority to sue defendant for money due to a third party. The money was due under an agreement, dated 26th August, but by mistake the order referred to the money as being due under an agreement of the 25th October. Held that the intention of the parties is immaterial in construing the order, and section 95 of the Evidence Act does not apply. *Bhude Behary v Ruy Narain*, 30 C. 699—7 C. W. N 651. Where land with certain boundaries is sold and is wrongly described as containing a certain area, the error is regarded as a mere misdescription and does not vitiate the deed. The maxim *demonstratio falsa non nocet* applies. Where in a sale-deed the land sold is sufficiently identified by the descriptions of its extent and assignment and the name of the registered *pattadar*, the addition of a wrong survey number may be disregarded and does not render it useless as a document of title. *Karuppa Gounden v Iyer Thambi*, 2 M. L. T. 506—30 M. 397. Under

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A. I. R. 1930 Lah. 414

General principle and scope of the section. It is not necessary and it is not humanely possible, for the symbols of description which we call words, to describe in every detail the objects designated by the symbols. The notion that description is a complete enumeration is an instinctive fallacy which must be got rid of before interpretation can be properly attempted. For example, a devise of "the house owned by me at No. 19, Theatre Road, Calcutta" is obviously a mere shorthand indication of some simple but essential attributes of the house. How many stories, rooms, doors, windows, closets, has it? What is the colour of paper on the respective walls, the kind of carpet on the floors,

it with fur certainty from others. Certainty in other words, is a relative term, it signifies that the few terms employed are the essential ones for the purpose. Had they not been in themselves sufficient, we might even have looked at

term, we are to apply the devise to that house. Just as we found that the omitted terms were not essential to applying the description, so we may find that some of the inserted terms are not essential. We are doing it no violence by ignoring the non-essential terms, for neither the omission nor the insertion of non-essential terms alters its essence as a whole. By conceiving clearly the

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observed
by the applicant's counsel—that the maxim *falsa demonstratio non nocet* only applies where there is some correct description at the end of the sentence. That is whittling away the doctrine and making it ridiculous; it is a misapprehension.

Intention 'As soon as there is an adequate and sufficient definition with convenient certainty of what is intended to pass by a deed, any subsequent erroneous addition will not vitiate it' *Per Parke B in Lleuellan v Earl of Jersey*, (1843) 11 M & W 183 at p 189
description is treated as mere surplusage
title *per unum non vitatur* (Interpret in the description of legacies, like those rectified by reference to the terms circumstances taken together *William's*

Application of the maxim in different classes of cases According to Mr (1) where an application to any innings v Crans town 7 M & W 1; (2) where there is a complete description, but the testator goes on to add words for the purpose of identifying or elaborating the previous description, these words, if inconsistent with the previous description may be rejected *Armstrong v Buckland*, 18 Beav 204, *Shigsby v Grainger*, 7 H L 273; *Traters v Blundell* 6 Ch D 436; (3) where there is no continuous description, and there is something answering to part of it, and something answering to other part, but two together are inconsistent, the question is which are the leading words of description? In the first class of cases under the head there is no repugnancy between the general terms and the particular superadded description, in the second and third class there is a repugnancy between the two parts of a description *Theobald*, 7th Ed 140

Illustrative cases If a testator devise his black horse, having only a white one (*Door v Geary* 1 Ves Sen, 235) or devise his freehold houses, having only leasehold houses (*Day v Triq*, 18 P Wms 286; *Doe d Bunning v Cranston*, 7 M & houses in the other w subject intended is added description though false, introduces no ambiguity; and as, by 1 e to any subject, the Court does by rejecting them. To such cases, with propriety be applied *Gyns* 1 Ves Jun 268; *Dowsett v Sweet*, Amb 175; *Garth v Meybrick*, 1 Bro C C 30, *Stockdale v Bushley* 19 Ves 381; *Smith v Campbell*, 19 Ves 403; *Welby v Welby*, 2 Ves & B 191, *Richardson v Watson* 4 B & Adol 733, *Miller v Traters*, 8 Bing 241, *Doe d Smith v Gallanay*, 5 B & Adol 43, and this is the proper limit of that Maxim *Higram* 5th Ed 61

Extension of the rule In the application of the principle in question the Courts have not confined themselves to cases which are strictly within its terms. It is often found, on a disclosure of the facts of the case that of two

'house' in a particular place, or his "B estate", or the like, then although he adds a clause to the effect that the property is in the occupation of a particular tenant, or is situate in a particular country, street or other locality, and it turns out that such clause is true only of a part of the property, the entire subject may well pass, unrestricted by additional clause, if such a construction be in accordance with general intent of the testator. *Jarman 6th Ed* 126, citing *Roe v Fernon*, 5 F&T 80, per Lord Ellenborough. In *West v Laidlaw*, 11 H L C 381 Lord Westbury explains the maxim *falsa demonstratio non nocet* in the following terms "where some subject-matter is devised as a whole S.

inaccurate enumeration of the particulars' In the case of *Travers v Blindell*, 6 Ch D 436, the testator was exercising a power given him by his father's Will over an estate called the Righby's Estate which his father had purchased, and Sir G Jessel after saying that the real question in issues of this description was which is the leading description, held that the words in the Will that part of Righby's Estate purchased by my father was the leading description although the enumeration of the closes, of which the Will and the estate consisted made no mention of the two closes. *Tibbhorandas v Krishnamam* 18 B 283 (288)

Inaccurate description The testator made a bequest of my "portrait of X" to the National Gallery and the executors sent it on there being no doubt as to the identity of the thing, bequeathed. The trustees of the National Gallery expressed doubts as to whether it was a portrait of X, whereupon the executors claimed it back for the residuary legatee. Held even assuming the description was wrong, the gift was valid and the portrait passed to the trustees of the Gallery. In *re Miner*, *Gibson v Culham* Cust v Attorney General, (1924) 1 Ch 456, a testator specifically devised 'all my messuage farm lands and hereditaments in Bently and Bombay in Essex now in occupation of Thomas Girling purchased by him of Alderman Thrope'. It was found that the testator had a farm in Bently and Bombay called 'Welham's farms' compounded of two small farms purchased by him of Alderman Thrope in 1881, and of another adjoining small farm and a field both purchased by him from Mr Carrington. At the date of the Will and death of the testator the whole of the lands so purchased were in the occupation of Thomas Girling who found them as one holding. Held that the whole of William's farm passed to the specific devisees. *Norman v Norman* (1919) 1 Ch 297

96. When the facts are such that the language used might

Evidence as to application of language which can apply to one only of several persons

have been meant to apply to any one, and could not have been meant to apply to more than one, of several persons or things, evidence may be given of facts which show which of those persons or things it was

intended to apply to.

Illustrations.

(a) A agrees to sell to B for Rs 1000, "my white horse". A has two white horses. Evidence may be given of facts which show which of them was meant.

(b) A agrees to accompany B to Haidarabad. Evidence may be given of facts showing whether Haidarabad in the Dekkhan or Haidarabad in Sind was meant.

Principle "If you go to parol evidence to remove the ambiguity you cannot well refuse it, to explain such ambiguity. Per Lord Thurlow in *Shelborne v. Ingham*, 1 Bro C C 338 341

Similar law *Id*s 89 of the Succession Act (XXIX of 1925)

Scope When there are two or more persons or things, and each of them exactly answers to the description in the Will, then all manner of parol evidence

is admissible, (*Charter v Charter*, L. R., 7 H. L. 364), for the language of the Will is complied with. *ever thing*
passes under the beque *Bing* 244
Thindal C J said; "Verborum
latens verasificatione suppletur) applies will be found to range themselves into
two separate classes. The first class is where the description of the thing
devised, or of the devisee, is clear upon the face of the Will; but upon the death
of the testator it is found, that there are more than one estate or subject matter of
devise, or more than one person whose description follows out and fills the words
used in the Will. As where the testator devises his manor Dale, and at his
death it is found that he has two manors of that name, South Dale and North
Dale, or where a man devises to his son John, and he has two sons of that name.
In each of these cases respectively parol evidence is admissible to show which
manor was intended to pass and which son was intended to take. The other
class of cases is that in which the description contained in the Will of the thing
intended to be devised, or of the person who is intended to take, is true in part,
but not true in every particular. As where an estate is devised called A, and
is described as in the occupation of B, and it is found, that though there is an
estate called A, yet the whole is not in B's occupation; or where an estate is
devised to a person whose sur name or Christian name is mistaken; or whose
description is imperfect or inaccurate; in which latter class of cases parol
evidence is admissible to show what estate was intended to pass and who was the
devisee intended to take, provided there is some indication appearing
on the face of the Will to justify it. *tion*
"Where the object of testator's bounty or *ence*
the person or thing intended) is described in terms which are applicable in
differently to more than one person or thing, evidence is admissible to prove
which of the persons or things so described was intended by the testator."
Higram Proposition VII at p 110. See also *In re Stephenson*, (1897) 1 Ch 80,
W. 129; Unsettled
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statements made by any parties to the document, and as to the intentions in
reference to the matter to which the document relates." *Steph Dig Lk art 91*
This rule is applicable where two persons have got the same name as mentioned
in the document, but one of them has got an additional name. *Bennet v*
Marshall, 2 K & J 740; *Doe v Allen*, 12 A. & T. 451; *Fleming v Fleming*
31 L. J. Ex 419; *Webber v Corbet*, L. R. 16 Eq 515. In order to ascertain the
intention of the parties to any instrument evidence of the conduct of the parties
is admissible. *Watson v Mohesh*, 24 W. R. 176 (177), *Cheetun v Chatterdhore*,
19 W. R. 432.

When an instrument appears, on the face of it, to be free from ambiguity,

it is to be construed according to its plain meaning. *ent comes to*
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applicable was intended to be denoted. Reference may in this connection be
made to the *Charter v Charter* case. *v Jeffries*, 15 M & W. 161
if C. J. in Shore v Wilson
l. v. Fennel, 7 H. L. C. 650
Co v Marine Board of
the Cape, (1888) A. C. 32, and of Lord Atkinson in *Walchman v Attorney*
General, (1910) A. C. 533-57 L. J. P. C. 159. The decision of the judicial

committee in the last mentioned case shows that the principle that when an S.

Co Ltd, 36 C. L. J. 212-72 Ind : -
directly describes two sets
apply to both, evidence may
Ngacho v Ma Sa Ma, 10 B - !
provides for the payment of
whether the parties meant the revenue as assessed at the date of death or as it
might be re-assessed from time to time evidence may be given under this section
to show what was meant. *Fur and v Ham*, 22 O. C. 270-59 Ind. Cas 261.

Application of the rule T Boult
C. J in *Grant v Grant*, L. R. 6 nd of
parol evidence is not admissib ng, or
altering the Will of the testator, but is admitted simply for purpose of enabling
the Court to understand it, and to declare the intention of the testator according
to the words in which the intention is expressed. If such evidence establishes
that the description in the Will may apply to each of two or more persons,

and there appeared by extrinsic evidence to be two persons answering such
d testator's state-
n *Doe v Needs*,
G dgment of the

Court in the above-mentioned case observe
it is uncertain whether a deviser had selected
no evidence would have been admissible
certain individual such would have been a
the meaning of *Lord Bacon's* rule, which ambiguity could not be holpen by
averment; for to allow such evidence would be, with respect to that subject, to
cause a parol Will to operate as a written one; or adopting the language of *Lord*
Bacon, 'to make that pass without writing which the law appointeth shall not
pass but by writing' But here, on the face of the devise, no such doubt arises
There is no blank before the name of *Gord* the father, which might have occa-
sioned a doubt whether the deviser had finally fixed on any certain person in
his mind. The deviser has clearly selected a particular individual as the devisee

law, in certain special cases, admit extrinsic evidence of intention to make
certain person or thing intended, where the description in the Will is insuffi-
cient for the purp-

Doe v. Howells, L M. & W. 363 (367) "which is by evidence of his declaration, of the instructions given for his Will, and other circumstances of the like nature, which are not adduced for explaining the words or meaning of the Will, but either to supply some deficiency, or remove some obscurity, or to give some effect to expressions that are unmeaning or ambiguous. Now, there is but one case in which it appears to us that this sort of evidence of intention can properly be admitted, and that is, where the meaning of the testator's words is neither ambiguous nor obscure, and when the devise is, on the face of it, perfect and intelligible but, from some of the circumstances admitted in proof, an ambiguity arises as to which of the two or more things, or which of the two or more persons (each answering the words in the Will), the testator intended to express. Thus if a testator devise his manor of S to A B, and has two manors of North S and South S it being clear he means to devise one only, whereas both are equally denoted by the words he used in that case there is what Lord Bacon calls 'an equivocation': the words equally apply to either manor, and the evidence of previous intention may be received to solve this latent ambiguity." So "where one person accurately fulfils the description, and no one else does you cannot admit parol evidence to show that such person was not intended." *Per Millins v. C* in *Re Walerton Mortgaged Estates*, 7 Ch D 199; *Re Roren* (1915) 1 Ch 673; see also *Doe v. Westlake*, 4 B & Ald 57; *Webber v. Corbett*, L R 8 Eq 515; *Howood v. Griffith*, 4 D M & G 700. But the rule contained in this section is applicable where the gift is "to the four children of my cousin E. B." and where in fact E. B. had six children, two by one husband P. and four by another husband B. *Hampshire v. Pierce*, 2 Weg 216; see also *Jones v. Newman* 1 W. Bl 60; *Doe v. Allen*, 12 A & E 451, *Grant v. Grant*, L R 5 C P 727, *Naseby v. Jeffry*, (1914) 1 Ch 375; *Hunderson v. Hunderson*, (1905) 11 R 353; *Re Baltic Wrightson*, (1920) 2 Ch. 330. This rule is also applicable to deeds and contracts. *Wigmore* § 2472.

Ambiguity—Evidence of intention. It is commonly said that extrinsic evidence is admissible in cases of latent ambiguities whereas such evidence is inadmissible in cases of patent ambiguities. "But upon examination the maxim proves not to be a universal guide; for, on the one hand, there are many recognised authorities for the admission of parol evidence to explain ambiguities

of the words he has used. It is to the admissibility of this species of evidence that attention is now to be turned. To say that such evidence is admissible,

family, or other circumstances, that ambiguity may be removed by further evidence of the same nature. But in admitting this interpretation of the rule, all distinction between patent and latent ambiguities is lost, for in every case the Judge by whom a Will is to be expounded is entitled to be placed, by a knowledge of all the material facts of the case, as nearly as possible in the situation of the testator when he wrote it. A patent ambiguity it is true, may not be undoubtedly true. But by our hypothesis in this precise extent, and no further, is the latter branch true also. We come, therefore, to the conclusion that the distinction taken by the canon between latent and patent ambiguities is an unsubstantial one, or that the proposition does, in its second branch, assert the admissibility of evidence to show the testator's intention (as words); and that, consequently, special class of cases. It remains in admissible. Suppose, then,

that evidence has been given of all the material facts, and that these have ultimate existence of more than one object applicable. The uncertainty as to which of these was in the testator's contemplation would if the investigation stopped here, necessarily be fatal to the gift. Under these peculiar circumstances, however, declarations of the testator or other direct evidence of his intention are admissible to clear up the ambiguity, pointing out (if they can) the actual subject or object of gift, among the several properties or persons answering to the description. Of this nature are the examples given by Lord Bacon, in illustration of the maxim, "*Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguitas verificatione facit tollitur*"; and are styled by him as cases of equivocation." *Jarman 6th Ed 516 518.*

Evidence as to application of language to one of two sets of facts, to neither of which the whole correctly applies.

97. When the language used applies partly to one set of existing facts, and partly to another set of existing facts, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply.

Illustration.

A agrees to sell to B "my land at X, but not in the occupation of Y, but it is not at X. Evidence may be given to show to which of the two it was meant to apply."

Principle. "The characteristic of all these cases is that the words of the Will do describe the object or objects of the testator has not whatever; it only enables which the description in the devise is understood to be signified." *Parke J in Doe v Needs, 3 M & W 129.*

Scope of the section. This section is the converse of the preceding one; in that there is language partially applicable to two sets of facts, but wholly applicable to neither. In this case evidence is admissible to discover the intention of the person or thing bequeathed of the several subjects though the evidence may be received for subjects the language applies, inadmissible. *Doe v Hascock* (1841) 10 Cl & F 101.

It is found that the language exactly answers the error appears in the evidence of the testator. But according to Prof Wigmore there is no danger in receiving declarations of intention, because the precise words of the document cannot be literally applied in any event, and there is thus no contradiction between the literal and the intended meaning.

uttered part of said: 'be pre wish to recollect permit give of strictly logical course, I think, would be either to admit declarations of intention both in cases falling under paragraph 7 (—ss. 95, 97) and in cases falling under

Doa v. Hiscocke, 5 M. & W. 363 (367) "which is by evidence of his declarations, of the instructions given for his Will, and other circumstances of the like nature, which are not adduced for explaining the words or meaning of the Will, but either to supply some deficiency, or remove some obscurity, or to give some effect to expressions that are unmeaning or ambiguous. Now, there is but one case in which it appears to us that this sort of evidence of intention can properly be admitted, and that is, where the meaning of the testator's words is neither ambiguous nor obscure, and when the devise is, on the face of it, perfect and intelligible but, from some of the circumstances admitted in proof, an ambiguity arises, as to which of the two or more things, or which of the two or more persons (each answering the words in the Will), the testator intended to express. Thus

equivocation' : words equally apply to either; but, by previous intention may be received to show that one person accurately fulfils the

But the rule contained in this case is applicable in fact husband and wife. *Bl 60; v Jeff Baito* contract. But the rule contained in this case is applicable in fact husband and wife. *Bl 60; v Jeff Baito* contract. *eg 216, see also Jones v Newman* 1 W. *int v Grant*, L R 5 C P 727, *Nassey v Hunderson*, (1905) 11 R 353; the rule is also applicable to deeds and

Ambiguity—Evidence of intention. It is commonly said that extrinsic

authorities for the admission of parol evidence to explain ambiguities appearing on the face of the Will, while, on the other hand, the existence of a latent ambiguity will certainly not, as appears sometimes to have been supposed, warrant the admission in all cases indiscriminately of parol evidence to show what the testator meant to have written as distinguished from what is the meaning of the words he has used. It is to the admissibility of this species of evidence that attention is now to be turned. To say that such evidence is admissible, that attention is now to be turned. To say that such evidence is admissible,

is confined to developments of facts with reference to which the Will was written, and to which the language of the Will expressly or tacitly refers; and therefore, it lies within the strict limits of exposition which is denied that the latter transgresses. The proposition only an otherwise unambiguous family, or other circumstances, that ambiguity may be removed by further

of the testator when he wrote it. A patent ambiguity it is true, may not be explained by any other kind of evidence and so far the first branch of the canon is undoubtedly true. But by our hypothesis to this precise extent, and no further, is the latter branch true also. We come, therefore, to the conclusion either that the distinction taken by the canon between latent and patent ambiguities is an unsubstantial one, or that the proposition does, in its second branch, assert the admissibility of evidence to show the testator's intention (as

that evidence has been given of all the material facts and circumstances of the case, and that these have ultimately raised an ambiguity by disclosing the existence of more than one object or subject to which the words are equally applicable. The uncertainty as to which of these was in the testator's contem-

examples given by Lord Esher, in illustration of the maxim "*Ambiguus verborum latens verificatione suppletur, nam quod ex facto oritur ambiguum verificatione facit tollitur*"; and are styled by him as cases of equivocation." *Jarman 6th Ed 516 518.*

Evidence as to application of language to one of two sets of facts, to neither of which the whole correctly applies.

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Illustration.

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Principle "The characteristic of all these cases is that the words of the Will do describe the object or subject intended; and the evidence of the declarations of the testator has not the effect of varying the instrument in any way whatever; it only enables the Court, to reject one of the subjects or objects to which the description in the Will applies, and to determine which of the two the testator understood to be signified by the description which he used in the Will." *Parke B in Doe v Needs, 2 M & W 129.*

Scope of the section. This section is the converse of the preceding one; in that there is language partially applicable to two sets of facts, but which is applicable to neither. In this case the evidence is admissible for discovering the intention of the person or thing bequeathed. In section 95 *Quin Ex 286* of the person or thing bequeathed of the several subjects though the evidence may be received for subjects the language applies, inadmissible. *Doe v Hascock* of the California Civil Code as there is an imperfect description or that no person or property exactly answers the description, mistakes and omissions must be corrected, if the error appears from the context of the Will or from extrinsic evidence; but evidence of the declarations of the testator as to his intention cannot be received. But according to *Prof Wigmore* there is no danger because the precise words of the document event, and there is thus no compromise of utterance, it is simply a question which part of the description. *Wigmore § 2* said. "Conclusive as the authorities upon the subject are, it is not presumptuous to express a doubt whether the conflict between a natural wish to fulfil the intention which the testator would have formed if he had recollected all the circumstances of the case, the wish to avoid the evil of permitting written instruments to be varied by oral evidence, and the wish to give effect to Wills, has not produced in practice an illogical compromise. The strictly logical course, I think, would be either to admit declarations of intention both in cases falling under paragraph 7 (—ss. 95, 97) and in cases falling under

sections 95 and 97 or section 96, *Woodroffe Ev.* p 663; *Field Ev* 6th the subject is thus laid down by

it was intended to apply to one rule established by the second clause evidence, including expressions

and to
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also
dence,
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168 Mo
correct and partly
not apply precisely
legally certain that

by outside circumstances, may be more
stator, in its entire scope, effectuated
eaning." *Wignmore* § 2474 In *Ryall*
rty to *Elizabeth*, the natural daughter
of B B has a natural son *John*, and a legitimate daughter *Elizabeth*. The Court
may infer from the circumstances under which the natural child was born, and
from the testator's relationship to the putative father, that he meant to provide for

Elizabeth Stringer, who had died before the date of the Will and that it was put
into the Will by a mistake on the part of the solicitor. *Stringer v Gardiner*, 27
Beav 35=4 Deg & J 468. Criticising on that decision Sir James Fitzjames
Stephen said "Such a decision as that in *Stringer v Gardiner*, the result of which
was to give a legacy to a person whom the testator had no wish to benefit, and
who was not either named or described in his Will, appears to me to be a practical
refutation of the principle or rule on which it is based. Of course every docu-
ment whatever must to some extent be interpreted by circumstances. However
accurate and detailed a description of things and persons may be, oral evidence
is always wanted to show that persons and things answering the description
exist; and therefore in every case whatever, every fact must be allowed to prove
to which the document does, or properly may refer; but if more evidence than
this is admitted, if the Court may look at circumstances which affect the
probability that the testator would form this intention or that why should
declaration of intention be excluded? If the question is, 'what did the testator
say?' why should the Court look at the circumstances that he lived with
Charles, and was on bad terms with *William*? How can any amount of evidence
to show that the testator intended to write "*Charles*" show that what he did
write means "*Charles*"? To say that "*Foster*" means "*Charles*," is like saying
that "*sign*" means "*stone*." If the question is, 'what did the testator wish?' why

pp. 166, 167.

A agree to sell to B
at X but not in the
it is not at X, evidence
Another common case
wrongly described as
containing a certain area, the error in area is regarded as a mere misdescription

and does not vitiate the deed. The maxim *demonstratio falsa non nocet* applies. *Karuppa v Periatthambi Gotundan*, 30 M 397 (399). So where land is described in a document by boundaries and area is wrongly specified, the land within the boundaries will pass whether it be less or more than the quantity specified. *Bhayaiah v Dacarka*, 15 C P L R 163. In such a case the maxim *falsa demonstratio non nocet* applies, or

v. Saider, 12 W R 439, *Lslim v*
18 W R 25, *Kazee Abdul v. Buroda*
am, 18 B 283; *Subhoya v Mut*
Harimohan v Rameswar, 64 Ind C
751; *Narain v Jauahar*, 50 P, I
L T. 245.

to the
of the
house
is adn
of the property taken as a whole the intention was to convey the whole house or
only a portion of it. *Abdul Ghani v Ashiq Husam*, 65 Ind Cas 442 = (1923)
C 100 W 1

of an ambiguity in the description of land in a mortgage deed it is open to a
party to show by other evidence what land was actually covered by the deed.
Ramchandra v Arshad Ali, 43 Ind Cas 721

Whole of it does not apply correctly to either. This section has appli-
cation when the whole of the language used in a document does not apply
correctly to either. Because "if I have some land wherein all these demon-
strations are true, and some wherein part of them are true and part false, then shall
they be, intended words of true limitation to pass only those lands where all
those circumstances are true." This rule is based upon the 18th maxim of

Lord Bacon which is as follows,
rationem quae competunt in limitatio
is devised, and there are found to
and precisely corresponding to the
so completely answering thereto, the latter will be excluded, though had there
been no other property on which the devise could have operated, it might have
been held to comprise the less appropriate subject; *Jarman 6th Ed* 1276
A devise of lands described in a particular place and in the occupation of a
particular person
of that person
see also *Falsa*

Where a testator has devised all his lands at any particular place, extrinsic
evidence is not admissible for
other lands not situated
lands having been enjoyed
period of time, or of the
of his having been in the h
under one distinguishing name' *Per Baqqally L. J. in Homer v. Homer*, 1 Ch.
758 at p 774.

98. Evidence may be given to show the meaning of illegible

Evidence as to or not commonly intelligible characters of
meaning of illegible foreign, obsolete, technical, local and provin-
character, etc. cial expressions, of abbreviations and of words
used in a peculiar sense.

B.

Illustration.

A, a sculptor agrees to sell to B, "all my models." A has both models and modelling tools. Evidence may be given to show which he meant to sell.

Principle "Where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself; for reason and common sense agree, that by no other means can the language of the instrument be made to speak the real mind of the party. Such investigation does of necessity take place in the interpretation of instruments written in foreign language, in the case of ancient instruments, where, by the lapse of time and change of manners, the words have acquired in the present age a different meaning from that which they bore when originally employed; in cases where terms of art occur;—in mercantile contracts, which, in many instances, use a peculiar language, employed by those only who are conversant in trade or commerce;—and in other instances in which the words besides their general common meaning have acquired a peculiar idiomatic meaning in which he was dwelling, or in which he passed his life, the real meaning of the language used in the instrument, in order to enable the Court or Judge to construe the instrument." *Irish v. Parke* said: "I apprehend two which bear upon the subject are admissible in every case for the purpose of enabling a Court to construe a written instrument, and to apply it practically. In the first place, there is no doubt that not only where the language of the instrument is such as the Court does not understand, it is competent to receive evidence of the proper meaning of that language as when it is written in a foreign tongue; but it is also competent, where technical words or peculiar terms, or indeed any expressions are used, which, at the time the instrument was written, have acquired an appropriate meaning either generally or by local usage, or amongst particular classes. This description of evidence is admissible, in order to enable the Court to understand the meaning of the words contained in the instrument itself, by themselves and without reference to extrinsic facts on which the instrument is intended to operate."

Scope of the section. In order to interpret or ascertain the meaning of a written document, parol evidence may be given of the meaning or sense in which not only words, but also signs, symbols, private marks, or nicknames, have been used. Such evidence is admissible in any case in which it is in question by the person who is in question.

class of persons

Sec 302 So in order to ascertain the meaning of the signs and words used upon a document, oral evidence may be given of the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical, local, and provincial expressions, of abbreviations, and of common words which, from the context, appear to have been used in a peculiar sense; but evidence may not be given to show that common words have been used in a sense which does not appear from the context. *Stephen Dig* said *Lord Thurlow* in *S* instance where parol evidence was given to show that the word "vulgar" was used in a vulgar sense. . . . no idea of its obtained a precise that would, as

In *Beacon L. & S. Co. v. L. & S. Co.* 10 Q. B. 49, 53, *Lord Chelmsford* said: "In order to construe a term in a written instrument where it is used in a sense differing from its ordinary meaning evidence is admissible to prove the peculiar sense in which the parties understood the word; but it is not admissible to contradict or vary what is plain." See also *Per Mallett v. C. in Silver's Trusts* L. R. 12 Eq 183, 186. *Prof. Wigmore* in his *Law of Evidence* in considering

both the theory and policy of the above rule said "That the theory of it is unsound, ought not to be doubted. There can be in the nature of things, no absoluteness of standard in interpretation. An advanced communism might conceivably bring men to such a level of intellectual uniformity that their thoughts would be expressed in invariably identical symbols. But till that day comes the varieties of individual expression and sense must be unquenchable. So long as men are allowed to grant and contract freely and so long as the law undertakes to carry out those acts by enforcement, just so long must the standard of interpretation continue to be mobile, subjective, and individual. The fallacy consists in assuming that there is or can be one real or absolute

Justice Doisen it is not so much a canon of construction as a counsel of caution' (*Re Jodiell*, L. R. 41 Ch. D. 590). The distinguished Master of the to counsel that 'no body could, and yet the Court of Appeals ter all convinced of that precise D. 181) to say that it would vidence to fail to be convinced, that is very different from an idical mind is legally not open cory nor in policy any basis for an absolute rule declaring that when a word has a plain meaning, it is by the popular standard; neither the local nor the mutual nor the individual standard can be substituted, such a rule is still maintained by many utterances like those above quoted. But its vogue is disappearing; . . ." *Wigmore* § 2462.

In *Brown v Byrnes*, 3 E. & B. 703, Lord Coleridge J. said "Neither, in the construction of a contract, nor in the construction of a will, is the ordinary

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ed.
own

Illegible Where the writing is that in ordinary use, but illegible, the *1 L. 281*. So it is assist in deciphering *Masters v Masters*, § 2025. Illegibility peculiarity of character, writing. Referring to the case of *Cyprien*, Baron Almonston observed "Words on paper are but the means by which a person expresses his meaning, and shorthand is in this respect, like long hand, and equally admits interpretation." *Clayton v Nugent*, 13 M. & W. 206.

in each instance whether it needs any S.
 -d or phrase in dispute *Wigmore* § 1955
 be received, but you cannot ask a
 witness what is the meaning of a written document' *Kirkland v Nisbet, 3 Macq*
Sc. App. C. 766 In most of the cases in this section the word or words may be

unless from other words it is very clear that the
Lord Redesdale in Jesson v Wright, 5 M & S

testimony to ascertain the technical and popular use of the word *Durr Jones*
 § 455

In mercantile contracts the question has often arisen on expressions deno-
 ting a
 1 Esp
 turn t
 which
 and e

was understood to mean a package of
Cockburn C J said "If the term 'bale' as
 particular trade a signification differing
 ence must be received on the subject,
 contract" So a bale of cotton may mean a

or locality, no matter how plain the apparent
 reader. In *Smith v Wilson, 3 M & Ad 728*
 prove that by the customary meaning of it
 applied to rabbits, meant '100 dozen' In

seals are named with 'and
 delivered from either at seller's
 "Yes, if you read it strictly
 Lord Abinger, said "The

Court must look at each contract, and say whether in its whole spirit and
 meaning and did not mean or in the understanding of the parties" "Days"
 in a bill of lading, was held to mean "working days" *Cockburn v Retberg, 3 Esp*
 121 In *Grant v Maddox, 15 M & W 737*, interpreting the word 'year' evidence
 was admitted of the professional usage that actors were never paid during the
 time of vacation In *Myers v Sanl, 3 E & E 306*, which was a building contract,

'dark gray or black mohair,' the goods had a dark appearance, and *Jessel*
M R. declaring "that is a black selvedge and not a white selvedge," and
 that "no evidence would convince them that black was white", declined to
 give effect to the plaintiff's testimony that the plaintiff's selvedge "was
 what was perfect" *well known* *appeal*,
 this was
 selvedge is
Wigmore
 interpreted
 dance wit
 the
 "age"
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 Parol

evidence was admissible to show that the term 'in the month of October' according to the mercantile usage, means a particular part of the month
Chait context
quali usage
Whe re any
and and
quib. *jundad* held that the ladies obtained an absolute estate *Thakur v. Ro ad*
Jamma Kuar, 6 A L J 420, *Chumal v. Bai Muli*, 2 Bom L R 47-24 B
 420 *Surjomoni v. Robinath* 30 A 81 *Kandarpa v. Jogendra*, 12 C L J 391
Lalit Mohan v. Chakraborty 23 C 831
N 458, Roidas v. Bangolap 26 C
 26 C W N 425 (P C); *Sulochana*
Ashutosh, 27 C 44, *Sibnarayan v. Tara ngini*, 8 C L J 20

Local and Provincial expressions Of local usage a striking illustration is afforded by the case of a lease of a rabbit warren, where the lessee covenanted to leave on the warren at the expiration of the term 10,000 rabbits, the lessor paying for them
 according to the loc
 meant 1,200 *Smit*
 usage of a trade
 the ordinary or popular sense of words, it remains merely a question for the particular case whether the parties have in fact spoken according to that standard Where all the parties are members of the same trade or other circle of persons, little difficulty can arise, the only requirement is that the special sense alleged should be in fact a usage, or settled habit of expression, and not merely the expression of a few persons or of casual occasions *Russian Steers*
Nat v. Sitta, 13 C B N S 610 617 Where the usage is not that of a trade but of a locality, the form of it may be common reputation or commonly used documents *Wigmore* § 2464 Where in a deed words in use in a particular locality in a peculiar sense are employed, oral evidence is admissible under section 98 of the Evidence Act to explain the meaning of the words in question
Chuddu v. Chiu, 63 Ind Cas 133

Abbreviations Where initials or other abbreviation are to be interpreted the local usage or repute is of course receivable *Wigmore* § 2461 A wager contract to run one greyhound against another, concluded with the initials P P Evidence was received to show that it meant—Play or Pay,—that is to say,—win the match, or forfeit the stake *Atterson D said* 'standing by themselves' those letters are insensible, but the evidence confers a real meaning upon
 and that they
 were inse
 said 'T
 also *Baron Pail's*
 case of a
 It is like the
 sculptor, . . . of a celebrated
 'mod—tools for
 carving' is a familiar illustration on the part of terms of art The word 'mod' was there contended on the one hand to mean modelling tools and on the other models, which latter were of great value, and evidence of sculptors and others was received in interpretation of the word 'mod' *Goblet v. Beechey*, 3 Sim 24, *Goodere Ex* 377 On this case the illustration is based Put the case of shorthand writers' notes, which a Court unskilled in the art of stenography must have explained or interpreted before it can attach any meaning to the arbitrary signs *Hell v. Charmer*, 23 Beav 195

Words used in a peculiar sense There is no reason in the nature of things, why the words in a particular sense, . . . use what we are seeking . . . standard is merely taken . . . in theory only a question of fact in each case whether the parties were using a special mutual sense The application of the principle has long been seen in the interpretation of descriptions in deeds, because there is there always some concrete and local object, fully known to the parties but unknown to the Court and in every such case it is obvious that the words used must be translated into things and facts, the parties to the deed almost always use terms of description which are peculiar to themselves *Wigmore* § 2465 *Doe v. Bart*, 1 T R

701, 704, *Van Diemen's Land Co v Marant Board*, (1906) App. Cas. 92; *Squire v. Campbell*, 1 Myl & C 159 "The purpose of all such evidence is, to ascertain in what sense the parties themselves used the ambiguous terms in the writing which sets forth it manifest in what sense the best definition to be applied. The effect must be limited to the subject matter. If so limited the negotiations relates to the future, and consists in positive engagements on the part of the other party to the contract. Their effect depends, not upon their promissory obligation, but upon the aid they afford in the interpretation of the contract in suit. They are not the less effective for the purpose of explanation and definition because they purport to carry the force of obligation. *Per Wells J in Stoops v Smith*, 100 Mass 63. In *Doe v Denham*, 1 A. & L 614, 652, *Coleridge J* said "The Courts have come to some inconsistent conclusions in cases of this kind, out from the main body of them

at the time, in order to see in what sense the words were used" *Wilmore* §§ 2465, 2467. In *Kell v. Charnes*, 23 Bery 195, a bequest was "to my son W the sum of 1xx; to my son R C the sum of 0xx, the testator having in the course of his business used certain private marks or symbols to denote prices or sums of money," this usage was resorted to, and showed that the sums of £100 and £200 were signified. In *Pe Osner, Samuel v Osner*, (1209) 2 Ch 60, a bequest was to "my grand nephew Robert O." There was no "Robert O" but there was a "Richard O." Evidence of the memorandum of the testator showing that the testator called Richard "Robert" was admitted; see also *Ellen v Halston*, (1912) 1 Ch 135, *Wilmore* § 2467. Where a Hindu testator uses technical terms of English law in his Will and those terms have no accepted meaning in Hindu law the rule is that effect of the intention of such terms cannot be given. *Jatinder W R* 359, *Krishnamom* 317 P C = 18 Free Bombay Harbour F O B means (519), see also *Jade Rat v Dhabataran* *Jackeriah*, 2 Ind Jur 311

Who may give evidence of agreement varying terms of document.

99 Persons who are not parties to a document or their representatives in interest, may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document.

Illustration

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Principle "The rule under consideration is applied only (in suits) between the parties to the instrument; as they alone are to blame if the writing contains contained. It cannot be prejudiced by things ignorance, carelessness, to be precluded from

proving the truth, however contradictory to the written statement of others *Greenl Ev* § 279, cited in *Taylor* § 1149, *Holt v Collyer*, L II 16 Ch D 718. Strangers have not assented to the compact nor can they be heard in a proceeding to set aside or reform it. Hence they are at liberty to show that the written instrument does not disclose the true character of the transaction. *Burr Jones v* § 449. To hold strangers bound which were behind their backs, *cessat lex* the rule therefore does

Scope of the section This section being an enabling provision cannot be held to prohibit the reception of evidence as to a fact in issue or a relevant fact admissible independently thereof. *Pathammal v Syed Kalai Rnuhar* 27 M 329, *Krishna Suami v Mangala Thammal* 53 Ind Cas 213. It is well settled that the word 'varying' in section 99 covers the same ground as the words

or subtracting from' in section 92 (1) (b).

3) No construction of section 92 can modify which provides that persons not parties to the document or their representatives in interest may give evidence to show a contemporaneous agreement. *Krishna Suami v Mangala Thammal* 53 Ind Cas 213 see also *Maung Kyin v Ma Shue* 15 C 320=22 C W N 257 P C. So extrinsic evidence is admissible to show the real nature of the transaction, both as against and as in favour of evidencing the transaction or rectifying it. *Baldeo v Puttu La* evidence provided by section 92 (1) itself, one to be used only as between the parties to the instrument or by its representative in interest. This section expressly gives a free hand to persons

necessary implication when read with the executants of documents against such

R 115. Under sections 92 and 99 of the Act, the law is given by the pre-emptor to show the real

nature of the transaction. He being no party to the instrument. *Chhuiko v Jugga* 11 Ind Cas 501, *Khondad v Nasar*, 127 P L R 1902. *Parmanan v Atrabat* 20 P R 1899. *Usman v Md Shaif* 1927 A 204=98 Ind Cas 99. Where A purported to make a gift of his lands to his daughter B it was open

evidence that the transaction was, consequently liable to be set aside against him. *Jagat* plaintiff is not a party to the purported transaction. *Bageswari v Ishfaq* 1473, 1474.

Syed 53 Ind Cas 961. The exception of a fraudulent operation of the instrument of one of the parties may introduce the fraudulent intent which accompanied and characterized the giving of the instrument. Similarly a person who is suing one of the parties to a sealed instrument upon a cause of action not arising out of the instrument may show that the instrument was in fact a mere device concocted to mislead out of dealing with one or the other parties to it and that it did not truly represent the relation between those parties. It is to be observed however that the right of a stranger to vary a written contract by parol is limited to rights which are independent of the instrument. *Brown Parol Ev* § 28. So when one, although not a party to the instrument has his claim upon it and seeks to render it effective in his favour as against the other party to the action, by enforcing a right originating in the relation established by it or which it founded upon it, the parol evidence rule applies. *Burr Jones v* § 449. A person who does not claim through the settlor is entitled to challenge the

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Saving of provisions
of Indian Succession
Act relating to wills

100. Nothing in this Chapter contain-
ed shall be taken to affect any of the provi-
sions of the Indian Succession Act (X of
1865), as to the construction of Wills.

and limits so far as relates to immoveable property situate within those territories
reversed in 22 C 788 (P C)

PART III.

PRODUCTION AND EFFECT ON EVIDENCE

CHAPTER VII

OF THE BURDEN OF PROOF.

101. Whoever desires any Court to give judgment as to
any legal right or liability dependent on the
existence of facts which he asserts must prove

Burden of proof

that those facts exist.

When a person is bound to prove the existence of any fact,
it is said that the burden of proof lies on that person

Illustrations

(a) A desires a Court to give judgment that B shall be punished for a
crime

in the
to be true

A must prove the existence of those facts

Burden of Proof—its origin and place in the law of Evidence "Whoever
enters in a legal controversy needs to know with precision what is in dispute,
in point of substantive law in point of fact, and in point of form All this
he must know before he reaches the trial. The ascertaining of it belongs,
properly, to the period when you state your case, the period of pleading. It
matters not what be the purpose of pleading, whether, as in the Roman system, it

must be conducted. Science, therefore, acknowledges no burden of proof. In the same way, in legal proceedings *in rem*, where the personal element of litigation is in a measure subordinated to the social interest in the ascertainment of the truth regarding the status of persons, the legal relations of property and the like, the assignment of the position of a burden of proof is deemed of much less importance than in personal actions. In the latter class of proceedings, however, both the mentally untrained nature of the jury and the limits of time which should be devoted to the trial of any particular case have united with the fact that the tribunal must sit, as a rule, at a particular place whither it is necessary that before the trial should go upon the truth of some definite issue known as in the trial by battle, which a defensive combat. This

knowledge it was the appropriate and characteristic mission of pleading to furnish and upon the issue raised by the pleadings one of the parties had the burden of proof and the other had not. (*Cambridge v. Lo* §§ 930, 931)

Duty of the person alleging the case to prove it The burden of proof in this sense means "the burden of establishing a case whether by a preponderance of the evidence or beyond a reasonable doubt" (*Rest. T.* p. 258) or as *Prof. W. C. Brown* states "that of a person of the law or the fact." (*U. S. v. ...*)

it is a profitable object and not otherwise. Here it is seen that the advantage is with B, and the disadvantage with A, for unless A succeeds in persuading M, upon the point of action A will fail and B, will remain victorious. The burden of proof, or, in other words the risk of non persuasion, is upon A. This does not mean that B is absolutely safe though he does nothing, for he cannot tell how much it will require to persuade M, a very little argument from A might suffice, or if M is of a rashly speculative tendency the mere mention of the proposition by A might without more effect M's action so that it may be safer in any case for B to say what he can on his side of the question, and thus in fact he as well as A, has more or less risk in the sense that there are always chances of A's persuading M no matter how trifling his evidence and argument.

and constitute rights and duties of pleading and procedure, which tips of duty and assign one or more of the requisites of the tribunal's action the total facts that can in any event be involved, and in the second place the law of pleading will further subdivide and apportion these facts. *Ibid.* If the pleadings consist of the allegation of certain facts by the plaintiff, and their denial by the defendant, the burden of proving the facts be they negative or affirmative, is upon

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plaintiff has given *prima facie* evidence which, unless it be answered, will entitle him to have the question decided in his favour, the burden of proof is shifted on to the defendant as to the decision of the question itself. This con-

that the jury, after considering the evidence, are left in real doubt as to whether they are to answer the question put to them on behalf of the plaintiff, in that case also the defendant has been able to satisfy the minds of the whole jury of the burden of proof.

Burden of proof as meaning the duty of the one party or the other to introduce evidence. The party having the risk of non persuasion (under the pleadings or other rules) is naturally the one upon whom first falls this duty of going for and since with there is no first upon the proponent (a term convenient for designating the party having the risk of non persuasion). This duty, however, though determined in the first instance by the burden of proof in the sense of the risk of non persuasion, is a distinct one, for it is a duty to the party if it is not satisfied found in an opinion of Lord Justice W. R. 50, 53. 'In order to make my opinion clear I should like to say briefly how I go on. If he

successful if no evidence at all was given at this particular point

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which are rebuttable; by presumptions of fact of the stronger kind, and by

Muthua, 7 C 225

Burden of proof whether shifts. "After all the evidence is in whether introduced by the plaintiff or by the defendant, it must appear that the person who had the burden of proof has a preponderance of the evidence in his favour, if he would win the case. The burden of proof fixes upon the party who has the duty of first going forward with the case. If he fails to introduce any

duced that he has proved his case. If, however, he has introduced sufficient evidence to make out what is known as a *prima facie* case, then, in the absence of evidence to controvert such case, the jury would find—for the Judge would so instruct them—in his favour. Right here we run up against that other sort of burden of proof noticed above, which is not really burden of proof at all, but only the duty of that party to produce some evidence. When the plaintiff

Phelp *Et* 7th *Ed* p 30. Burden of proof means the burden of establishing a case as well as the duty or necessity of introducing evidence. The burden of establishing remains throughout the entire case exactly where the pleadings originally place it. It never shifts. The burden of proof in the sense of introducing evidence may shift constantly as evidence is introduced by one side or the other, as the one scale or the other preponderates. *Phola v Bhagwant Rao* 13 C P L R 159, *Robins v National Trust & Co*, 101 Ind Cas 303=1927 P C 515; *R v Stoddard*, 25 T L R 612, *Radhakrishnan v Jagahu* 80 Ind Cas 791 P C =47 M L J 329, *Yellappa v Tippana*, 33 C W N 239 P C, *Man Mohan v Mathura* 7 C 223.

Scope of the section Before the Court can proceed to hear a case, it is obviously necessary to determine which party shall begin, or upon whom the burden of proof of the whole case lies. The general rule is that the party who alleges any matter in issue must prove it. There is only one fact in issue, but there is a question of proof of some one being on one party. The position is practically this, that the party against whom judgment would be given must prove it. *Cockle* *Et* 123. This section is based on the general rule that the burden of proof lies on the party who asserts the affirmation of the issue, or question in dispute, according to the maxim, *Ei incumbit probatio qui dicit non qui negat*. (The burden of proof lies upon him who asserts not upon him who denies)—a rule which the common sense of mankind at once asserts, and which, however occasionally violated in practice has ever been recognised in jurisprudence. *Hest* § 269. So it is often said that the burden is upon the party having informed the affirmation of the allegation. But this is not an invariable rule, nor even always a significant circumstance, the burden is often on one who has a negative assertion to prove, a common instance is that of a promisee alleging non performance of a contract. It is sometimes said that it is upon the party to whose case the fact is essential. This is correct enough, but it merely advances the inquiry one step, we must then ask whether there is any general principle which determines to what party's case a fact is essential. The truth is that all the cases are decided on the burden of proof.

the burden of proof upon the plaintiff. If the defendant pleads a defence, and avoidance, admitting the plaintiff's allegation, but alleging further facts by way of defence, the matter is then thrown upon the defendant, if denied. But if it is there, the burden of proof of some is on one party and of others on the other party, &c. and distribution of the burden of proof is so even if the question is general.

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102. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Illustrations

(a) A sues B for land of which B is in possession and which, as A asserts, was left to A by the will of C, B's father

If no evidence were given on either side, B would be entitled to retain his possession.

Therefore the burden of proof is on A

(b) Asues C for money due on a bond

The execution of the bond is admitted, but B says that it was obtained by fraud which A denies

If no evidence were given on either side, A would succeed as the bond is not disputed and the fraud is not proved

Therefore the burden of proof is on B

Scope of the section The general burden of proof is upon the party who would be unsuccessful in the case if no evidence at all were given, and such party

'65 In that case *Alderson B* by simply ascertaining on a proper test is, which party Now here, supposing no

uld be entitled to the verdict,

what particular point from the defendant's former and so on continues to be

which section 101 exists upon *n v Sahchulla Paramant*, in the sense of the burden *Inde Darlatz v Ganesh*, *Kali Parshel*, 23 W R.

owing to particular circumstances, the very slight evidence may suffice to discharge the side—"slight evidence" means evidence which does not go the whole length of proving a particular fact, but merely suggests it *Hur Djal v Raj Krisho*, 21 W R 107 The burden of proving the nature of the transfer is on the person whose success depends upon the substantiation of the case set up by him *Kashibai v Ladwan*, 8 N L R 18 evidence of either side, that side must lead *Ghasi v Manga*, A I R 1930 710, see also *Dadri v Baynath*, A I I

103. The burden of proof as to any particular fact lies on

Burden of proof is that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

to be established, and which must be specially alleged in the pleading (2) Those which are merely implied from the allegation of affirmative facts, since the existence of such affirmative facts, precludes the negative thereof". *McKelvey's* Jt § 33 In an action for malicious prosecution, the plaintiff made two main allegations (1) that the defendant prosecuted him (2) that he had no reasonable cause for

The burden is an affirmative fact by force of the through not affirmative

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tion of a negative, and we have been pressed with the proposition that, when a negative is to be made out, the onus of proof shifts. That is not so. If the assertion of a negative is an essential part of the plaintiff's case, the proof of the assertion still rests upon the plaintiff. The terms 'negative' and 'affirmative' are, after all, relative, and not absolute. In dealing with a question of negligence, that term may be defined to adopt the definition adopted in *McKelvey's* Jt § 33. Whenever a person asserts affirmative facts as present or absent, or that an eventment which he is bound to prove positively. As to the burden of proceeding — a case of introducing evidence — that at the start is with the plaintiff. He must make a *prima facie* case on his negative proposition before the defendant need go forward with any evidence. Of the second class of negative propositions, perhaps as good an illustration as any is found in a case where the plaintiff seeks to recover upon an express contract. In his complaint he sets

contract — is upon him, the burden of proof still remains with the plaintiff. Ho

where it is clearly seen, that it is burden of proceeding. *McKelvey's* Jt § 33. The general rule of evidence is that if in order to make out a title, it is necessary to prove a negative the party who avers a title cannot be absolved from proving it. *Moshuq Ali v Husumissa* 114 Ind Civ 113 = A I R 1929 Oudh 20, *Pulin Behari v Watson* 9 W R 190 = B L R Sup Vol 901 (F B)

Burden of proving fact to be proved to make evidence admissible

104 The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

Illustrations

- (a) A wishes to prove a dying declaration by B. A must prove B's death.
- (b) A wishes to prove, by secondary evidence, the contents of a lost document. A must prove that the document has been lost.

Scope of the section. The burden of proof in the sense of adducing evidence, applies not only to matters which are the subject of express allegation in the pleadings, but also to those that relate merely to the admissibility of

evidence or to the construction of documents. Thus a party desiring to adduce a hearsay statement (*R v Thompson*, [1893] 2 Q B 12) or secondary evidence of lost deed, must first establish the conditions necessary to its reception, and if a document be ambiguous, the party tendering it has the burden of showing that his interpretation thereof is correct. *Fateh v Williams*, (1900) A C 176 181 (P C), *Halsbury* Vol 13, p 437. "The illustrations point the section which is but a rather verbose way of stating, that no per on shall be allowed to give evidence before he has shown that he is in a legal position to do so." *Ant* 290

General principles as regards burden of proof. The doctrine of *onus probandi*, only applies to a case when the mind of the Judge is in doubt as to the point on which side the balance should fall in coming to a conclusion. As a case proceeds the *onus* shifts from one party to another. *Appa v Typpala* 8-33 C W N 1238. The question on which importance when evidence has been given by both sides. *Sati Pro* 117. *Golinda Chander*, 33 C W N 227=A I R 1929 Cal 325, *Ye* 197 461. *Dari* 119 Ind Cas 222=A I R 1929 R 183, *Gopal Rao v Hirralal*, 83 Ind Cas 246=A I R 1925 Nag 225, *Minabai v Yadro*, 103 Ind Cas 166, *Fateh* 1238. *Din v Anwar Khan* 9 Lah 221=112 Ind Cas 89=A I R 1928 Lah 47. *Some Dairly v Official Assignee* 30 Bom L R 290=107 Ind Cas 233-47. C L J 339=A I R 1928 (P C) 77, *Sunder Mull v Satiya Kuntar*, 55 I A 9=47 C L J 403=32 C W N 657=A I R 1928 (P C) 64=51 M L J 127 (P C), *Jeorathani v Mt Goura*, 95 Ind Cas 826, *Juanenba Nith v Nalini* 87 Ind Cas 565=A I R 1925 Cal 1269, *Gopal Rao v Hirralal*, 83 Ind Cas 246=A I R 1925 Nag 225, *Pahram v Kamalji*, 78 Ind Cas 330=1924 Nag 363, *Sawasatti v Yadorao* 78 Ind Cas 887, *Sonaji v Durlal* 75 Ind Cas 782, *Goverdan Das v Hari Lal*, 69 Ind Cas 541, *Mahomed v Myyubali* 27 C W N 329, *Nihal Chand v Gurditta* 1923 Lah 641, *Muhammad v Johana* 190 L J 404=1922 Oudh 774, *Sri Chudambara v Veerarama*, 45 M 586=45 M L J 640, *Almas v Majub*, 36 C L J 196=(1922) Cal 461, *Donamali v Jalu* 1 P L T 102=5 P L J 151=55 Ind Cas 841, *Sultan Si* 1920. *Ram Mahiton*, 5 P L J 87=(1920) P 131=54 Ind Cas 652, *Jhara Singh v Tolikaram*, 52 Ind Cas 860. Burden of proof depends on circumstances of each case. *Durlal Prosad v Nasir Ahmed*, A I R 1925 Oudh 16. The placing of burden of proof wrongly is immaterial provided no party is prejudiced. *Hem Chandra De v Amiyobala*, 52 C 121=84 Ind Cas 693=A I R 1917 Cal 61. The question upon which party the *onus* of proving any particular point falls, when the *onus* is on the plaintiff, in its proper use, means, that, if a fact has to be proved, the person whose interest it is to prove such slight, upon which a Court could not find a judgment and decree upon that point. *Ant* 290. Mis-placement of the burden of proof is only a ground for remanding the case if the circumstances had been such that by placing the burden of proof on the wrong party, somebody has been misled or taken by surprise, or had no opportunity of adducing evidence. *Hullal v Ramgati* 11 C L R 581. Where the *onus* is upon the defendant to prove a certain fact, but the plaintiff, without waiting for the defendant's evidence took upon himself to prove it, he cannot subsequently say that the defendant did not discharge *onus*. *Sajan Kuntar v Joti Prosad*, 10 Ind. Cas 223. The burden of proof must be placed according to the pleadings and any preliminary examination of the parties, and, for the final decision of the case, the burden remains upon the same party. When the party who has to discharge the burden of proof, has made out a case, the burden shifts on to the other party. When, however, the Judge has heard the whole case, he must weigh the evidence and decide upon the point at issue. The burden of proof shifts on to the other party.

evidence for both parties, placing the burden of proof as it was originally placed. S. Supposing the party upon whom the burden of proof lies makes out a *prima facie* case, the burden shifts to the other party to rebut it.

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Varjuandas, 11 Bom L R 625=50 B 515. Where the relevant facts are before the Court and all that remains for decision is what inference is to be drawn from them, the question of burden of proof is not pertinent and this is more so at the appellate stage. *Trimbakdas v. Bhatnagar*, 27 N L R 75=A I R 1930 Nag 225 [47 I. A 76=43 M 567 and 49 I A 236=43 M L J, 610 (P. C.) and A I R 1922 Cal 160 Pol]; see also *Muhammad v. Ibroze*, A I R 1932 P C 228. In a case of two rival claimants to properties in the hands of stakeholder, there is equal burden of proof upon both. *Kallari v. Karuppa*, 120 Ind. Cas 379=A. I R 1930 Mad 341.

BURDEN OF PROOF—ILLUSTRATIVE CASES.

Abadi—stranger in possession. Where a stranger is found to be in

possession of the property, the burden of proof is on him to show that he has a license were such as disentitled the proprietor from re-entry on the site. *Bhagwan v. Raghular*, 86 Ind. Cas 763=A I R. 1925 Nag 396.

Assault. In a case for damages for loss of a son, who had been

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sum to be due
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21 W. R. 202

certain sum, which had been exceeded, the suit is not liable to be dismissed unless the defendants show that they were neither servants nor contractors for profit and loss as between
had received

C. L. J. 245 = A. I. R. 1925 Cal 418 Where the accounts between two parties were settled and a balance struck, the burden is on the defendant to prove payment of the amount due *Indraj Mal v. Laje Ram*, 6 Lah. L. J. 593 = 86 Ind. Cas. 333 = A. I. R. 1925 Lah. 278 Every presumption is made against a person suppressing account books and on proof of a *prima facie* case the party suppressing has the burden of proving the contrary. *Venkataramayya v. Pitchaimo*, A. I. R. 1925 Mad. 164 Where a plaintiff sues for a specific sum of money due on a balance sheet, the burden is on the defendant to prove that the balance sheet is correct.

settled and a party alleges error in the accounts, the onus of proving it rests on that party *Kaloo v. Nutha*, 47 P. R. 1866 The onus is not on the defendant to prove the contrary, but on the plaintiff to prove his allegation that he has in the account, or in the balance sheet, a credit to the plaintiff, credited to the defendant have been made. The fact of payments by a banking firm being disavowed, the mere general statements of the banker to the effect that his books were correctly kept was held not sufficient to discharge the burden of proof that lies upon him, the books of the firm being at most corroborative evidence, particularly, if he has the means of producing much better evidence. *Baboo Gunga v. Baboo Indrajit*, 23 W. R. 320 P. C. The fact of payments by a banking firm being disavowed, the mere general statements of the banker to the effect that his books were correctly kept was held not sufficient to discharge the burden of proof that lies upon him, the books of the firm being at most corroborative evidence, particularly, if he has the means of producing much better evidence. *Baboo Gunga v. Baboo Indrajit*, 23 W. R. 320 P. C. Where the burden of proving that there was no consideration rests on the defendant, the burden of proving that there was no consideration rests on the defendant. *Dol Singh*, A. I. R. 1932 Lah. 135

Acknowledgment Where some

Acquiescence In case of acquiescence the onus is on the defendants to show (1) that they made a mistake as to their legal rights, (2) that they had expended money on the faith of that belief, (3) that the plaintiff knew of the existence of the mistake. *Shankar v. Shankar*, 13 C. L. J. 100 = 100 Ind. Cas. 100 = A. I. R. 1925 Cal 100

Admission of liability Where a defendant admits a debt but pleads that it is barred, he has to prove his plea. Where however there is no such admission, the plaintiff has to prove everything required to entitle him to a decree. *Subbarayalu v. Vengalra*, 123 Ind. Cas. 197 = A. I. R. 1930 Mad. 742

Adverse possession It is for the plaintiff to prove possession prior to the alleged disposssession. *Raja Jagadindra Nath*, 10 C. W. N. 100 = 100 Ind. Cas. 100 = A. I. R. 1925 Cal 100 A co-parcener holding an item of property left undivided at a family partition is a mere co-owner. He must prove that he has been dispossessed of the property by the defendant to his knowledge. *Vaigapuri v. Mad*, 27. The burden of proving title by adverse possession lies upon the person claiming to have acquired title by such possession. *Kanhaya Lal v. Girwar*, 27 A. L. J. 1106 = 119 Ind. Cas. 6 = A. I. R. 1929 A. 763; *Madha v. English*, 7 C. L. R. 364 P. C.; *Jano v. Narasimha Das*, 117 Ind. Cas. 803 = A. I. R. 1929 Lah. 549 *Nawab v. Gopinath*, 13 C. L. J. 626, *Nayamtulla v. Nana*,

Agent. The burden of proof is on the person dealing with any one as an agent, through whom he seeks to charge another as principal. He must show that agency did exist, and that the agent had the authority he assumed to exercise, or otherwise. *Assaram Bridican v Mathura Das*, 11 M. L. J. 111. In a suit to recover advances alleged to have been made by the defendant to the plaintiff, the plaintiff is to prove the payment to and receipts from the defendant. *Gomathi Robert Watson v Sridhar*, 10 W. R. 421. Agents entrusted to collect money on account of an insolvent estate are each of them, bound to prove to the court that the money was actually paid to the insolvent. *Chandrasekhar v. S. S. S. S. S.* Sums charged by an agent on account of a principal are not a debt due to the principal, but a debt due from the principal to the agent. *Chandrasekhar v. S. S. S. S. S.* A suit against an agent for a debt due to him from the principal lies on the agent of the principal. *Chandrasekhar v. S. S. S. S. S.*

Arbitration When a Court is affirmed that a suit has been instituted in contravention of an arbitration-agreement, it has a discretion to stay the suit, but the burden lies on the plaintiff to show that some sufficient reason exists why the matter should not be referred to arbitration, and not on the

1. defendant to show that no such reason exists *Folkart v Fatch*, 61 Ind C 322; *Ganesh Das v Dunga Das*, 60 Ind. Cas 776.

Attachment claim Although where the assignee of a decree wishes to execute it, it is incumbent on him to apply under s 232 Civil Procedure Code 1882, yet, if at the date of the assignment, the judgment debtor's property is already under attachment, it is not necessary for the assignee to apply for a fresh attachment *Hafiz v Abdullah*, 16 A. 133 = A W. N 1894, 13

Auction purchaser The right of a purchaser at a revenue sale in getting rid of encumbrances is such that he is in many cases allowed to have the benefit of a certain presumption, and by virtue thereof to throw the burden of proof on his opponent, the presumption being founded mainly upon the principle that every bigha of land is bound to pay and contribute to the public revenue, unless it can be brought within certain known and specified exceptions *Nityanand v Banshi*, 11 C W N 341; *Forbes v Meer Mahamed*, 20 W. R 45

Avoidance of encumbrance A person seeking to obtain the benefit of s 12, Bengal Act VII of 1868 must give some *prima facie* evidence to show that the encumbrance which he seeks to avoid is an encumbrance falling within the terms of the section—that one who previously held it suit by the purchaser of it (Ben Act VIII of 1869), to on the ground by an authentic plaintiff to plaintiff is *Reilly*, 13 C 1

Award Any party wishing to set aside an award on the ground that the arbitrators in arriving at an unfair award either refused to hear somebody or heard the n e hearing undertakes the burden of satisfying nath, 82 Ind

Bailment burden of proof l would have exer *Bhau*, 74 Ind Ca by the plaintiff, it lies on the defendants to show that they took as much care of the goods as a man of ordinary prudence would, under similar circumstances t the loss occurred notwithstanding *D I Ry*, 82 Ind Cas 1897, 44

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25 C W N 100, *Swaiman v Men*
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is not the true owner, the plaintiff can only rely on his claim as purchaser in good faith for value from a person who, by the act of the true owners had become the

plaintiff. *Rullo*
masses a receipt in
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ly on the debtor

Bill of exchange T
of a hundi to prove the
non presentment of the hundi
tional circumstances that the drawer could not have suffered any damage owing
to non-presentment *Dhulka Mal v Raghubar*, 88 Ind Cas 915-23 A L J 861

Bond Where the consideration for a bond is disputed the burden of
proving repayment is on the person who alleges that the bond was not repaid
88 Ind Cas 251-A
as to interest on the bond
the bond without his consent
Where an unregistered document, such as a bond or a receipt or an entry in an
account book the execution of which is admitted or proved contains an admis-
sion or recital of the payment of consideration the onus lies on the person who
alleges that the bond was not repaid
1 R 1925 Lah 64

1930 Mad 476

Boundary disputes The onus lies on the person setting up the plan to

of a boundary removed by one of the parties
general direction proved by the other party
lies on the party who removes it *Judoonath v Kaste Aristo* 19 P C=10 M I A 81
Icelandund v Moheswar Singh, 3 W R 19 P C=10 M I A 81 Where a
decision of the High Court fixing
Council would not interfere with the
s boundary was of the vague and
nature of the allegations

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held that plaintiff should prove that lands are within his *talook* *Ganga Maish v Madhub Chunder*, 10 W R 413 In a question of boundary between a *lakheraj* tenure and in favour of one or of his case *Beerchun* parcels of land alleged to have been comprehended in one plot, where one held by

part of the land held by

Nath, 12 W R 79 ..

alleging that the land

beyond his proper be

the landlord *Rhuday*

recover a quantity of land by rectification of certain survey awards, which he averred demarcated erroneously the boundary between his *zemindary* and the *zemindari*s of the defendants, it was held, on a consideration of the evidence that his suit was rightly dismissed, because he failed to prove the position or existence of a stream, which he stated was the true boundary between the

Deo Bahadur Singh v Deo Bahadur Singh, 13 W. R. P. Q. 7

In ..

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entitled to recover possession of any land which the drying up of the water way lay bare *Monohur Choudhury v Nursingh Choudhury*, 11 W. R 272

Carrier A common carrier in this country is liable as a carrier, that is he is responsible for the safety of the goods entrusted to him in all events except when loss or injury arises from the act of God or King's enemies. But his liability for loss or injury is limited to the goods actually received by him.

contract ..

carrier, on ..

negligence ..

Ind Cas ..

C L J 639.

suit is barred under Order

Abdul Qadir v Imamdin

the plaintiff in a suit under

abolish the right which he

190-A I R 1929 Pat 579

In a suit instituted under Order 21, rule 63, the onus of establishing that the

to the rule

121 Where

of 1859, held

under s 235

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23 Plaintiff

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who impugned that order by the present suit, to prove title under the purchase alleged by her by proving both the payment of the purchase-money and her possession since the purchase and the lower Court was therefore held to have been wrong in having thrown the burden of proof in the suit on the defendant *Govind Airmaram v Santal*, 12 B 270 On a claim being denied

the ordinary tests of

main business

Vol II, 230

to establish

ing failed in

that he acquired property in good faith and for consideration lies on him

Narayan v. Dhisraj, 2 N. L. R 87. In a suit to set aside an order dismissing

a claim petition, the burden will be on the plaintiff to show that he was entitled to the property. *Nachaappa v Chunnian*, 4 L W 362=36 Ind. Cas. 791 S. 10

Call for evidence of a document drawn by the party proceeded
den of proving
d. Cas. 1055=11

L. J. 633

Confession In a cor
tion that the confessio
confession recorded under
v *Emperor*, A. I. R 1932 Sind 201.

Consideration Where it has been admitted or proved that an admission of consideration has been made or executed in a document, the onus of proving want of consideration rest
Paras Das v Suraj Bhan,
the execution of which
of payment of consideration, the onus is upon the person executing the document to prove that he did not receive the consideration *Firm of Ganda Singh, v Nur Ahmed*, 96 Ind Cas 820=A I R 1926 Lah 653; see also *Ma Ti v Ramaswami Chetty*, 5 Bur L J 49=95 Ind Cas 384, *Pannun Ram v Ghulam* 27 P L R 403=7 Lah 297=96 Ind Cas 630=A I R 1926 Lah 491 Where a document was concluded in the following terms — I the undersigned promised to pay to A the sum of Rs 1,000 payable during the period of one year without

it would have been if the suit had been brought against the mortgagor alone

Cas 732

from the recital therein drew an inference that the bond was supported by consideration Held, that there was no error of law committed by the lower Court. *Jadu Mondal v Jogendra Nath*, 63 Ind Cas 303. Where a person

4. executes and delivers a conveyance of his property and also gets it registered and the sale deed contains a recital of receipt of consideration, the burden of proving want of consideration for the sale is on the vendors *J H Power v Dan Shue*, 1 Bur L J 22 In a case of a formally registered document in which the receipt of consideration has been recited, the onus of proving that consideration did not actually pass is on the party who alleges non payment. In the case of an entry in an account book, however, the onus is on the party alleging payment to prove it *Rulla Singh v Tunia Mal*, 60 Ind Cas 701. Either party to a document may show that there was in fact no consideration though consideration was recited therein or that the consideration was in reality different from what was stated in the deed *Krishna Kishore De v Narendra Bala*, 31 C L J. 333 In a suit for redemption brought by the purchasers of the equity of redemption, the sale deed was a registered document and contained an admission of the executant that full consideration had been paid but the mortgagee contended that the sale was a sham and without consideration. Held, that the burden was on the executant of the deed and on people claiming under him to prove that what apparently happened did not happen *Ehtisham Ali v Jamina Parsaul*, 48 Ind Cas 365 (P C) = 24 O C 272 It is the established practice of the Courts in India in cases of contract to require proof that consideration has been actually received, according to the terms of

assignees of the equity of redemption, the onus of proving that the mortgagee did not in fact receive the moneys which he acknowledged by his execution of the mortgaged deed to have received, is *prima facie* on the plaintiff *Mulammaf Ahahyar v Muhammad Samuddin*, A. W N. 1887 245

Contract. The party who alleged that a contract is conditional on the happening of a certain contingency must prove the existence of such a condition by clear and unequivocal evidence. *Firm of Ganesh Lal v Firm of Debi Lal*, 10 Ind Cas 265 = A I R 1927 Lah 481 The ordinary presumption is in favour of the legality of a contract and it is for those who assert that it was not entered into to perform the contract in the manner recited therein, to prove their assertion *The Firm Kamari v Firm Ganpat Rai Ram Juman*, 7 Lah 442 = 91 Ind Cas 304 = A I R 1926 Lah 318 The burden of proving that there was an act which rendered a contract impossible of performance lies on the party to the contract who alleges it *Wuzeera v Moonooden*, 77 P R 1866

Contention. Where on the decree as passed, several defendants were made jointly and severally liable, in the subsequent suit for contribution by one of them, it was for any defendant to prove that he was not liable to pay the full share, to plead and prove it did not shift the onus from who *Baksh*, 95 Ind Cas 1007 = A I R 1927 Lah 481 for money admittedly paid by account of defendant's share of the revenue, where the defendants plead previous payment to the plaintiff, the onus of proving such payment lay upon the defendants *Mahadeo v Laboree Misser*, 24 W R 250 Where in a suit between two judgment debtors to recover money alleged to have been paid in satisfaction of decrees obtained against them by J, who had been wrongfully

that he entered into a contract with the plaintiff, the onus was on the plaintiff to prove that he was not liable to pay the full share, to plead and prove it did not shift the onus from who *Baksh*, 95 Ind Cas 1007 = A I R 1927 Lah 481 for money admittedly paid by account of defendant's share of the revenue, where the defendants plead previous payment to the plaintiff, the onus of proving such payment lay upon the defendants *Mahadeo v Laboree Misser*, 24 W R 250 Where in a suit between two judgment debtors to recover money alleged to have been paid in satisfaction of decrees obtained against them by J, who had been wrongfully

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Copy right—Infringement of Where in a case of infringement of copy right the complainant produces his certificate of registration and the book published at that time, and he further testifies that the book is not the same as that produced by his father the *onus* lies on the defence to show that matter contained in the complainant's book was also contained in the previous book *Emperor v Sheo Charan*, 131 Ind Cas 865=A I R 1931 All. 353=1931 A. L. J 304

Criminal cases Where the accused gave the deceased a beating the previous day and were seen by various persons on the occasion, it was highly impossible that they would murder the person the next day *Sheo Ram v Emperor*, 1923 Lath 480 It is the first principle of criminal law, that where a statute creates a criminal offence, the ingredients of that offence must be strictly proved, and that where the doing of an act without authority or without consent is made a criminal offence, and the statute does not expressly put upon the accused the proof of such consent or authority it is a necessary part of the case for the prosecution to negative by evidence such consent or authority *Brij Basi v. Queen Empress*, 19 A 74=A W N 1896, 178 In a criminal case, the burden

Courts should presume the absence of such circumstances *Queen Empress v Prag Dutt*, 20 A 459=A W N 1898, 117, see also *Queen-Empress v Bai Mahakar*, Rat Un Cr C 820

involving a departure from the o
by the person setting it up *Guin*
27 I A 238=23 A 37 P C
must be proved by those who asser
318, *Lattu Begam v Nawab Mo*
Mohantlal, 9 C P L R 47

Damages In a suit for damages for malicious prosecution the plaintiff
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Debt and Debtor The burden of proving that a certain payment was made in full satisfaction of a debt is on the person alleging it *Daraula Kania v Jitendra Nath*, 49 C L J 560 It is elementary law that when a creditor sues the debtor for the payment of a debt and the defence is that the debtor paid

1. the debt to another person it is for the debtor to prove that the other person had or had been held out to the debtor by the creditor as having had the authority of the creditor to receive payment of the debt on behalf of the creditor *Muham-
mad v Les Taneries Lyonnaises*, 49 M 435=A I, R 1926 P. C 34=31 C W
N 1 When a debtor pleads tender of payment as a ground for not being

Ranee Shurui Soondur
69 If a debt is proved or
debtor *Mobarik v Seena*
against the son of a deceased
proving the
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his case by the fact of an admission of the plaintiff that the actual consideration was different from that described in the bond *Lal Singh v Chaitram*, 15 C P L R 24 The burden of proof that a creditor by agreeing to an arrangement whereby a firm indebted to him conveyed to two of the partners thereof certain property in trust to pay off his and certain other debts and thereby release the remaining members of the partnership lies upon the parties who were originally liable to such creditor *Kalaikhan v Madho*, 3 N W. P 129

Declaratory title In a suit for a declaration of title by plaintiff who has failed to establish his title to establish obligation to tory *Abd il* or immovable advantage of *Mega v* proprietor *Arana*, 2 his own *hammel* as heir

to his uncle's property and for the reversal of a deed of sale from that uncle set aside to it sion of to the ould be on the

defendants the burden of proving the document by primary evidence or by secondary evidence on properly accounting for its non-production *Rim v Raghu*, 7 A 738

Dedication In a suit for a declaration that a certain property is *waqf* the onus is on the plaintiff, to prove that the property has been dedicated as *waqf* *Akhum v Channan*, 55 Ind Cas 210

Deeds In a suit to set aside an order of the Small Cause Court in which that Court had held that a certain *kobala* was *mala fide*, the onus is on the plaintiff that it has been executed *bona fide* *Ishan Chandra v Rakimuddin*, 2 B L R A C 326 N=10 W R 412 Where it is found on the face of a deed creating a trust that the transaction is *bona fide*, it is for the creditors who impugn the *bona fide* nature of the trust to prove their plea *Kasheshurree v Krishna Kamini* 2 May 557 Where certain deeds are duly executed and

towards another every character towards and *bona fide*, without influencing the donor, who has acted independently of him *Wajid Khan v Eicay Ali*, 18 C 545=18 I A. 144 (P C) The genuineness and due execution of a bond does not dispense with the necessity of proof

of consideration therefor *Baboo Ghansham v. Chulouret*, W R 1864, 197 S.
Where the executant of a mortgage deed denies receipt of consideration in a

the executant of the receipt of the whole sum in cash, where it is proved that
onus is on the
Lala Lakshmi

Easement Where in a suit for possession, the defendant claims a right of easement the onus is on him to establish it *Duni Chand v. Nizamuddin*, 26 P. L. R. 301 Where in a suit for injunction, the defendant sets up that he had acquired a right of easement, the onus is on him to prove that he had acquired an easement *Bya Ram v. Brij Lal*, 26 P. L. R. 42-A I R 1923 Lab 297. Where the right to have a way of water course over certain land is disputed by the owner thereof and an order under s 532 of the Criminal Procedure Code, has been passed by the Magistrate in favour of the person claiming the right, the fact of such an order having been made will not be sufficient to relieve the latter from the onus of proving the claim in a subsequent suit by the owner to establish his right to the exclusive use of the land *Obhoy Churn v. Lukhy Monee*, 2 C L R 555 In an ejectment suit, the defendant in possession though a trespasser, is entitled to require the plaintiff to prove that he has superior title *Kalu v. Barsu*, 19 B 803 In a case where an easement is claimed over defendant that he acquired it by grant or use W R 281. In a suit to remove an allegation that plaintiff is entitled plaintiff was bound to make good the R 83

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Kumar, 91 Ind Cas 761-A I R 1926 Cal 559 In a suit by the recorded
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to eject the defendant the latter sets up the existence of a tenancy entitling him to retain possession, the burden is upon him to prove the nature of his tenancy and his rights to remain in possession *Probodh Chandra v. Birsinha*, 71 Ind Cas 319 Where the recorded tenant of a holding who has been paying rent

where the ownership of the plaintiff is proved and the defendant sets up a right of permanent occupancy, the burden of proving such a right is on the defendant.

Enhancement of rent In cases of enhancement of rent, onus lies on the landlord to show that he is entitled to such enhancement. *Birendra v Ali* 33 C L J 605; *Hein v Kali*, 26 C 832; *Raj Krishna v Kali*, 11 B L R App 122. *Rama Nath v Jote Kumar*, 11 C. L. J 1; *Surja v. Danteswar*, 24 C 251. But when in such a suit the tenant pleads that no enhancement should be granted on the ground that he is a tenant at fixed rate, the onus is on the defendant to prove that he is such a tenant. *Gudar v Brijnandan*, 5 C W N 880.

prove that he is such a tenant. *Gudar v. Brihmandan*, 5 C. W. N. 530.
Execution. Under section 102 of the Evidence Act when once the execution is made, it is a fact that the mortgagee has executed the mortgage. If the mortgagee is a party to the suit, the mortgagee is bound to prove that he is such a tenant. *Gudar v. Brihmandan*, 5 C. W. N. 530.
Execution. Under section 102 of the Evidence Act when once the execution is made, it is a fact that the mortgagee has executed the mortgage. If the mortgagee is a party to the suit, the mortgagee is bound to prove that he is such a tenant. *Gudar v. Brihmandan*, 5 C. W. N. 530.

Ind. Cas. 500. A person to whom a decree is transferred must prove a title to execute it if his title be disputed. *Ganesh v. Chundee*, 6 W. R. 126. Where, in execution of a decree, a share of an estate is sold, and the representatives of the purchaser absorb more land than belonged to that share and bring a suit to declare their rights, held that there should have been a clear finding as to what was the extent of the share originally purchased and that, in determining the claim of the representatives to the increase, the burden of a very distinct nature should be laid on them. *Urnopoorna v. Rajbullu*, W. R. (1864) 151. Where a person denies to have signed a particular document the burden of proving that the document signed was not intended to be what it was expressed to be is initially on him. *Ghasi v. Rup*, A. I. R. 1937 Lab. 602.

Lab 002

Fraud. The burden ordinarily on the person *Fatima*, 94 Ind Cas

that it was not registrable in the place where it was done and proves that there was no fraud on the part of the purchaser to set aside a sale in execution of a decree on the ground of fraud, the onus lies upon the plaintiff to make out that the sale was fraudulent. *Ramprasad v Imtari*, 1 B. L. II S N 20 Where the defendant alleged that plaintiff's assignment was fraudulent, the onus was on him to prove that the transaction was

was not bona fide *Lalbehari v. Srinath* 3 B L R A C 73 Note Where a decree holder in a suit to establish his claim to certain property as that of his judgment debtor, al- the defendant was fraudulently executed to prove the fraud

Tala P. Das v. S. S. S. S. c)=10 W R 321 property thereby, it is for and suing to recover the those facts which constitute to bring the suit The

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by a Court of Justice in finding out whether or not a transfer is fraudulent can only be furthered with propriety by the testimony of the vendor who personally knowing the whole circumstances of the case can dispel the suspicions attaching to it. The story can then be subjected in all its particulars to cross-examination. It is an error to rely on the abstract doctrine of burden of proof. *Mohideen v. Mahomed*, A I R 1930 Mad 665 (41 I A 98 P C and 57 M L J 566 P C rel)

Good Faith. The burden of proving the good faith and fairness of a transaction is on the person who claims benefit thereunder. *Gunabai v. Malihal* 89 Ind Cr 625-A I R 1925 Nag 399

Government revenue. In a suit for contribution for money admittedly paid by the plaintiff into the Government treasury on account of the defendants' share of the revenue, where the defendants plead previous payment to the plaintiff, held, that the burden of proving such payment was upon the defendants. *Mahadho v. Lahore*, 21 W R 250

Guardian and Ward. Where an alienation by a guardian is questioned by a minor after attaining majority, the onus of proving that the transaction was for necessity is not always and necessarily very heavy on the defence and if it is established that the consideration for the alienation impugned went in discharge of previous debts and there is evidence that some of such debts were contracted to save the minor's estate, the burden of proof, though in the first instance it lay upon the defence, is shifted on to the minor and it is he who must show that the alienation effected by him was not for a purpose binding upon him. *Krishna Rao v. Ajasami Panlay* 21 Ind Cas 496, see also *Hanuman Pershad Pandey's Case*, 6 M I A 393, *Syed Lutf Hosseins Case* 23 W R 424, *Omed Rai v. Shua Lal* 65 D R N W P 611, *Sardar Kirpal v. Balwant Singh*, 17 Ind Cas 686-1 C W N 309 P C.

Hindu Law—Adoption. Where the plaintiff wants to have the adoption by the widow set aside as being without authority, the onus lies upon him. *Hurdial v. Roy Krishna Bhoomiel*, 21 W R 107. In a suit for possession of land by he as acq me D's adoption because the case of a person not recognized as an adoption, it is a very strong presumption in favour of the validity of his adoption. *Ramkrishna v. Siru Narayan* A I R 1932 Mad 198-62 M L J 116. But in ordinary cases grave and serious onus rests on persons seeking to displace natural succession by act of adoption. *Datt Ram v. Nani Mal* A I R 1930 Lah 579

Hindu Law—Adoption by Hindu—2—Where a legal heir of alien

Nabakishore v Upendra, 26 C W. N. 322 (P. C); *Nari v. Kasi*, 19 C W N 370 (P. C); *Radhakishore v. Mirtoonjoy*, 7 W R 23; *Debi Prosud v Golap Bhogal*, 40 C 721 (F B)

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was a competent act of the widow *Cataly Veneata v Collector of Musulipalam*
10 W. R. 47 P C = 11 M I A 619 So in a suit by heir of a mortgagee against
a Hindu proprietor's heirs, in possession after the death of his widow to enforce
a mortgage by her, the burden of proving the money to have been advanced to

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benefit of the estate (2) But where, in the particular instance, the charge is
it the estate, the *bona fide*
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serted, or the benefit to be
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The lender is bound to enquire into the necessities for the loan, and satisfy
himself as well as he can, with reference to the parties with whom he is dealing
that the manager is acting, in the particular instance, for the benefit of the
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The authority of the *shebait* of an
to that of the manager of an infant
14 B L R 450-23 W R 253,
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Hindu Law—Inheritance
by right of inheritance, in the
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Cas 220

the *onus* clearly depends
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the shoulders of another *Sarjoo Prosad v. Deadat Lal*, 1 O W. N. 958=105 S. 1
Ind Cas. 410=A. I. R. 1927 Oudh 499

Hindu Law—Partition Where in a suit for possession on the ground of a prior partition the plaintiff proves severance of interest, it will be on the defendant, who sets up a case of some of the brothers remaining joint to prove that plea *Challa Lakshnakka v. Bala Rangappa*, 91 Ind Cas 285=A. I. R. 1926

57=38 M. L. J. 521=22 Bom. L. R. 59

Hardat v. Dhandu, 84 Ind Cas 1011; *Harnarayan v. Suresh*, 1925 P. 101;
Sincar's Hindu Law, 312

Hindu Law—Stridhan A Hindu wife seeking to exempt property from responsibility for her husband's debts, must clearly prove that she had *stridhan*, and that she purchased the property with her self-acquired funds *Brojomohan v. Radha Kumaree*, W. R. 1864, 60

1925 All 811

Husband and wife Where a deed of gift by husband to wife is attached as being colourable, person attaching the same must prove the allegation *Nabab Mirza v. Nabab Fakar*, A. I. R. 1932 P. C. 13

Income tax When an assessee states that he has no income from a particular source and officers of the Income-tax Department disbelieve him, it is

In re Bishnu Priya Chaudhury 13 Ind Cas 303=50 C. 301=A. I. R. 1921 Cal 337

Insolvency In a suit against an insolvent and the Official Assignee for

A. I. C. Deenase, 25 C. W. N. 330

Insurance A claimant under a life-policy must prove that the age of the insured is correctly given *Oriental Government Assurance Co. v. Narasimha*, 25 M. 201. But no such onus is cast upon the claimant where the age has been proved and admitted by the company in writing *Ibid*

Inventions It is for the person who claims an exclusive privilege under the Inventions Act to prove that the facts exist which entitle him to the privilege claimed. *Elgin Mills Co v Muir Mills Company*, 17 A 490

Jurisdiction It is for the party, who seeks to oust the jurisdiction of the ordinary Civil Court. *do* District Board of Tanjore v *Kannusami* Ali Md v Halim, 1928 L 121 (1 B), Rang Cas 256

Lakhiraj and rent free If the land in question is within the *zemindari* of which *patni* the lands are really within claim those lands as *Nishtar Pirattor*, the onus rests on the defendants. *Bar v Hrishullesh* 49 C L J 516-A I R 1929 Cal 40

Land Acquisition Where a public body seeks to acquire, under the Land Acquisition Act, any portion of a block, which is structurally connected with the main building, it must show that the portion is not reasonably necessary for the use of the house. *Venkataram*

Landlord and tenant In an ejectment suit the landlord comes into Court with the allegation that the tenants had cut his *rahi* crops. The tenants alleged that the *rahi* on the defendant crop was shown to

himself, the onus is on him to show what the actual yield is. *Bhuneshuari v Sukhdeo* 6 Pat L T 419-85 Ind Cas 566-A I R 1925 P 605. When a tenant of lands in India in a suit by his landlord to eject him from them, sets up a defence that he has a right of permanent tenancy in the lands, the onus of proving that he has such a right is upon the tenant, and proof of long *Nainapillai v, Ramanathan* A L J 130, see also *Gopala v* 69. Where a tenant sets up the Revenue Records to show the fact that the rent which he pays ceases. *Ram Das v Chaitan*

Legitimacy Where a person claims under section 112 of the Evidence Act to be the son of a deceased person, he must prove that he was born within 280 days of the death of the deceased, and that he was in the possession of the deceased at the time of his death. *those who contest his legitimacy* *Prilok v Luchma*, 6 Bom L R 477. It is the duty of the person who claims to be the son of a deceased person to bring evidence to show that he was born within 280 days of the death of the deceased, and that he was in the possession of the deceased at the time of his death. *J 1-1*

M L J 56

Limitation The burden of proving that a payment was made which would bar the plaintiff who claims the debt is on the plaintiff. *Atindra Nath*, 49 C L J where limitation is pleaded, for to suit *Bhiloo v Mattu* 1327; *Dinobanath v James* R 67. In all actions for ejectment where the defendants are admittedly in possession, and a portion where they had been in possession for a great number of years, and a portion

claim of title, it lies upon the plaintiff to prove his own title. *Mohania v. Mohesh*, S. 1
16 C 573=16 I A. 23 (P. C)

W R P. C 293

marriage took place to bring
marriage, when there is
an inference can be drawn
from the oral evidence
of *Nabab Ali*, 5 C L J.

1 (P C)

Mercantile Usage Where a contract is alleged to be an "office dhara" and where the "office dhara" refers to the practice of certain firms as seen in printed forms used by them, a plaintiff relying on the term "office dhara" must produce and prove the printed forms above mentioned *Dassomal v Ram Chand*, 83 Ind Cas 304=A I R 1925 Sind 80

Mesne profits Where mesne profits are claimed by a person out of possession

20 N L R 52=75 Ind Cas 826=1924 Nag. 117

Minor. Where a deed is executed by a person who alleges himself to be a minor at the time of execution, a heavy burden rests upon him or his representatives when they set up the defence of minority *Sadiq Lal v Joykishore*, 47 C L J. 628=32 C W N 874=A I R 1928 (P C) 152 The burden of proving that a particular deed is void on the ground that its executant was a minor at the time of its execution lies on the person who makes the allegation *Munna Lal v Kameshor Dutta*, 114 Ind Cas 801=A I R 1929 Oudh 113 The burden of proving that the executant of a document is a minor lies on the person alleging it *Surja Prasad v Joti Prasad*, 87 Ind Cas, 415=L R 11 All 283=47 A 493=A I R 1925 All 631 In a suit brought on the basis of a contract, the burden of proof lies on the party who asserts that he was a minor at the time of contract *Ahanhantal v Debi Prasad*, L R 11 All 219=87 Ind Cas 778=A I R 1925 All 99, *Swaj v Joti Prasad*, L R 6 A 283=87 Ind Cas 445=47 A 493=A I R 1925 All 631, *Narain Singh v Churanji*, 22 A L J 161=79 Ind Cas 945 When the validity of a contract is questioned on the ground that the executant is a minor, it is for the plaintiff to establish by *prima facie* evidence that the contract was valid and entered into by a person who was competent to do so *Dachcha Lal v Hosan King*, 66 Ind Cas 814=(1922) All 210 It is on the executant of a deed, who pleads that he was a minor on the date of the execution of the deed to prove his plea *Kandhai v Mohammad*, 63 Ind Cas 525; *Niamutullah v Gopaj* 53 Ind Cas. 136=6 O L J 376

Mortgage Where a mortgage deed contains an admission of receipt of consideration before the Sub-Registrar, the onus is upon the mortgagor to disprove his admission *Gorindappa v Sontal*, 109 Ind Cas 149 Where land is mortgaged without possession and possession is subsequently given to the

Cas 679 In a suit for redemption the onus is on the plaintiff to prove the mortgage he set up, that it was still subsisting *Binla v Sanhata Prasad*, 95 Ind Cas 915 Where a mortgagor admits execution of a mortgage deed, it is for him to prove that he has not received the consideration recited in the deed *Jinca Ram v Jhanda Singh*, 92 Ind Cas 316 Where land is mortgaged without possession and subsequently possession passes to the mortgagee, the burden of proving

that the transfer in which possession was given was an *antichresis* sale in the person alleging it. *A T Chetty v. Feroz Khan & Akbar*, 3 Bore 27 = 6 Ind. Cas. 1011 = A. L. R. 1920 Rang 377. Where the rate of interest is usually but the burden lies on the mortgagee to prove that there was reason to borrow at so high a rate. *Sagar Singh v. Mohanrao*, 57 Ind. Cas. 1035 = A. L. R. 1920 O. 5.

Ordinarily the onus is on the *quodammodo* mortgagee to prove the validity of the foreclosure proceedings. It does not cease to be so simply because there was an entry in the register that mutation had been effected in favour of the mortgagee. *Kullu v. Suran*, 26 P. L. R. 751. Where the execution of the mortgage was a fraudulent and merely a

to it up. *Chandu v. D...* of proving a mortgage upon the mortgagor. *Pamji v. Mohan Lal* 71 Ind. Cas. 654 = 1923 All. 411. Where once a mortgage has been admitted the onus is on the mortgagee to show that the mortgage has been extinguished by subsequent sale. *Mohd. Mahomed v. Mahomed Ali* 1 A. 85 = A. L. R. 1930 P. C. 91 = 51 C. L. J. 31 P. C.

Notice. Where the defendant led evidence on the issue as to notice they cannot be said to have held back their evidence because of the imposition of the onus on the other side. *Ladha Pamji v. Jinda Pamji* 1923 Lah. 339. The burden of proving a purchase without notice of a prior mortgage or contract is on the subsequent purchaser and the rule is the same for moveable as well as immovable property. *Maung v. Bansi*, 70 Ind. Cas. 325 = 2 Bur. L. J. 63 = 1913 Rang 153. The burden of proof of the giving of notice of the inquiry into the conduct of a person lies on the authority holding such enquiry. *Rangaswami v. Seshan* 4 L. W. 611. Where there is an affidavit of the person serving the notice of proper service thereof, the party who impugns the fact ought to prove that there was no service. *Krishna v. Bhandar*, A. L. R. 1928 Cal. 722.

Partition. Where in a suit for partition defendants resist by setting up acquiescence in their permanent right of occupancy in a part of the land the burden of proving existence of those rights is on them. *Subra nanya v. Subra manya* 56 I. A. 243 = 5 V. 549 = 31 Bom. L. R. 830 = A. L. R. 1909 (P. C.) 156. The onus is heavy on the person who desires to show that certain partition lists were not acted upon and the parties continued to be joint in possession of those lists. *Venkata Krishnayya v. Rangayya*, A. L. R. 1925 V. 865. In a partition suit among Muhammadans burden is on plaintiff to show that it was acquired by the help of joint fund. *Yusuf Mahomed v. Abubaker*, A. L. R. 1925 Sind 26.

that the
v. *Muhfu*
Ramanam

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rdanashin woman, based upon a
to give satisfactory evidence
the lady. *Asifa Bibi*
Cas. 180 = 46 A. 310

Partnership. Where the title of a deceased person to certain properties is disputed and it is shown that those properties belonged to the partnership firm the onus lies on persons claiming through the deceased person to prove that those properties belonged to him at the time of his death. *Amrit v. Tayabali* A. L. R. 1909 Sind 182.

Perpetual and permanent settlements. If a person sets up as against the Government a permanent or perpetual settlement it is incumbent on him to make out that case. *Prosunno v. Secretary of State*, 26 C. 792 = 3 C. W. N. 690.

Possession. In a suit for possession of land the plaintiff has to prove that the land lay within his holding and not for the defendants to prove that it lay outside. *Sati Prosad v. Gobinda*, 56 C. 80 = 33 C. W. N. 27 = A. L. R. 1909 Cal. 375. The burden of proving a subsisting title to a land lies on the party out of possession and the fact that the party in possession is forced to institute a suit under Order 21 rule 103, C. P. Code, does not shift the burden of proof on to him. *Raman v. Feroz Mahomed* 82 Ind. Cas. 861 = A. L. R. 1925 Sind 201. Where in a suit for recovery of possession of land or declaration of title the defendant in possession does not admit the title of the plaintiff but says that the plaintiff is his *benamidar*, it is for the plaintiff to prove that the defendant is not the owner. *Lal Muhammad v. Ayazuddin*

Sheikh, 57 Ind Cas 972. Where the plaintiffs who are in possession of a property before the institution of the suit ask for a declaration of their title and confirmation of their possession as against the defendant, who seeks to disturb the possession, it is for the defendant to show that he has a better title than the plaintiffs *Mahomed Husin Mia v Abdul Hamid*, 50 Ind Cas 131

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Posting of letter The presumption is that if a letter properly directed is proved to have been posted, it reached its destination and was received by the person to whom it was addressed. *Kamlhya v. Khalik* 8 Pat L T 633=102 Ind Cas 821=A. I. R 1927 Pat 305

Pre-emption It is a settled rule of law that a very slight proof will shift the burden to the vendees to prove the actual payment of the price entered in the deed. *Abid Ali v. Har Prosad*, 119 Ind. Cas 459=A. I. R. 1929 Oudh

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is on the vendee to prove that the consideration stated in the sale deed was really paid and there was an actual payment *Ahmadjekhan v Gulmur*, 75 Ind Cas 271.

Promissory note
the burden of proving
Harishar Prosad v Mahab.
632=A. I. R 1931 Pa

on the defence to explain how document bearing defendant's thumb impression came into existence *Sahdeo v. Pulesar*, A. I. R 1930 Pat 593

Railway Cases Where a Railway Company was sued for compensation
to prove loss of goods
to prove wilful neglect
to the terms of risk-

Recital in a deed or other instrument Where a mortgage document was executed by the father of the defendant and contained a recital that the consideration had been received by the executant, the burden lay upon the executant or his representative to prove that the recital was untrue and to satisfy the Court how he became a party to a document which contained untrue recital of this description *Benoybhusan v. Dharendra*, 38 C L J. 114=74 Ind Cas 178 The onus of proving that a document to which a person has affixed his signature does not contain a correct statement of the facts and of the intention of the parties is on the person who makes the allegation *Ramdas v Chandrabali*, 4 Pat. L W 237=44 Ind Cas 399 When a party to a contract alleges that it is different from what on the face of it, it purports to be, the burden of proving his case lies on him, since there is a presumption that a transaction is in substance what it is in form. *Eshoor Doss v Venkata*, 17 M 190 Where the vendor admits receipt of full consideration in the sale deed, the burden lies heavily on him to explain the admission and prove non receipt of consideration. *Johnstone v. Gopal*, 12 Lah. 516=A. I. R. 1931 Lah. 419

Record of rights There being a presumption of the correctness of the entries in a record of rights, a party who challenges any of the same to prove it *Parm* T. 805=A. I. R. 87 Ind. Cas 741= an entry showing a person as possessing occupancy rights, the person who wants to challenge it ought to show it is wrong The mere fact that he was holding

that the transfer in which possession was given was an outright sale lies on the person alleging it *A T Chetty Firm v Mahomed Kasim*, 3 Rang 367=90 Ind Cas 1011=A I R 1 the burden lies on so high a rate *Saga* 750 Ordinarily the onus is on the *quondam* mortgagee to prove the validity of the foreclosure because there was an entry mortgagee in favour of the execution of the

added it was fictitious and merely a party who sets it up *Chindu v Desraj* the burden of proving a mortgage is on the mortgagee to show

Where once a mortgage has been admitted the onus is on the mortgagee to show that the mortgage has been extinguished by subsequent sale *Mahomed v Mahomed*, 57 I A 86=A I R 1930 P C 91=51 C L J 391 P C

Notice Where the defendants cannot be said to have held back their onus on the other side *Ladha Ram v* of proving a purchase without notice of a prior mortgage or contract on the subsequent purchaser and the rule is the same for moveable as well as immoveable property *Maung v Bansi*, 75 Ind Cas 328=2 Bur L J 63=1923 Rang 153 The burden of proof of the conduct of a person lies on the authority *v Seshu* 4 L W 611 Where there is no proper service thereof, the party who impugns the fact ought to prove that there was no service *Krishna v Bhandar*, A I R 1928 Cal 722

Partition Where in a suit for partition defendants resist by setting up acquiescence in their permanent right of occupancy in a part of the land the burden of proving existence of those rights is on them *Subramanya v Subramanya* 56 I A 248=52 M 549=31 Bom L R 830=A I R 1929 (P C) 156 The onus is heavy on the person who desires to show that certain partitions were not acted upon and the parties continued to be joint in spite of those lists *Venkata Krishnayya v Rangayya*, A I R 1928 M 865 In a partition suit among Muhammadans, burden is on plaintiff to show that it was acquired by the help of joint fund *Yusuf Mahomed v Abubucker*, A I R 1929 Sind 26

on a document purporting to be a *rdanashan* woman, based upon a statement to give satisfactory evidence that the document has been explained and understood by the lady *Aisha Bibi v Muhfuzunnissa* 22 A L J 205=L R 5 A 97=78 Ind Cas 180=46 A 810, *Rumanamma v Vmana* 54 C L J 183=35 C W N 633

Partnership Where the title of a deceased person to certain properties is disputed and it is shown that those properties belonged to the partnership firm the onus lies on persons claiming through the deceased person to prove that those properties belonged to him at the time of his death *Ismail v Tayaballi* A I R 1929 Sind 182

Perpetual and permanent settlements If a person sets up as against the Government a permanent or perpetual settlement it is incumbent on him to make out that case *Prosunno v Secretary of State*, 26 C 792=3 C W N 690

Possession In a suit for possession of land the plaintiff has to prove that the land lay within his holding and not for the defendants to prove that it lay outside *Sati Prosad v Gobinda* 56 C 80=33 C W N 227=A I R 1929 Cal 325 The burden of proving a subsisting title to a land lies on the party out of possession and the fact that the party in possession is forced to institute a suit under Order 21, rule 103 C P Code, does not shift the burden of proof on to him *Raman v Fakir Mahomed*, 82 Ind Cas 861=A I R 1925 Sind 201 Where in a suit for recovery of possession of land or declaration of title the defendant in possession does not admit the title of the plaintiff, but says that the plaintiff is his *benamidar*, it is for the plaintiff to prove that the defendant is not the owner, *Lal Muhammad v Ajayudh*

Sheikh, 57 Ind Cas 972 Where the plaintiffs who are in possession. S.
of a property before the institution of the suit ask for a declaration of their
title and confirmation of their possession as against the defendant, who seeks
to disturb the possession, it is for the defendant to show that he has a better
title than the plaintiffs *Mahomed Husin Mia v Abdul Hamid*, 50 Ind Cas
431

Posting of letter The presumption is that if a letter properly directed is
proved to have been posted, it reached its destination and was received by the
person to whom it was addressed *Kamlhya v Khalik* 8 Pat L T 633=102
Ind Cas 821=A I R 1927 Pat 305

Pre-emption It is a settled rule of law that a very slight proof will shift

to show that the property is sold for a price less than what is stated in the sale-
deed Even slight evidence may be sufficient to shift the onus on to the defen-
dant *Shwaja v. Rotram* 89 Ind Cas 768 In a suit for pre-emption the onus
is on the vendee to prove that the consideration stated in the sale deed was
really paid and there was an actual payment *Ahmadyekhan v Gulmu*, 75 Ind
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Promissory note the burden of proving
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Singh, 12 Pat
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on the defence to explain how document bearing defendant's thumb impression
came into existence *Sahdeo v Pulesar*, A I R 1930 Pat 598

Railway Cases Where a Railway Company was sued for compensation
for non-delivery of goods, held that the Railway must first prove loss of goods
and on such proof the onus will shift to the plaintiff to prove wilful neglect
on the part of the Railway or its servants, etc, according to the terms of risk-
note *E I Ry Co v Piyara Lal*, A I R 1928 Lah 774

Recital in a deed or other instrument Where a mortgage document was
executed by the father of the defendant and contained a recital that the consi-
deration had been received by the executant, the burden lay upon the executant
or his representative to prove that the recital was untrue and to satisfy the Court

does not contain a correct statement of the facts and of the intention of the
parties is on the person who makes the allegation *Ramday v Chandabali*, 4
Pat L W 237=41 Ind Cas 399 When a party to a contract alleges that
it is different from what on the face of it, it purports to be, the burden of proving
his case lies on him, since there is a presumption that a transaction is in sub-
stance what it is in form *Eshoor Doss v Venkata*, 17 M 180 Where the
vendor admits receipt of full consideration in the sale deed, the burden lies
heavily on him to explain the admission and prove non receipt of consideration.
Johnstone v Gopal, 12 Lah. 516=A I R. 1931 Lah 119

Record of rights There being a presumption of the correctness of the
entries in a record of rights, the burden of proving the correctness of the same to
prove it *Parmeri* L T.
807=A I R 19. 87=
87 Ind Cas 741=.
an entry showing a person as possessing occupancy rights, the person who wants
to challenge it ought to show it is wrong The mere fact that he was holding

1. without rent is not sufficient *Gouri v Jhanda*, L R 4 A. 372. The entry in a record of the tenant . . . of the 31 Ind Cas 561 . . . favour of the . . . recovery of possession of that land, and that . . . holding, having . . . plot was part . . . A I R 1930 . . .

Registered deed Burden of proving that a registered deed was sham is on the person alleging when he was party to deed *Magaraja v Vendalanni*, A I R 1933 Mad 18

Release In a suit to set aside a release deed on the ground that it was obtained by misrepresentation, and that there was no consent, when the defendant pleads that there was consideration and that the arrangement came to be reasonable, the onus is on him to prove it *Hem Singh v Bagaboto Singh*, 8 Ind Cas 67

Rent Where the rent has never been paid the burden of proof that rent was agreed to must surely lie on the person who asserts it, and that in this case lies on the defendant in the suit for ejectment *Suldeo v Abdul*, L R 4 A 210

Sale Mere denial by the vendor of the receipt of the consideration acknowledge upon the . . . the plaintiff . . . Where . . . performance and under which the defendant was in possession and enjoyment of the subject-matter, and in possession of the title deeds he must establish at least a good *prima facie* title to the relief he seeks *Rampal Ram v Subha Singh*, 4 Pat L J 17-53 Ind Cas 83

Sale for arrears of revenue In a suit by a ryot against an auction purchaser, claiming protection from ejectment under the proviso of section 37, Act XI of 1859, the onus of proving the character of the holding is on the ryot *Donmu v Pudnun* W R 1364, Act X 123 Where a taluk is sold at a revenue sale under Act XI of 1859, the burden of proving that under tenures in the taluk fall under any of the exceptions to s 37 of that Act, lies on him who alleges the under tenures to be within those exceptions *Rash Behari v Hara Mones* 15 C 555 The right . . . of . . . the burden of proof on . . .

Specific performance In a suit for specific performance of a contract if the plaintiff proves his prior contract, the burden of proving a subsequent *bonafide* transfer for value without notice under section 27(b) of the Specific Relief Act lies on the party alleging it *Ramdani v Gumani*, 10 Pat L T 307 -119 Ind Cas 70-A I R 1929 Pat 300

unknown, etc . . . the margin is co . . . to specification . . . specification . . . were according . . .

Vendor and purchaser . . . his property . . . the vendee to . . . the original . . .

1. . . A person who derives his title through a purchase must prove that his vendor had a title in the property sold *Gulab Din v Monji Ram*, 38 P. L J 1919-51 Ind. Cas 575

Wills 'In the Court of Probate' says *Baron Pyle* in *Baker v Ball* 2 Moo P C 317 at pp 319, 320 "Where the *onus probandi* most undoubtedly

the deceased, he is bound to pronounce his opinion that the instrument is not entitled to probate For if the party upon whom the burden of proof of any fact

proved that a Will has been duly executed by a person of competent under

propounding the Will, and he must satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable testator In all cases the *onus* is imposed on the party propounding a Will, it is in general discharged by proof of capacity and the fact of execution for which the knowledge of and assent to the contents of the instruments are assumed *Barry v Butlin* 2 Moo P C 482 (484) *Brojesuar v Rasil* 85 Ind Cas 581, *Woomesh v Pashnom* 21 C 279 *Surend a v Ramdas* 47 C 1043-24 C W N 860, *Rajendar v Ramjaval* 5 Lah 263 *Mullabai v Waman* 69 Ind Cas 572, *Lala Singh v Kumar Bijoy Protap* 41 C L J 360 *Raj Bachan v Shatanji*, 5 O L J 519-47 Ind Cas 963 *Murad v Khalim* 12 Ind Cas 49-114 P W R 1911 *Prasannomoy v Bailuntha* 25 C W N 779 *Rajdulari v Krishna*, A I R (1926) Pat 269, *Bundesuari v Mt Baisalha* 24 C W N 674, *Sorajini v Haridas*, 26 C W N 113 *Robins v National Trust Co Ltd* 101 Ind Cas 903 (P C)-A I R 1927 P C 515 *Rangaia v Sheshappa* 101 Ind Cas 416 The *onus* of proving capacity to execute a Will lies on the person who wants to propound the Will *Mrtibai v Jamselji*, 26 Bom L R 479-29 C W N 45-1924 (P C) 28 The burden of proving a Will lies on those by whom it was propounded *Bhagbhari v Khatun* 80 Ind Cas 118 The qualified admission of a party regarding the signature of a testator does not shift the burden of proving the non execution of the Will to him *Kesho v Ithai* 8 N L J 173-80 Ind Cas 468-A I R 1925 Nag 427

105 When a person is accused of any offence, the burden

Burden of proving of proving the existence of circumstances that are of accused bringing the case within any of the General comes within excep Exceptions in the Indian Penal Code, or tions within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances

Illustrations

(a) A accused of murder alleges that, by reason of unsoundness of mind he did not know the nature of the act

The burden of proof is on A

by grave and sudden provocation,

Code provides that whoever except in the case provide for by section 33, voluntarily causes grievous hurt, shall be subject to certain punishments

A is charged with voluntarily causing grievous hurt under section 32

The burden of proving the circumstances bringing the case under section 33 lies on A

Scope of the section The rule that every one is presumed to be innocent till he is proved to be guilty, is sometimes spoken of as if it was peculiar to the administration of criminal law In the Indian Evidence Act, s 101 illustration

(1) it is given as a particular instance of the general principle equally applicable to a suit for ejectment and to a trial of murder. The rule merely means that a person who is accused of a crime is not bound to make any statement or to offer any explanation of circumstances which throw suspicion upon him. He stands before the Court as an innocent man till he is proved to be guilty. It is the business of the Crown to prove him to be guilty, and he need do nothing but stand by and see what case has been made out against him. As far as the case of the crown is concerned he cannot be called upon to take part in the proceeding except in so far, for his own protection, the Court may question him under s 342 of the Criminal Procedure Code. If there is a piece of evidence against the prisoner which might be cleared up one way or the other by a word from him he is not bound to say that word. He is entitled to rely on the defence that the evidence as it stands is inconclusive and that the Crown is bound to make it conclusive without any help from him. Further in making out their case the prosecution have to get rid of every presumption against it, and to a certain extent there is a presumption in favour of innocence. When the case for the Crown has closed it is for the prisoner or his adviser, to consider whether any case which he need answer has been made out against him. This will depend on the nature of the charge. The definition of every offence must be satisfied by proof and if the proof fails as regards any necessary item the whole fails. Assuming the minimum of proof to be supplied the Crown has offered evidence which may be sufficient for a conviction. The question is whether it is sufficient. It may be that the evidence is unworthy of belief, or that, if believed it is consistent with

the acquittal and then the innocence has vanished. There is no presumption in favour of the existence of any particular fact which is necessary to make out innocence. If it is necessary for a man's defence to establish an *alibi* he must prove it. [vide section 103 illustrations]

Reg v Stokes 3 C & K 185. So under the provisions of this section an answer setting up the right of private defence must be supported by evidence giving a full account of the transaction from which the charge against the accused person arises. *In re Jamsheer Sirdar*, 1 C L R 62. Unless a plea that the acts with which an accused person is charged as constituting an offence came within one of the exceptions named in the Penal Code is distinctly taken by the accused the Court is not competent to infer from the evidence in the case that any such exception exists in favour of the accused. *Queen Empress v Chakhar*, A W N 1893 209, *Queen Empress v Sulha* A W N 1893 210. So this section is an important qualification of the general rule that, in criminal trials, the onus of proving everything essential to the establishment of the charge against the accused lies on the prosecution. *King Emperor v Nga Chit* U B R 1906, Excise 7.

This section is at variance with what was formerly the law in regard to those exceptions which are called special. *Mark Ey* 81. General exceptions are those applicable to all crimes and are stated in Chapter IV of the Penal Code. Special exceptions are exceptions restricted to a particular crime. Formerly of special exceptions, except one which is really a part of the charge against the accused, the onus of proving the exception was on the accused.

Indian Evidence Act (I of 1872) was thus stated by *Princep J* in, *In the matter of the Petition of Shibu Prasad Pauling*, 1 C 121 (130) "The Penal Code contained a chapter of general exceptions to offences (Chapter IV), and for certain offences special exceptions were provided. The Code of Criminal Procedure made especial provisions for these exceptions and the burden of proof to establish any of them. The effect of ss 235 and 236, was that it was for an accused person to establish the existence of any of the general exceptions; while s 237 provided that if the charge denied the existence of any of the especial exceptions to an offence, the absence of circumstances constituting such exception was to be assumed. This was the state of the law without Presidency towns until the Evidence Act I of 1872 and the Code of Criminal Procedure of 1872 were passed, when ss 235 and 237 were repealed with the rest of that Code, and in their place s 105 of the Evidence Act was enacted, which threw the burden of proof on the accused to prove the existence of any general or special exception." So far, then, as the Special Exceptions are concerned, an important alteration has been made in the law. *Field J* v 350. But in *Empetor v Hapt Hussun*, 32 A 451 at p 456, the Court observed: The Evidence Act in laying down the principle set forth in section 105 has at times been said to have introduced something new and to have put the law regarding criminal cases upon a different basis than the one upon which it stood before it was enacted. We are unable to take this view. Undoubtedly, in criminal trials, the onus of proving every particular element, if we may use the term, which goes to the making of an offence lies upon the prosecution, and if the prosecution do not prove all such elements and room is left for doubt, it is for the accused to satisfy us that a principle, but putted upon *King v. Hill on Crimes*, Vol 3, p 407, *Reg v James Johnson*, (1902) 1 Q B 510. In the case of most general exceptions the circumstances which bring the case within a general exception are circumstances within the special knowledge of the accused person and lie within the rule that when any fact is specially within the knowledge of any person the burden of proving that fact is upon him." In *R v. Turner*, 5 M & S 206, *Lord Ellenborough* said: "The question is upon whom the *onus probandi* lies; whether it lies upon the person who affirms a qualification, to prove the affirmative, or upon the informer who denies any qualification, to prove the negative. There are, I think, about ten different heads of qualification enu-

& P 468, *Heath J* in *H v Stone*, 1 East 639, the Judges were equally divided on the point. So even in England there has been some doubt whether if a statute creating a crime contains exemptions, exceptions, or provisos, the indictment should negative them under a plea of not guilty. 1 K B 540, an indictment and chattels of her husband, nor that she had taken them when leaving or deserting, or about to leave or desert the husband. It was contended that in as much as a wife cannot at common law be guilty of stealing from her husband, the indictment was bad as

05 was whether the exception was part of the enacting clause, or tacked on in a proviso or included in another clause of the statute. *Russell on Crimes* p 162. In *R v ...* the rule laid down in *R v ...* is not applicable. At Gib ... any reference to exemptions contained in ... Vict C 109 ... negative any of them. And it was held that the rule above stated applied equally to negative and ... 431, *Russell on Crimes* p 1 support the defence of ... dence ... believed and the jury have their ordinary duty of deciding a question of fact on the evidence before them. *Mahomed v Emperor* 30 C 318-1973 Cal 31

General exceptions. Under this section the burden of proving the existence of circumstances bringing the case of an accused person within any of the general exceptions in the Penal Code is on the accused and the Court shall presume the absence of such circumstances. But this does not mean that an accused must lead evidence. If it is apparent from the evidence on the record whether produced by the prosecution or by defence that a general exception would apply then the presumption is removed and it is open to the Court to consider whether the evidence proves to the satisfaction of the Court that the accused comes within the exception. *Anand v Emperor*, 71 Ind Cas 69-13 A 329. In a defence of insanity, the onus lies on the person alleging it is the person charged. *King Emperor v Shrofin*, A W N 1901 1 15 13. The party setting up the right of private defence, to prove that he was within the exceptions stated in the Code. *Veeranadan v Emperor* 1912 M W L 113-15 Ind Cas 310, see also *Emperor v Gullu*, A W N 1914 113-1 Cr L J 427. Although this section places on the accused the burden of proving in a criminal trial that they have acted within their legal rights in exercise of the right of private defence of property, still this burden can be discharged by the evidence of witnesses for the prosecution as well as for the evidence for the defence on such plea being set up. *In the matter of Khatun Mukherjee* 11 C L R 237. Where an accused person has raised a plea inconsistent with the defence which would bring his case within one of the general exceptions ...

from the evidence given for the prosecution or to be found guilty on the record. *King Emperor v Wajid Hasan*, 7 A L J 133 37 A 101-11 Cr L J 374-6 Ind Cas 559. bringing the case of accused. *Aung Myat v Emperor v Ali Raja*, 26 Cr L J 310. When one man takes away the life of another ...

R 1930 Oudh 408 of proof in certain already performed it which such a plea necessarily follows it is the duty of the Court to give the benefit of it. *Mingal Ganda v Emperor*, 25 Cr L J 107-61 Ind Cas 901-1925 Nag 37.

Special exceptions. Under the Criminal Procedure Code 1901, it was necessary, in a charge upon a section of the Penal Code containing general exceptions, to aver the absence of any special exception. *In re ...* or general exception of circumstances contained in any shall presume that ... Ind Cas 259-11 Cr L 612. The onus to show that any offence falls within ...

a general exception of the Gambling Act, is upon the accused and it is for him to show, in order to bring the case under s. 10 of the Gambling Act, that the game played is a game of mere skill. *Ram Nuar v Emperor*, 15 Cr. J. J. 276-23 Ind. Cas. 181. The burden of proving the exception of good faith is on the accused. A mistake of law does not make an exception under s. 79 of the

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the last part of section 11 of proceedings before Magistrate on or complaint in any such case shall negative any exemption, exception, proviso or condition in the statute on which the same shall be founded, it shall not be necessary for the prosecutor or complainant in that behalf to prove the affirmative thereof. *Emperor v. A. J. L. T. 187-1 L. B. R. 319*

Penal Code means no more and no less than 'unless authorized, or not having

Division, 4 D. & A. 40.

When a person is charged with the possession of any property

itself. So in a defamation case, when once the complainant has proved that the reputation, it rests with the accused. *Razak v Gauri Nath*, 4 P. W. *Gowamma v. Verianna*, 11 Mys. has to regard the absence of grave injury is proved by the accused. 19 C. W. N. 653-21 C. L. J. 377

-16 Cr. L. J. 561-30 Ind. Cas. 113 (F. B.)

Burden of proving fact especially within knowledge.

106. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Illustrations

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

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to injustice at least the production of expense and delay. In order to prevent this, it has been established as a general rule of evidence that the burden of proof lies on the person who alleges the fact which lies more peculiarly cognizant.

Ph & An
 6 T R 57; *Calder v Rotherford*, 3 B & B 302; *Sunderland Marine Insurance Co v Kearney*, 16 Q B 925; *Best Ev* § 274.

Not a general rule. The characteristic, then, of the burden of proof (in the sense of a risk of non-persuasion) in legal controversies is that the law divides the process into stages and apportions definitely to each party the specific facts which will in turn fall to him as the pre-requisites of obtaining action.

or rule which incidence the party nor even negative assertion to prove; a common instance is that of a promisee alleging non-performance of a promise whose case the enquiry

careless or careless, in part on the fairness of putting the burden on one or the other, and thus in part on the consideration which of the parties has the means of proof more available. This last consideration has often been advanced as a special test for

to be kept in mind in There is then, no one

the subject matter of a party's allegation (whether affirmative or negative) is

Scope of the section. This is an exception to the general rule. Where the subject matter of a party's allegation (whether affirmative or negative) is

peculiarly within the knowledge of his opponent it lies upon the latter to rebut such allegation. *Phip Et* 36, *Atrath v N E Ry Co*, 11 Q B D 110; *Pouell v Mc Glynn*, (1902) 2 Ir R 151; *Holth v Ross*, L R 11 Q B 531, 541, 543. In *R v Turner*, 5 M & S 296, 211, *Bruley J* said "I have always understood it to be a general rule that if a negative averment be made by one party, which is peculiarly within the knowledge of the other the party within whose knowledge it lies, and who asserts the affirmative, is to prove it, and not he who avers the negative." This rule is applicable, whether it be affirmative or negative, and in civil or criminal cases. *Dickson v Evans*, 11 T R 69. It is only reasonable that where one party can easily produce what holds him harmless and the other party have great difficulty in

equally within the control of each party, then the burden of proof is upon the party averring the negative, but when the opposite party must, from the nature of the case, himself be in possession of full and plenary proof to disprove the negative averment and the other party is not in possession of such proof, then it is manifestly just and reasonable that the party which is in possession of the proof should be required to adduce it, or upon his failure to do so, it must be presumed it does not exist, which of itself establishes a negative. *Durr Jones* § 181. For instance where a carrier has undertaken to carry goods safely, fire of insurance, when in contingencies. It within the knowledge

of the defendant or prisoner, a general sense of convenience shifts the burden of proof; as for instance where a hawker or pedlar stands charged with trading, without a license it is easy for him to produce his license, and so end the discussion, whereas it might throw the most serious impediment in the way of the prosecutor.

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Where the goods are solely under the control of the bailee the fact as to when loss, destruction or deterioration occurred is a

of great difficulty, upon which there are conflicting authorities. Cases may be suggested of great difficulty on either side of the general question. Suppose under the English game laws an unqualified person is prosecuted for shooting game without the license of the lord of the manor, and after the alleged offence and before the trial, the lord dies and no proof of license, which may have been by parol can be given? Shall he be convicted for want of such affirmative proof or shall the prosecution fail for want of proof to negative it? Again suppose under the law of this commonwealth it was made penal for any person to sell goods as a hawker and pedlar without a license from the select men of some town in the penalty, and he was not duly licensed. To obtain more than three hundred towns must be cited and it may be said, that the difficulty of obtaining proof is not to supersede the necessity of it, and enable a party having the burden to succeed without proof. This is true, but when the proceedings are upon statute an extreme difficulty of obtaining proof on one side amounting nearly to impracticability, and great facility of furnishing it on the other side if it exists leads to a strong inference, that such course was not intended by the legislature to be required. It would no doubt be competent for the legislature to frame a statute provision, as to hold a party liable to the penalty who should not produce a license. Besides, the common-law rules of evidence are

to them to be considered as they arise. In the present case the Court are of opinion that the prosecutor was bound to produce *prima facie* evidence, that the defendant was not licensed, and that no evidence of that averment having been given, the verdict ought to be set aside. The general rule is that all averments necessary to constitute the substantive offence must be proved. If amounting to a confession, it could not be affirmed, which there

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is to sustain it. The prosecutor, in general, is not called upon to prove negatively all that is stated in the information as matter of disqualification. In *R v. Turner* all the learned Judges concur in that principle. I concur in all the observations upon which the judgment of the Court in that case was founded; and I think every one of them is applicable in principle to this. The general principle and the justice of the case are here against the defendant. It is urged, that if we decide against the defendant we shall open the door to a great deal of inconvenience, that by no means follows, this man might have produced his license without any possible inconvenience, which would at once have relieved him from all liabilities to penalties. Probably the whole enquiry before the Magistrate was as to the fact of selling the ale, and that nothing was said about the license, but however, I think by the general rule, the informer was not bound to sustain in evidence the negative averment that the defendant

negative, whether a book should be produced, or an examined copy, and many other questions of that sort where no one can arise when the defendant himself produces his license. This therefore, not being one of the excepted cases, but a case falling directly within the general rule I am of opinion that judgment must be given for the crown. *Apothecaries' Company v Bentley*, Ry & M 159=1 C & P 535, was decided upon the same principle. That was an action for a penalty, under the Apothecaries Act, 1815 (55 Geo III C 104), for practising as an apothecary without having obtained the certificate required by the Act. All the counts in the declaration contained the allegation that the defendant did act and practise as an apothecary, etc., "without having obtained such certificate as by the said Act is directed". No evidence was offered by the plaintiffs to show that the defendant had not obtained his certificate. The plaintiffs having closed their case, counsel for the defendant submitted that there must be a non suit. *Abbott C J* said "I am of opinion that the affirmative must be proved by the defendant. I think that it being a negative the plaintiffs are not bound to prove it but that it rests with the defendant to establish his having a certificate". *Cf R v Harris*, 10 Cox 511, *Magdalen Hosp v Knolls* 8 Ch D 709 724 (C A). This section cannot be utilised to help persons who are representatives of other parties and who step into their shoes. *Ragharendra Rao v Venkataswami*, 1929 M W N, 752-30 L W 966-A I R 1930 Mad 251. Where a person is charged with having been a member of an association declared unlawful by the Government the burden of proof is not on the accused to prove that he discontinued his membership. It is for the prosecution, to prove that he continued to be a member even subsequently to the notification by Government. *Emperor v Sripath*, 55 B 484=33 Bom L R 90-A I R 1931 Bom 129.

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6. Plaintiff to prove that the land was lakhera village in putnee Nubo Krishna v Pioratha holding lands of considerable extent under a zemindar, it is a matter peculiarly within his own knowledge of what that holding consists, and if he alleges that one or two plots occupied by him are held under a different title, it is for him to show it Ram Coomai Ray v Peej Gobind, 7 W R 535 In a suit for pre-emption, where the pre-emptor claims the

But very proof upon the ho mu t he in gican Singh v Sheoporgriah 29 A 618,

v Dhamraj v A 203-A 203, 204, 205; Makham v Jahan, 16 A L J 533 But the date of the child's birth or death is not a fact specially within the knowledge of its father It is a fact which

A's wife that the purchase money 17 M L J 339 Where the defendant company intentionally in respect of the goods to land the plaintiff acted on to deny that such cash

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on to the incumbrancer protected interest The occupancy is a matter s and the onus under s 16 C W N 779=15 Ind Cas 30, see also Jogesh v Honnu

a tax imposed upon the averred that the tax had the plaintiff within the on the defendant Muncipalman of the Darujur order to apply this section in the nature of corporations and individuals in v Chairman, Ranch mortgage is contested by

that the bond was executed and also asserted that the ff to prove his a contract if it Jodi Dhallee the limits tract Act, for loss of fire, the the Contract time of the loss f from proving re part of the ition Co Ltd)=1913 M W

In a case where the question is whether a particular act was or was not within the scope of an agent's employment the burden of proving the limit of the agent's authority is on the principal, in as much as the character of the authority is a matter specially within the knowledge of the latter. *David M. Bruce v. M. K. K. Co.* 45 Ind. Cas. 822, see also *Sultan v. Behari*, 15 C. W. N. 273; *Srikishen v. Jodhari*, 45 Ind. Cas. 291; *M. K. K. Co. v. M. K. K. Co.* 45 Ind. Cas. 81. *Midan v. Praymath*, 61 Ind. 64 Ind. Cas. 883, but see *Jinks v. Thuker*, 21 Ind. Cas. 181, *Ishurnal* 196.

An accused person is always entitled to hold his tongue, but where the only alternative theory to his guilt is a remote possibility, which, if correct, he is in a position to explain, the absence of any explanation must be considered in determining whether possibility should be disregarded or taken into account. *Smith v. Emperor*, 43 Ind. Cas. 105-19 Cr. L. J. 149. The fact that a Muhammadan girl below the age of 15 years has attained puberty is a fact within her special knowledge. *Khondakar*, P. Code lies in mentioned circumstances.

Where all the circumstances go to show that the intention of the accused was to employ a girl as a prostitute as soon as she was physically ready for the purpose, the burden of proving that she intended to wait until the age of majority had been reached is on the accused. *Khetramoni v. Emperor*, 35 C. L. J. 451-1922 Cal. 539. Where property is entrusted to a servant and such servant fails to return the property or to account for it or gives an account which is shown to be false and incredible it is ordinarily a reasonable inference that he has criminally misappropriated the property so entrusted to him and dishonestly converted it to his own use. In such cases the Courts are entitled to draw hostile inferences and presumptions from the action and statement of the servant. The provisions of 106, 114 of the Indian Evidence Act, can be applied. *Sonameah v. King Emperor*, 2 Cr. L. J. 100-1922 Cal. 100.

If he is not able to show what he has done with the property, the Court may infer that he has converted it to his own use. *Sonameah v. King Emperor*, 2 Cr. L. J. 100-1922 Cal. 100. If he is not able to show what he has done with the property, the Court may infer that he has converted it to his own use. *Sonameah v. King Emperor*, 2 Cr. L. J. 100-1922 Cal. 100.

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instrument renders it suspicious it is only reasonable that the party claiming
under it should remove the suspicion *Henman v Dickinson*, 5 Bing 183
Clifford v Parler, 2 M & Gr 910, *Lord Palmouth v Roberts*, 9 M & W
471 *Lord & Bright Rf Co v Lurelough*, 2 M & Gr 705, *Tay* § 1819
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107 When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it

Burden of proving death of person known to have been alive within thirty years

Principle Where there is proof of the existence of a state of things and no evidence of its cessation, the presumption is that such state of things continues for a reasonable length of time. Hence, if the question is as to the life or death of a person who has been once shown to be living, the burden of proving him dead lies at first on the party who asserts the fact *Wilson v Hodges*, East 312, *Achenich J* however denied this in *In re Aldersey* (1905) 2 Ch 186, *Pouell Ev* 411. The presumption of continuance is often not so much an inference of fact as an administrative statement of the inertia of the Court *Chamberlayne's Et* § 1090. Presumptions as to continuance of life are not legal presumptions, but presumptions of fact only, depending on the circumstances of each case *R v Willshire* 6 Q B D 336, *R v Lumeley* 11 Cox C C 274, *Lapsley v Gritson*, 1 H L C 498.

Scope of the presumption In *Wilson v Hodges* 2 East 312 *Lord Ellenborough* C J referred to it as a presumption that a person once shown to be living is to be living the for the presumption is that the party continues alive until the contrary be shown. This presumption of continuance is clearly one of the most practical importance. It is frequently impossible to prove, for instance, the existence of a certain thing in a certain state or condition at the particular moment in question. It is sufficient with the aid of this presumption, to prove such existence and state at such an earlier time that, according to the nature, it may fairly be presumed to have lasted to the moment in question *Cockle Cas* Ff 29. A person proved to have been alive at a former time is presumed to be alive during the probable period of life's duration, until his death is proved or a presumption of death arises *Lauson's Presumptive Evidence*, Rule 20. The Mahomedan law, presumed the death of a missing person ninety years after the last news of him, and the Hindu law for 12 years, before the passing of the Act. "Presumptions or immutability of absence of proof correspond to the fact that we have been heard of assumption would be reversed, and death would be presumed. What is the period which the presumption might be affected by the particular case, such as state of health and so forth, are certainly been prescribed by high authority, life. Still even the attainment of a hundred years of occasional, and not over rare occurrence, while instances have been stated

extending life to almost half a century further. All ordinary experience, however certainly pointing to a period so rarely exceeding an age of 100, it would seem that this might be : : : :
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 decision. In fact, the period ap : : : :
 all. A presumption of death at the expiration of a hundred years is recognized, however, in both the civil and Scotch Law, and in a case so long ago as the time of *Lord Hale*, there is a dictum of his, that if testament be made to the use of one for ninety nine years if he shall so long live, and after the death to the use of another, this shall not be contingent, for it would be presumed that his life would not exceed ninety nine years. *W'ell v Lomer*, Poll 67" *Goodere* 11 623 "The life of a person once shown to exist" says *Justice Buller* in an American case, "is intended to continue till the contrary is proved, or is to be presumed from the nature of the case. . . . The witness, if alive is eighty years old: an age that we may admit is an advanced one, The : : : :
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his being dead the presumption disappears, and the question has to be determined on the balance of proof. *Mark II* ¶ 83 Ss 107 and 108 of the Evidence Act should be read together, because the latter is only a proviso of the rule contained in the former, and both constitute one rule when so read together. *Dharun v Gobind*, 8 A 614

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death may fairly be based, the Court will not assume, in an administrative way, that the person in question is actually dead, i. e., its inertia will not be overcome so as to enable it to act upon the basis of death until no further possibility of

17 offering it in evidence must explain its appearance, if he be called upon to do so by the issue raised (*Parry v. Nicholson*, 13 M. & W. 779, per Parke B.), and if the instrument be not admitted by his opponent and notice (*Freemantle v. Stearn*, 11 Q. B. D. 202), because, as every alteration on the face of a written instrument renders it suspicious, it is only reasonable that the party claiming it should remove the suspicion (*Hennan v. Dickinson*, 5 Bing. 153; *Curry v. Carter*, 2 M. & Gr. 510; *Lord Lalmouth v. Roberts*, 9 M. & W. 171; *Lord v. Bright*, 11 Q. B. D. 100; *Lurelough*, 2 M. & Gr. 763, *Talbot*, 11 Q. B. D. 111; *Plantier v. Mitchell*, 1 M. L. A. 12) (129).
Lamasuane v. Williams, 3 M. H. C. R. 2.

17 This rule is not applicable in cases of admission of a plaintiff's claim (*Hamman v. Tineham*, 11 Q. B. D. 111).

107 When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who asserts it.

Principle. Where there is proof of the existence of a state of things and no evidence of its cessation, the presumption is that such state of things continues for a reasonable length of time. Hence, if the question is as to the life or death of a person who has been once shown to be living, the burden of proving him dead lies at first on the party who asserts the fact. (*Wilson v. Hodges*, 2 East 312, *Kelouch J.* however denied this in *In re Aldersey*, (1907) 2 Ch. 1, *Poicell* F. 111. The presumption of continuance is often not so much an inference of fact as an administrative statement of the inertia of the Court. *Chamberlayne v. I.* § 1090. Presumptions as to continuance of life are not legal presumptions, but presumptions of fact only, depending on the circumstances of each case. *R v. Hildreth*, 6 Q. B. D. 336, *R v. Lumley*, 11 Cox C. C. 24, *Lapsley v. Grierson*, 1 H. L. C. 198.

Scope of the section. In *Wilson v. Hodges*, 2 East 312, Lord Ellenborough, J. said: "Where a person once shown to be living, the burden of proving his death is on the party who asserts the contrary. It is one of the most practical instances, the existence of which at particular moments in time, to prove such existence and state at such an earlier time that, according to the nature of the case, fairly be presumed to have lasted to the moment in question." (*Cockle v. Cus*, 29 Q. B. D. 111). A person proved to have been alive at a former time is presumed to be alive during the probable period of life's duration, until his death is proved or a presumption of death arises. *Lauson's Presumptive Evidence*, Rule 30, says: "A person ninety years of age is presumed to have been heard for 12 years before the passing of the Act." But the Hindu law is different.

of the Indian Evidence Act is that

Three score years and ten have certainly been prescribed by high authority as an average limit of human life. Still even the attainment of a hundred is of occasional, and not over-rare occurrence, while instances have been stated

evident proof of the life,' and that the Judge should 'direct the jury to give their verdict as if the person were dead'. But if the absent party should not really have died, provision is made by the statute, then effect of this statute, then into evidence, by a certain The rule fixes, for the particular inquiry, the same thing as death, it is its legal equivalent.

Now very likely, in practice, similar cases may have been brought within 'the equity' of the statute, as *Chief Justice Holt*, in 1692, is reported to have 'held that a remainder man was within the equity of that law'; but we hear of no suggestion of a general seven-year rule, such as we have now, before 1805. In the case *Doe d George v Jackson*, 6 East 50, there was a rule for a new trial, in an action of ejectment, which turned on the question whether the plaintiff's lessee or had entered within the time allowed by the statute of limitations, which

presumption (3) seems to be a rule of law, and not a rule of equity.

ends at the expiration of seven years, to be living. If a man was living at a later period, there was fair ground for the jury to presume that he was dead at the end of seven years from the time when he went to sea on his second voyage, which seems to be the last account of him. This was supporting what was justified, on the analogy of the even years; and more was questioned upon this point. It was not laid down that they must; nor was any rule of presumption put forward; nor, as I say, was it on any such point that the ruling below was questioned in the Full Bench.

In 1809, at *Nisi Prius* (*Hopewell v De Pinna*, 2 Camp 113) in an action against a woman on a promissory note, she pleaded coverture, and proved her

that it knows that the party has been absent and unheard from for more than seven years. Upon evidence for the issue is upon the life this presumption (1) that he is dead.

constant change *Hile Parl v Clinton, supra; In re Tetis Trust*, L P 6 Ca 35. *In re Benjamin*, (1902) 1 Ch 723. *In re Waller*, L R 7, Ch 120. When the inference from experience as to the continuance of life has weakened in probability and even after it has departed the continuance of life remaining merely as an administrative assumption, additional facts may so strongly tend to establish an inference of death that the inertia of the Court will be overcome and affirmative action taken. *Clamborough v Ft* § 1601

108 * [Provided that when] the question is whether a man is alive or dead, and it is proved that he has been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is * (shifted to) the person who affirms it.

Burden of proving that person is alive who has not been heard of for seven years

Principle Where certain results would have followed if an act or an event had occurred (or not occurred) the absence of those results is some indication that the act or event has not occurred (or occurred). A common class of evidence of this sort is that of lack of news to show probable death of a person: the probable loss of a ship, for as it is usual for living persons to be heard from directly or indirectly, by persons having an interest in knowing, and for ship officers to leave word of their journey at the ports they touch or with the other ships they pass the lack of any such news indicates their non-existence. *Wigmore Pt* § 159. This is a genuine presumption of universal acceptance, is not proof of death. It is generally said to arise from the person's continuous absence from home for seven years, unheard of by the persons who would naturally have received news from the absentee. *Wigmore Et* § 231. There are several

length of a dead? The six or eight rule is a the 12th March, 1811.

After what is a man? Obvious have a direct James Stephen

Origin and growth of the rule "It is a rule of presumption that, in the absence of evidence to the contrary, a person shall be taken to be dead when he has been absent seven years and not heard from. That is a modern rule. It is not at all modern to infer death from a long absence; the recent thing is the fixing of this time of seven years, and putting it into a rule. The faint beginning of it as a common law rule, of general application in all questions of life and death, is found, so far as recorded English cases show in *Doe v George v Jess* 1805. Long before this in 1604 the "Bigamy Act" of its provision who had married for seven years, and (2) those whose spouse had been absent for seven years, although not beyond the seas,—the one of them not knowing the other to be living within that time." This statute, it may be noticed, did not absolutely treat the absent party as dead, for it did not validate the second marriage in the penalty. Again, in convenience by want of taking themselves, upon and leases dependent or or reversioner absenting himself o "sufficient and

* These words in s 103 were substituted for the original words "when" and "on" respectively by the Indian Evidence Act Amendment Act (18 of 1872), s 2.

evident proof of the life,' and that the Judge should direct the jury to give their verdict as if the person were dead. But if the absent party should not really have died, provision was made for a subsequent recovery by him. The effect of this statute then was to end in a specific class of cases, all enquiry into evidence, by a certain assumption, or, as it is otherwise called, presumption. The rule fixed for the purpose of a particular inquiry, the effect of specified facts, absence for seven years, unheard of, is to be accounted, in regards this particular inquiry, the same thing as death, it is its legal equivalent.

Now very likely, in practice, similar cases may have been brought within the equity of the statute, as Chief Justice Holt, in 1692, is reported to have held that a remainder man was within the equity of that law; but we hear of no suggestion of a general seven-year rule, such as we have now, before 1805. In the case *Doe d George v Jesson*, 6 East 80, there was a rule for a new trial, in an action of ejectment, which turned on the question whether the plaintiff's lessor had entered within the time allowed by the statute of limitations, which

As to the period the Statute 10 also according to the duration of life, with respect to persons of whom no account can be given, ends at the expiration of seven years from the time when they were last known to be living. Therefore, in the absence of all other evidence to show that he was living at a later period, there was fair ground for the jury to presume that

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nor was any rule of presumption put forward; nor, as I say, was it on any such point that the ruling below was questioned in the Full Bench.

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seven years. Upon the basis of these cases, there soon appeared in the text books on evidence for the first time in 1815, a general proposition that 'where the issue is upon the life or death, this presumption (namely, that a

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3. which he thinks should find a place in the law of evidence Stephen published his Digest in 1876 Here, then, in seventy years, we find the rule about a seven years' absence (1) coming into existence in the form of a judicial declaration about what may or may not fairly be inferred by a jury in the exercise of their logical faculty; the particular period being fixed by reference to two legislative determinations in specific cases of a like question; (2) passing into the form of an affirmative rule of law requiring that death be assumed under the given circumstances. This is a process of judicial legislation, a departure from what is a mere recognition of a legitimate step in legal reasoning to a declaration of the legal effect of certain facts. *Thayer Pre Treat* Ft pp 319-321 But the Indian Evidence Act, which found place in the Statute Book in 1872 went further and by s. 107 it allowed presumption to be made of the continuance of life for a period of 30 years from the period when a person is last heard of. But this presumption is not free from criticism.

Scope of the section This section provides in effect that if it appears that a person has not been heard of for seven years have heard of him if he had been alive, and probability of his being alive, the presumption

large *Writ* Ft 83 But sections 107 and 108 should be read together, the latter is only a proviso of the rule contained in the former and both constitute one rule when so read together *Dharup Nath v Gobind Saran*, 8 A 614-6 A W N 239 The two presumptions are conflicting and the circumstances might be such that both presumptions were raised. What is to prevail? It was in order to solve this question that the language of section 108 was changed

upon this If the to find or refer court red and

twenty years ago, so that according to the common course of natural events he could not be alive now (*Vide* section 114 *infra*); or he may prove that two years ago X went to sea in a ship which has not since been heard of. But, in all this there is no shifting Mark Et p 84 So also this presumption left his home under circumstances moment that he I & W Bench, 804, *Lord Denman C J* that the presumption of Law relates only to the fact of death, and that the time of death, whenever it is material, must be subject of distinct proof. The

quite clear, therefore, that when no such probability exists, the presumption cannot arise. Per Sir John Stuart V C in *Bowden v Henderson*, 2 Sm & G the Evidence Act is a presumption was raised, that is, at the date of

v Pheasant, 14 C W N 311-Stephen J 1862 ten been alive use must evidence; 108 of t would ad at a But

and the question the Evidence Act shift, and instead given time, the de we are constrained *Surgey*

Kanta Ruy Choudhury 35 C 25, it is expressly laid down by *Griffith J* that the presumption that arises on a man not having been heard of for seven years is a presumption that he is dead at the time when the question is raised, that is, in this case at the date of the suit and not at some antecedent date that is at the time of *Halkari's* death in 1872. The judgment of *McLean C J* seems on the facts mentioned in the judgment of *Griffith J* to be to the same effect. A similar view was expressed by the Burma Chief Court in *Molla Cassim v Molla Abdul Rahim* and was accepted by the Privy Council (13 C 173). This is not the English law as may be seen in the judgment in the leading case of *In re Phene's Trust* (1869) 5 Ch App 139 and the cases therein quoted, and were the matter *res integra* we are not sure that we should attribute to the words of section 108 the effect that is given to them in the cases we have mentioned." *Mohammad Sharif v Pande* 111 8 A L J 1052 (F B). This section of the Indian Evidence Act, 1872, according to its terms, does not require that the Court should hold the person dead at the expiration of the seven years therein indicated, but merely provides that the burden of proving that he is alive at the time of the suit is shifted to the person who asserts it. *See also* *Shree Ram v R. R. 1920*. The presumption is in the death of a person by L J 181-56 Ind C. . . . showed that a person was unheard of and there was no other evidence to show that the person had not been heard of for 40 years the presumption as to death could be drawn. *Tirapathi v Ringit*, A I R 1931 Oudh 40-130 Ind Cas 124-2 O W N 712. Where the nearer relations deposed that they had not heard of the person in question for seven years the presumption under the section should be drawn. *Khan Chand v Mt Janandi*, 1923 Lah 174. This section

presumed for probate as a matter of fact and not of law, before seven years *Philp Ed 7th Ed p 653.*

Circumstances may create presumptions at earlier period. The legal presumption arises only at the expiration of the seven years, but the fixing this would in no way preclude the presumption of fact as the in short of the seven years. *Nezille, Manning, 344*, "that nothing could be more absurd than that there should be a presumption of life or death without reference to the age, circumstances, situation of life, and common habits of the party. Can there be the same presumption as to a party who is one hundred, and one who is thirty five? As to a party who was in good health upon his country. *Hubbock* or other similar testimony, or again, the sudden unexplained cessation of his

tent with the supposition of his continuing existence." *Hubbock* page 174; *Goodette Et.* 631. So death may be proved by reputation, by hearsay, or by

8. evidence of facts inconsistent with the theory of the existence of life. The presumption will arise that the death of the absent has occurred before the expiration of seven years where any of the following circumstances are shown:—(1) That within that time he was in a desperate state of health. *Wes's v. Burchmore* 13 Ves 362. In the above mentioned case "the health was very bad—the chancellor speaks of it as desperate." (2) That within that time he embarked on a vessel which has not since been heard of and is long overdue inquiries having been made at her ports of departure and destination. *Lauson Presumptive Evidence*, rule 50, *Merrill v. Thompson* Helt, 550. In the above case the Court, observing: "The presumption of his death does not rest upon the fact that he has not been heard of for seventeen months, but upon the weightier circumstance that the vessel has not been heard of for seventeen months." In *Pe Smyth* 25 L J (P & M) 1, Sir Creswell Creswell said: "I do not find in the affidavits any statement that enquiries have been made at Barcelona or elsewhere about the crew. The affidavits only state that neither the vessel G S, nor any of the crew have been heard of. I should undoubtedly presume that the vessel has been lost, but it does not follow that the crew or some of them may not have been saved. The case had better stand over until you have written to the agent of the ship at Barcelona and ascertained whether any of the crew have survived." Similarly in *Re Bishop*, 1 Sw & Tr 307, the same learned Judge said: "I think probably the vessel is lost, but it does not appear that any inquiries have been made at Palermo as to whether any of the crew have arrived there or have been heard of." (3) That at sometime within that period he has encountered a "specific peril," which includes not the ordinary dangers of travel or navigation, but some unusual or extraordinary danger. *Fagle's Case*, 3 App Pr 220, *Lauson Presumptive Evidence*, rule 51. (4) That his habits, character, domestic relations, &c., are such as to lead to the inference that he is more likely to die than those showing ex-
within that period he
home or domicile or
rule 52. A son, after the death of his father and knowing of a provision in his Will, to take effect on the death of his mother, leaves home. He is not heard of for many years. He will be presumed to be dead. *Karsten v. Karsten* 15 N Y (S) 966. On March 25 1866, S left her home and was never heard of again. She depended on an income payable in quarterly instalments. She did not appear to claim the amount due in June, 1866. In a proceeding in 1875 the presumption is that she was dead after June, 1866. *Re Beasney* L R 7 Eq 498.

quently to the end of seven years. *Lauson Pre Ev Rule 53*. In 1829 R. left her family in England and went to Paris where she took a situation as governess. She continued to correspond with her relatives. In 1835 she wrote to her sister from Paris, saying that she was about to accept another situation and stating, that she had become a Catholic. On receipt of this letter her sister replied in a letter of remonstrance reproaching her for her abandonment of the Protestant religion. No reply was received to this letter, and she was not subsequently heard of. There is no presumption that she died in 1847. *Bowen v. Henderson* 2 Sim & G 360. In this case it was said that the principle on which the dead based: with some draw from when no such probability exists the presumption can not arise. In this case all the circumstances tend to show that after what had taken place between L and her friends it was extremely improbable she would have entered into further communication with them. She had abandoned her religion and her friends wrote to her a letter of remonstrance and reproach for doing so. The reproaches were not calculated to encourage further communications. I think this circumstance, taken in connection with the rather eccentric course of life which it

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appeared from her. There she remained for a long time, but she could have viewed it follows of information the lady were Eq 1, it was and "The circumstances of the present cases are not such as to render it safe to make that presumption at present. *Hugh Morgan* left Ireland for America some time before the year 1859, resided there for some years, married there, came back to Ireland with his wife in 1879 for a temporary purpose only, he sold all his property in Ireland and after a few months returned to America, whither his wife and son followed him. It is contended, however, that because he has not since been heard of by his sister, the only member of his family who remains in Ireland, I am therefore to presume that he is dead. But suppose that an alien comes into this country and stays for a few months, or that a person who is not an alien, but has his residence abroad, comes here and, stays for a little time, and then leaves having—to put an extreme case—no relatives here, and not heard of for seven years, is the presumption, therefore, to be made of his death? I haves nding that idwell

"C said: "Here a girl of about sixteen or seventeen years of age, whose father was a farmer, chose, for some reason which does not appear, to leave her father's house and to go no one knew whither. But it seems that in August 1814, she was at Portsmouth, and that she then intended to go abroad. Therefore it is but reasonable to presume that all along she has been concealing herself, and that she never intended to return home. The mere fact of her

1834 for seven years for a crime. He last that year. The records showed that he resumption that he was dead in the year 507, *Lauson Pre Ev* Rule 53, see also *Re Ocean Co*, 2 I R 1.

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70 *Lal*, 2 *Hay*.
10 W R 484;

C 134 Note, *Watnuddur v Ram*
W R 891, *Ghasee v Jasouddee*,
H C 1. It is only when the

provisions of section 108 of Act I of 1872 will apply. *Parameswar Rao v Bissessar Singh*, 1 A 53 (F B). Where a person claims another's property on the allegation that the latter was missing and has not been heard of for more than seven years, the question whether such person is to be presumed to be dead is one of fact. *In re Estate of John D. Bick*, 11 B 1. *W N 1889*.
239 Balaya v Kirtnapra, 11 M 118, *Hari Chutman v Moro Lalchandra*, 11 B 89; *Jaywant v Rinchanhao*, 18 Bom L R 11-40 B 232-33 Ind C 181, *Pondur v Jalali*, 71 Ind C 305-32 M L T (H C) 6. Under the Mahomedan Law, the share of a missing person cannot be distributed until seven years have elapsed since his birth. *Ali v Maharban*, 2 A 625; *R. v. Doulat v Khya*, 2 Agr 59. But in a later Full Bench case of the same High Court those cases were overruled. In that case *Mahmood J. said*: "The rule of Mahomedan Law that a missing person is to be regarded as alive till the expiry of 90 years from the date of his birth, is a rule of evidence, and not of succession in inheritance etc., within the meaning of section 24 of the Bengal Civil Courts Act." *Mirar Ali v Bulh Singh*, 7 A 297 (F B) = A W N 1881, 333. So the rule contained in section 103 of the Indian Evidence Act, applies to the case of a Mahomedan, who has been missing for more than seven years when the question of his death arises in cases to which under the provisions of section 24 of the Bengal Civil Courts Act (VI of 1871) the Mahomedan Law is applicable. *Ibid*, see also *Imdad Ali Ghulam v Jilani*, 12 P R 1892; *Moolah Casseri v Moolah Abdul*, 2 C L J 236-15 M L J 317-7 Bom L R 892-2 A L J 798-10 C W N 33-33 C 173-32 I A 177; *Yusuf Ali Beg v Ayub Beg*, 11 A L J 355-18 Ind C 920, *Miraj v Abdul*, 43 A. 673.

Time of death. Though under ss 107 and 108 of the Indian Evidence Act, a presumption is made that a person has died on the

presumption of death, nor on the other upon the presumption of the continuance of life. *Rango v Mudi Yappa*, 23 B 296. Whenever the question as to the exact time of death arises, it must be dealt with according to the evidence and circumstances of each case, when the death is alleged to have occurred at any time not affected by the presumption of law as to seven years. *Dharip Nath v Gobind Saran*, 8 A 614 = A W N 1886, 239, see also *Guru v Lachhman*, 14 M L J 464. The law on the subject is thus stated by *Richards C J* in *Mohammad Sharif v Bande Ali*, 31 A 36-8 A L J 1052 (F B). "They contended that it must be presumed that *Madad Ali* died sometime during the first seven years during which according to the evidence he was not heard of, and that upon the expiry of the first seven years it must be presumed that he was dead. In my opinion this contention is not correct. The mere fact that the evidence adduced by the plaintiffs went to show that *Madad Ali* had not been heard of for more than seven years raises no greater presumption than that *Madad Ali* is dead. There is no presumption that he died in the first seven years or in the last seven years. The presumption merely is that he was dead at that time. The burden of proof is on the plaintiff. If it was *Nath v* on which *Richards* who delivered the judgment in the case, I think that he misinterpreted and misunderstood the passage from *Taylor on Evidence*, which he quotes. The period of seven years which the learned author there speaks of is in my opinion the minimum period during which it is necessary for the plaintiff to show that the person whose life or death is in question has not been heard of and that if the evidence shows the person had not been heard of for 14 or 15 years instead of seven, the presumption would not be carried one bit further. There would be merely the presumption that the man is dead; but there would be no presumption that he died at any particular moment of the period during which he has not

been heard of. In the last edition of *Taylor on Evidence* the passage is as follows: "although, however, a person who has not been heard of for 7 years is presumed to be dead, the law raises no presumption as to the time of his death, and if any one who seeks to establish the precise period during those seven years at that the

time, he
It seems to me that this argument proceeds upon the assumption that if *Dillar* had sued during his life time, the evidence as to the disappearance of *Mudal Ali* would have been exactly the same. This would be a very rash assumption. Seven or eight years ago there must have been many persons who might have heard of the existence of *Mudal Ali* who are now dead and gone. Reliance was also placed upon the case *In re Phene's Trusts*, L R 5 Ch App 139. In that case the question was whether or not *Nicholas Phene Mill* had survived his uncle who died on the 5th January, 1811, leaving certain property by Will to his nephews in equal shares. *Nicholas Phene Mill* was one of his nephews. Sir G. M. Gifford L J examined the authorities upon the question of presumption and finally decided that it lay upon the administrator of *Nicholas Phene Mill* to show by affirmative evidence that the latter had survived his uncle. At page 151 the Lord Justice says "It is a general well founded rule that a person seeking to recover property must establish his title by affirmative proof. This was one of the grounds of decision in *Doe v Nye* and to assert as an exception to the general rule that the onus of proving death at any particular period, either within the seven years or otherwise, should be with the party alleging d

not of presumption but of proof, or with the real substance of the actual decisions, or the sound parts of the reasoning in *Doe v Nye* or with the principles to be deduced from the judgment in *Underwood v King*. The true proposition is, that those who found a right upon a person having survived a particular period

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equal force to the case when it is essential for the plaintiff's claim that he should establish the death of an individual at a particular period. Lastly, the appellants relied upon the judgment of *Karamat Hussain J*, in the case of *Mussammatt Akbari unmissa v Sayed Bashir Ali* S A No 486 of 1909. With great respect I think the learned Judge fell into the same error as the Judges who decided the case

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time of the suit, but there is no presumption as to the precise time of his death.

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presumed dead from the moment the seven years commenced. But the contention was overruled, and Lord Denman Chief Justice, in delivering the judgment of the Court stated thus—"The absence of *Mathew Knight* abroad for seven

years, without having been heard of, is evidence from which a jury might reasonably presume, and in this case have properly presumed, his death. This period has been adopted as the ground for such presumption in analogy to the Statutes of 1 Jac 1 C II relating to bigamy, and 19 Car 2 C 6, as to the continuance of lives on which leases were held, and the lessor of the plaintiff clearly proved the first of the points necessary to maintain the case. But such absence abroad for seven years, though it naturally leads the mind to believe that the party is dead, and therefore is sufficient evidence to warrant a presumption of fact that the party was dead at the end of seven years, clearly raises no inference as to the exact time of the death; and still less that such death took place at the end of seven years. Absence for the period has no tendency to induce the belief that life has ceased at that precise time; and no case has been cited, nor do we know of any, in which it has been laid down as a rule of law that the loss of a vessel in which a person sailed might be presumed, after having sailed on a foreign voyage, that it might be

time case on appeal in the *Eschequer Charter*.
 'Now, when nothing is heard of a person for seven years, it is obviously a matter of complete uncertainty at what point of time he should be heard of. In other words it is presumed that his not being heard of has been occasioned by his death, which presumption arises from the considerable time that has elapsed. If you assume that he was alive on the last day but one of the seven years, then there is nothing extraordinary in his not having been heard of on the first day, and the previous extraordinary lapse of time is not a presumption of death. The presumption of death is not a presumption of death.

question is raised before a Court as to whether a person is alive or dead. These sections do not lay down any presumption as to how long a man was alive or at what time he died. *Band Veeramma v Gangala*, 16 Ind Cas 43; *Pooma-loori v Chelakapattar*, 33 M L J 295-(1917) M W N 722-6 L W 633; *Alwaraj Fatima v Abdul* 19 A L J 713-63 Ind Cas 236; see also *Re Phen's Trusts*, L R 5 Ch 139, *Re Lene's Trusts*, L R 6 Ch 356; *Re Rhodes*, 30 Ch D 586, *R v Lumley*, L R 1 C C R 196, *Lalchand v. Mahant*, 42 T L R 159; *Punjab v Natha*, A I R 1931 Lah 582 (F B)-183 Ind Cas 889, *Meher Khan v Salhi*, A I R 1932 Lah 45-131 Ind Cas 97, *Gudra v Jangi*, 124 Ind Cas 25; *Jangi v Gudra*, A I R 1932 All 365-1932 A L J 170, *Jewan v Keuar Redti*, A I R 1930 All 427-1930 A L J 469. The earliest date to which the date when the suit was filed. *Jeshankar* Ind Cas 525; see also *Basharat v Naje* 0; *Faqir v Dan Bahadur*, 21 O C 143-46 Ind Cas 503, *Monohar Lal v Chuni*, L R 3 A 393, *Muhannad v. Abdul*, 64 Ind Cas 468, *Rekhab Das v Mt Sheobai*, 45 A 466-21 A L J 393-7; *Fateh Ali v Ahmad* 00 Ind Cas 446; *Mahadeo* h 13, *Jagannath* r v *Mahadeo*, 115 Ind Cas 626. If a person has not been heard of for seven years that is a presumption of law that he is dead but at what time within that period he died is a question of fact. It is essential that the presumption is essential. A. 24-30 289 (P. C).

see also *Ganesh Das Amora, In the goods of*, 13 C L, J. 578-97 Ind. Cas. 217- A I R 1926 Cal 1056

By persons who would naturally have heard of him "Persons who would naturally have heard of him" is not confined to a particular class; they may be relations or strangers *Lawson's Pre Li Rule 15; Doe v. Deakin*, 4 B. & Ald 433 A wife, who left her husband and is in keeping of another is not one of the persons who would naturally hear from him if he were alive *Kantabai v Umabai*, 117 Ind Cas 205-A I R 1929 Nag 127.

Not been heard of "Not been heard of" means that none of the "persons"

an action was brought on the policy in 1874 and the question was whether N was then dead He had left his home in England for Australia in 1867, and follows: A niece of man on the street "passing crowd" o her mother and all thought her d been 'heard of' ble grounds, then Assurance Co v.

Edmonds, 2 App 1 that not being thing about him was dead, added "you cannot say that a man has never been heard of, when in the first place one of his nearest relations comes and says she saw him alive and well within three years; still less can you say that he has never been heard of when every member of the family states that they heard that which is now stated" On appeal this was held to be an error "The direction," said Lord Chancellor Hatherley, "seems to me to come to this In the first place, if the jurymen believed Mrs C's assertion to be correct, and thought she had seen him alive and well, of course that ends the case But then he adds: member of the n, as far as that i for the jury- them whatever t on as arising when every member of the family had heard what she said, because, be it true or be it not true, the fact of their having heard it would prevent the assumption arising I think that would be the reasonable inference from that language,

other hand presumption that he is dead,—that is, that he has never been heard of by any of his relations for the space of seven years,—when you find that every one of the relatives has come forward, and every one of the relatives heard that he was alive" Therefore it appears to me that the Lord Chief Baron plainly and distinctly directed the jurymen that they had no evidence before them at all

came to the conclusion that Mrs. C's story was not to be believed. On the contrary, it seems to have been laid down in clear and precise terms, that if every member of the family has heard of him, whether by a credible story or not, then there is a probability of his being a of death would not arise. And Lord Blackburn in had failed in proving the actual death of n the rule of law which is generally laid down man has not been heard of for seven years at he is dead. It is generally so enunciated correct way of enunciating it, but I think it may be fairly enough put in those words for this purpose. I think, having regard both to the reason of the thing and the decisions we must take 'not being heard of' in a certain sense. There was seldom or never a man who had reached the age of forty with regard to whom it would not be easy to call scores of people to say, 'I was at school with him, I knew him perfectly well, and I have not heard of him for the last seven years.' But that would not be enough to raise a presumption that he was dead, because if ever so much alive, those people might not have heard of him. My lords, it appears from the case of *Doe v. Anletric* (15 Q. B. 731), that it presumption that there should have been an he was alive, would analogy, but it is something like the case of a search for documents; where you are allowed to give secondary evidence of a document, you must search the places where the document would in the natural course of things be, if it were still in existence, and having proved that you have done that, you may then give your secondary evidence. In like manner, in order to raise the presumption that a man is dead from his not having been heard of for seven years, you must of him if he was a ld k is dead who said so, but afterwards is that Mrs. C. had seen him' in Australia, but that he did not l a report would hardly witness saying he had not posing the jury men had n, would or would not the a seven years' absence I think certainly they would It seems to me that when she said, 'I have seen the man in the streets arising from the relative, including and it turned the onus the other might have been proved that the man else. If that had been proved it had never made that statement. When d all the others had heard it from her, statement affected the onus, yet

think many lawyers themselves,—would be under the commonly enunciated rule about a man's not being heard of for seven years, that there has not been a physical hearing of him, and seven years and at the think was at it that ot see!

him than the other, and the fact that he had been seen about him which might raise a presumption in his favor, but I do not think that because I think, though I think the presumption, yet the facts might be such as to create a reasonable doubt was not a reasonable person came and

be said, after it was proved that the man who told them that had been educated into the belief that he had seen the brother, could it be said that evidence, so explained, put an end to the presumption arising at the end of seven years? I apprehend not, yet the wording of the Lord Chief Baron in the first line might have led the jury to think so; and I must acknowledge that when I read the whole through, I think it did lead the jury to think so, whether so meant or

Robert Nutt has been heard of, no matter how or where, and even you are satisfied that the hearing was founded upon a mistake, that mere fact of hearing is enough. That I think would be misdirection."

Presumption of survivorship When two persons, and especially when two relatives, have perished in a conflagration, it often arises in questions of succession to estate

Greenl § 29 Direct proof, however, can seldom be procured in these cases, and in several other codes, recourse is had to the particular circumstances connected with the case. These presumptions are based on the strength of age and sex. *Ibid* The

common law however does not attempt to ascertain, in the absence of any evidence on which to go the survivor of a common catastrophe. Strictly it may be said that the common law presumes neither that one survived nor that all perished at the same moment. *Lauson Pre Ev* p 293 But by leaving the matter as one unascertainable, "the practical consequence", as has been said, is nearly the same as if the law presumed all to have perished together at the same moment. It is, in fact, exactly the same where two persons (whether of the same or different ages, sexes or physical conditions) perish in an accident, ship wreck or battle, and there is no evidence to show which one of the several survived, the law will not raise a presumption from the fact that one was younger or stronger, or of the more hardy sex, that he survived an older or weaker or a less hardy victim. The party alleging that one survived the other must prove it, the *onus* is on him.

the survivorship of one to prove

1 *Meriv* 307; *Wollaston v Berke*

Re Wheeler, 37 L J (P & M) 40,

Wing v Argrave, [1883] H L C 183; *In re Benyon*, (1901) P 141, *In re Fisher*,

(1915) 1 Ch 309. *General*, *Wynne*

1 Hag said fair and

reasonable in these unhappy cases to correct the presumption at the

same instant of time than to resort to any presumption on account of the degree of robustness."

1 Court said "Instances have occurred where the question has been, which of the two survived

the existence of a state of things at a particular moment
such existence may fairly be presumed
generally thought it is presumed, until the contrary is proved C 72 (79).

Scope of the section When the existence of a person, or personal relation, or a state of things, is once established by proof the law presumes that the person, relation, or state of things continues to exist as before, till the contrary is shown, or till the question is shown to exist.
Taylor Et al § 1

or object, or relation, or state of things, is shown to have existed at a given time. In reality, however, a genuine rule of evidence usually declares merely that certain sufficient evidence for the jury's finding of a 109 of the Evidence Act cannot be overruled. *Keyan v Mt Lin*, 8 Bur L T 292-33
In *nasorgats* are predecessors in interest within the meaning of s 223, Berar Land Revenue Code. *Ramchand v Ratnanath*, 98 Ind Cas 674-A I R 1927 Nag 99

Partners This section presumes that the partnership continues until the partnership brings an action not partners. It is proved that the presumption is that they continue to be so. *Anderson v Clay*, 1 Stark 405, *Cromwell v Nedman*, 22 Barb 510, *Clarke v Alexander*, 8 Scott N R 161; *Clarke* sumption finds legislative sanction in section 256. *Cummingham* said, "By burden of proving that persons who are shown to have been acting as partners have ceased to stand in that relation to each other is thrown on the person who affirms it, and by this section the further presumption is created, that the relations of such persons continue to be governed by the terms of the original contract which has expired, so far as they may be applicable to a partnership determinable at will. The same rule within the same limitation, obtains in the case of a tenancy which is continued after the expiration of the term limited by the lease." *Cum Contract Act Notes* under s 256. "The evidence of a joint interest in the plaintiffs was sufficient *prima facie*. It was shown that they were partners in business two or three years previous. The witness stated that he had frequently done business with

held that the partnership could be dissolved only by a special notice, and that,

D.

Principal and Agent An authority to do an act, once shown to exist is presumed to continue until the contrary is proved. *Prall v Palmer*, 4 Ark 456, *Law on Pres. Fr Rule 3*.
 case of principal and agent *Rayan v La*
 agency is terminated in any of the ways
 Act the agent or the third person concerned is affected by the termination only from the date when it becomes known to him. The same rule applies where it is his notice by death, or by insanity, that the agency is terminated. *L. C. v. F. p. 41*.
 see also Contract Act s. 152-235. If a man were on several occasions to authorise his mistress to order goods from a tradesman on his credit, the jury would be amply justified in finding him liable for articles supplied after the termination of the connection in the absence of any proof that the tradesman had received notice of such termination. *Riffin v Lamb*, 12 Q. B. 464.

Landlords and tenants When once the relation of landlord and tenant is admitted or proved to exist it will be presumed to continue until it is shown by affirmative proof that it has ceased to exist. *Mohun Uthas v Sur Shem*, 21 W. R. 5, *Mung Sam v Maung Tin*, U. B. R. (1897-1901) Vol. II, 114, *Tiru v Sangudien* 3 M. 118, *Ismahar v Dulpin*, 7 C. L. J. 202, *Dattatraya v Sridhar*, 17 B. 736. Mere non-payment of rent though for many years, would not affect the landlord's right to tenant once existed. *Bima Charan* L. J. 72, *Mung Lal v Abtool*, 4 C. 314.
Premsook v Bhuyia, 22 A. 517 (F. B.); *Ismahar v Gobordhin*, 7 C. L. J. 202 *Dudaja v Krishna*, 7 B. 34. Failure of payment of rent by the tenant to the landlord does not alone operate to create in favour of a tenant a title by adverse possession. *Reayudh v Chand*, 21 C. L. J. 453, *Maung Lun v Maung Shue*, U. B. R. (1892-96), vol. II. 363; *Troulkhoo v Mohana*, 7 C. L. R. 490; *Tiru Charna v Sangudien*, 3 M. 118; *Mridan v Kumar*, 7 C. L. J. 610. So where a tenant holds over after the expiration of the term, he is impliedly held subject to all the covenants in the lease which are applicable to his new tenancy. *Toniano v Young* 2 Camp. 50, *Thomas v Parlier*, 1 H. & N. 63. *Tay* § 197, *Chatur v Alukund*, 7 Cal. 710, *Bu Nath v Raghu Nath*, 16 C. W. N. 496, *Kishori Lal v Administrator General*, 2 C. W. N. 203, *Jumal* 419. *Chatterdhari*, 16 W. R. 185; *Beni v Raj Kumar*, 6 C. W. N. 589. See also section 116 of the Transfer of Property Act and section 51 of the Bengal Tenancy Act. The relation is presumed to have ceased. *Dattatraya*, Ind. Cas. 555. Where it is proved that the tenant of the plaintiff at one time, it is for the defendant, under s. 114, Evidence Act, to show when the relationship of landlord and tenant ceased and possession became adverse. *Charan v Tullusee*, 28 M. L. J. 361-27 Ind. Cas. 84.

110. When the question is whether any person is owner

Burden of proof as of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.

Principle Where title to land becomes material, the fact of present possession alone may serve to create a presumption of ownership, the emphasis is on the document to the opponent the contrary. It is because it is so obvious that it is a *Hari v Dhan* in some lawful and any made in quiet support possession is forthcoming it is resorted to *Sumner* in *Syed* 1 C. L. J. 340.
 most common muniments of title to real

estate is the presumption, from long possession, that such possession is lawful rather than unlawful,—in other words, that it is supported by a grant. It has become a well established rule that the peaceable possession of real estate is presumptive evidence of title until the contrary is shown. The title which adverse possession gives is one in fee simple, and consequently its acquisition must be safeguarded and all the avenues of approach to it watched with the argus-eye of the law that no one is wronged. Theoretically, at least possession is the primitive mode of acquisition of all property, and constitutes the ultimate foundation upon which every title rests. It constitutes also the only means of enjoyment of property. Hence it is necessarily the conspicuous badge or sign of ownership. This is a principle firmly imbedded in all common law jurisprudence. *Burr Jones* § 75. It is held that the presumption arising from possession is a presumption of *seisin in fee*. *Bull N P* 103, 103, *Asher v Whitlock*, L R 1 Q B 1—35 L J Q B 17; see also *Jayre v Price*, 5 Taunt 346; *Dainty v Brocklehurst*, 3 Ex 207.

Scope of the section. The fact of possession, in the eye of law, suggests always ownership, and whether it is put in Latin as *potior est conditio possidentis*, or in colloquial Anglo-Saxon that "possession is nine points of the law" it goes without saying that proof of the possession of property is *prima facie* evidence of title to it both with regard to moveable and immovable property. Indeed it may be said that the presumption has attained its full growth. *Pollock* says: "It has been said that there is no doctrine of possession in our law. The reason of this appearance, an appearance capable of deceiving even learned persons, is that possession has all but swallowed up ownership, and the rights of a possessor, or one entitled to possess, have all but monopolized the very name of property." *Webb's Pollock on Torts* 417. The same learned Judge, in comparing the status of owners in olden time and now, says that the owner in possession was protected against disturbance, but the rights of owner out of possession were obscure and weak. To this day it continues so with regard to chattels. For many purposes, the true owner of goods is the person and only the person, entitled to immediate possession." *Ibid* 416. This presumption of ownership theory that such possession is rightful assigned for this presumption are the principles of law to suppose until the contrary is shown, that possession is lawful rather than unlawful that since the rightful owners of property are not likely to consent that their property remain in the continued possession of others

(U S) 109^u *Burr Jones* § 74. Possession affords *prima facie* presumption of ownership, for men generally own what they possess. *Webb v Dob* 7 L R 307. Thus it is sufficient to maintain trespass on real property against a wrong doer. *Elliot v Kemp*, 7 M & W 312. *Porter v* 295. "If a person is in actual possession show that at least C & P 5.

to the first point made in this case on the part of the defendant is, that the ownership alleged was not sufficiently proved, it was proved by the captain in the ordinary way, that the owners by whom as such, he was appointed and employed, were the persons in whom the ownership is by the declaration averred to be. And though it afterwards appeared by his answers on cross examination, that the ownership was devised to those persons under a bill of sale executed by himself as attorney to one *Laurence Williams* the former owner, it did not on that account become necessary for the plaintiffs to produce that bill of sale, or the ship's register, or to give any further proof of such of their property, the *prima facie* evidence of proof or title deeds on the necessary in support of de, in consequence of the

adduction of some contrary proof on the other side" *Robertson v French*, 4 East, 150. In *Jones v Williams*, 2 M & W 326, *Parke* B. said: "Ownership may be proved by proof of possession, and that can be shown only by acts of enjoyment of the law itself." Possession, therefore, has a twofold value: it is evidence of ownership and in itself the foundation of a right to possession. *Hori v Dhond*, 8 Bom L R 96. Under this section, possession when long and continued upto a recent date, leads to a presumption of title. This section refers to the presumption to be made of ownership based on the circumstance of such possession, and allows the plaintiff with such *prima facie* title to claim a decree where no superior title is proved on the other side. *Per Ranade J* in *Hanmantrao v Secretary of State*, 2 Bom L R 1111-25 B 287; see also *Ma In Lun v Ma In Hla*, L B R (1893-1900), 85. Where there has been continued possession in assertion of a right, the right should be presumed to have lent a legal origin, if such a legal origin was possible and this presumption applies even if the alleged right in its inception rests on a foundation invalid in point of law and the Court will presume that the performance of all acts and the existence of all circumstances necessary to support the presumption are consistent with the law. *Katagin A I R 1930 N 100*. Possession under an unregistered instrument must be presumed to have had notice of such possession, and could not claim any priority over the unregistered instrument. *Bhikhu Ras v Udu Naram*, 25 A 366-4 W N 1903, 81. Under this section, possession short of the statutory period which may give a title by presumption, does not create a presumption of ownership, and shift the burden of proving title to the other side. *Neither side can show title, the possession is not sufficient to create a presumption of ownership.*

first dispossessed, can, after the summary relief under that section, rely in a regular suit for ejectment on s 110 of the Evidence Act. *Haradhan v Isuar Das*, 2 Pat L J 61-38 Ind Cas 797. Where nothing else is proved by the person in possession, he cannot maintain a suit for ejectment. *Specific Relief Act* when proved by limitation, rely in a regular suit for ejectment on s 110 of the Evidence Act. *Haradhan v Isuar Das*, 2 Pat L J 61-38 Ind Cas 797. Where nothing else is proved by the person in possession, he cannot maintain a suit for ejectment.

different object the (1900) 1 Ch 19, June 30, *Phup Ev 7th Ed* 103. Though section 110 of the Evidence Act recognizes a presumption that the person in possession also has a good title there is no corresponding section saying that the person with the title should be presumed to be in possession. *Kashu Nath v Ganesh*, 1923 Bom 361-77 Ind Cas 506. The presumption of a title is not a presumption of ownership. *Nizam Din v Niram Din*, 1919 A I R 1179. Where a person is in possession of property and he uses it for four months of every year for tethering his cattle, such possession is *prima facie* evidence of title, but Court should not say that the person's ownership is established. *Kashichand v*

Atmaram, 119 Ind Cas 701—A I II 1929 Nag 318 Prior peaceful possession is *prima facie* evidence of ownership under this section and is a good title against all persons except the true owner and can be relied on in successfully
 at another who has no title to the land in
 Cas 680 Possession acquired tortuously
 can show no better right 2 Green L

Possession, meaning of The word "possession" contemplated by this section is to be understood as opposed to juridical possession and to denote actual present possession *Mi Lin Kin v Nga La*, U B R 1905, Evidence, 7 Where the possession of a person is peaceable and obtained without ousting any

property law *Hanmantrao v Secretary of State*, 2 Bom L R 1111—25 B 287 The mere length of possession by a mortgagor is not in all cases of itself sufficient to justify the
Auar v Pir Balsh, A W present possession, and
 he *prima facie* evidence of
 This section means that
Sambhasheo v Mahadeo, 10 N L R 189

the burden of proof will be shifted to the defendant to prove title to himself and his right to oust the plaintiff *Mi Lin Kin v Nga La*, U B R 1905, Evidence 7 There is no presumption that the property left by a person long deceased is part of undivided estate When land has been in the exclusive possession of others for a long period, the person asserting that it forms part of an undivided estate should be required to prove the fact *Maung Lee Po v Maung Lee Gale*, U B R (1897 1901) Vol II, 418 Where in a suit to eject the defendant from a house which had been in his possession for 5 years without interruption, on the ground that he first entered the premises temporarily with the permission of the plaintiff's father and the defendant in reply alleged a sale, the burden of proving permissive occupation clearly lay on the plaintiff

e out a title of his own.
 6) Vol II, 371 Where the wrongful dispossession of ion by defendant, and the held that the burden of

proof lies on the plaintiff *Maung Tun v Maung Pu U*, U B R (1902 1903) Vol II, Evidence, 7 Where the question is whether any person is owner of any thing of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner *Ma Illa v Ma Thail* U B R (1892 1896) Vol II, 377 There is a clear distinction as to the onus of proof between a case in which a plaintiff sues to obtain possession of land by redemption of a mortgage, and that in which the defence to a suit for possession of land is twelve years' adverse possession by the defendant In each case it is for the plaintiff to plead his title, and if that title is put in issue, he must make it out by at least *prima facie* evidence before the defendant can be put to proof of his defence In the second case, where the defence is twelve years' adverse possession the defendant must plead and make out the title he alleges, and thus show that the title of the plaintiff which otherwise had been proved or admitted was lost. *Parmanand v Sahib Ali*, 11 A 438.

Where plaintiff who averred that defendant had been in possession for over 20 years of certain land, and had regularly paid the government revenue thereon during that period as the registered holder of the land in the *Shuggi's* books, however, stated that during this period defendant had only been in permissive occupation, having rented the land from plaintiff without paying rent for it, the defendant on the other hand, while admitting that the land was originally owned by plaintiff asserted that plaintiff had sold the land out and out to him, and that he had been in adverse possession ever since for over 20 years, held that the burden of proof lay on plaintiff to establish her title and to show that a sale . . . it is in the registered book . . . which . . . rent . . . 100 . . . there . . . ent . . . 1

person seeking to oust another out of the possession of the landed property, to which the latter has already succeeded and in whose favour mutation of names has also been effected, after regular enquiry by a Revenue Officer, is bound in the first instance, to prove that his right is superior to that of his adversary *Nasibulnissa v Mansoor Ali* 120 P W R 1909=4 Ind Cas 965 Possession in *prima facie* evidence of title against the person in possession *Krishna Iyer v Sreenivasulu* Cas 121=33 M 173 This section lies on the party who is out of possession (1872 1892), 102 In a suit for possession where both parties deny previous possession are both denied, the plaintiff should still make out his title and in *prima facie* evidence of title and is primarily exclusive, and it is for him, who impugns this exclusive title, to show his own right *Krishna Chetty v Chunder*, 1 W Adjudhya v S 5 W R 218, 1892, 458, *Laldas v Kashiram*, 4 B H C A C 60, *Pir Baksh v Jhanda*, 151 P R 1892; *Hassan v Farah*, 121 P. R. 1892; *Lachko v Har Sahai*, 12 A. 46=A W. N 1888, 43 *Maung Ya Bang v Ma Khin* U B R (1892-1896) Vol II 234; *Nga Shwe Yon v Nga Kang*, L B R (1872 1892), 133, *Ma Khin v Ram Persad*, 6 B R L T 185=21 Ind Cas 333, *Aslum v The Crown*, 88 L R. 141=16 Cr L J 133=27 Ind Cas 202.

Where a person is in possession of land and another person claims to be the owner but does not produce any evidence to show that he is the owner, the person in possession is entitled to continue in possession and the burden of proof lies on the person claiming to be the owner.

is on him who alleged a disclaimer *Brown v King* 5 Metc 173 Where a person is proved to be the owner of personal property with the present right of possession, the presumption is that he continues to be owner with the right of possession, until there is evidence that he has parted with that ownership or right of possession and the mere fact that the property is in the possession of another, with his consent shift the burden of right of property of one person is she will not be adju! proof of its having distinctly become so, for every presumption is in favour of the possession continuing in the same subordination of title *Lauson Pre* Lt 210

What constitutes possession The acts of enjoyment from which the ownership of real property may be inferred are various, as for instance, the cutting of timber, the repairing of fences and banks, the perambulation of boundaries of a manor or parish, the taking of wreck on the foreshore and the granting to other of licences or leases under which possession is taken and held, also the receipts of rents from tenants of the property, for all these acts are fractions of that sum total of enjoyment which characterises *dominium* *Hills* Lt 60, see also *Harbey v Conderoy* (1912) A C 599 *Doe v Arkwright*, 5 C & P 575 *St Leonards v Ashburner*, 21 L T 593, *Hoolway v Roule*, 1 A & E 114 In cases of possession every act of enjoyment or possession is a relevant fact, since the right claimed is instituted by an indefinite number of acts of user exercised *animo domini* But inasmuch as such acts are more or less discontinuous in their character—and in the case of ancient rights the evidence of them is by lapse of time rendered even more so—the question for the tribunal is whether the acts proved are so numerous and so connected that the right of possession may be inferred from them If they are so frequent and of such a character as to constitute a continuous open claim it is exercise it, the mere discontinuity

Ibid Acts of possession and enjoyment of land as cutting timber, repairing hedges, granting leases etc may be evidence of ownership, not only of the particular piece or quantity of land with reference to which such acts are done reality or similarity of the other piece of rent constitutes a of jungle lands possession is presumed with the rightful owner *Leelanund v Basheeroomissa* 16 W R 102, *Moochee Ram v Bissambher Roy*, 24 W R 410, see also *Munshi Maharaj v Bepari Singh* A W N 234-3 A L J 567, *Basanta Kumar Ray v Secretary of State* 44 C 808

111. Where there is a question as to the good faith of a

Proof of good faith in transactions where one party is in relation of active confidence transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence.

Illustrations

(a) The good faith of a sale by a client to an attorney is in question in a suit brought by the client The burden of proving the good faith of the transaction is on the attorney

(b) The good faith of a sale by a son just come of age to a father is in question in a suit brought by the son The burden of proving the good faith of the transaction is on the father

Principle In the ordinary transactions of life, fairness and honesty are presumed and conveyances, sales and contracts generally are presumed to have

been made in good faith until the contrary appears *Burr Jones* Pt § 13 The allegation of bad faith is one which the plaintiff according to section 101 is bound to prove in contrast to the defendant. The plaintiff having been entirely in the hands of the defendant, would be destitute of the means of proving affirmatively the mala fides of the transaction whilst the defendant, in such a transaction, may fairly be subjected to the duty not only of dealing honestly but of preserving clear evidence that he has done so *Mt 1 Pt 86* The broad principle on which the Court acts in cases of this description is that, wherever there exists such a confidence, of whatever character that confidence may be in a transaction between the fairest explanation and communication of every particular relating to the one who seeks to establish a contract with the person so trusting him. *Per Page Woolf C in Tole v Williamson, 1 Pq at p 535*

Scope of the section The rule is that the burden of proof is always upon the party alleging a fraud but there is one large class of cases which forms an important exception. When a question arises between a trustee and a beneficiary or between other parties who are in a fiduciary relation as to the good faith of transaction between them, a peculiar burden is imposed upon the one in whom the trust is reposed. When the complaining party proves such relation, the burden of proof is cast upon the trustee or other persons holding the relation of trust to show that the transaction is fair and reasonable and that it was entered into by the other party. To state the rule resulting takes place in a business transaction the person holding the influential position, the law presumes everything against the transaction and casts the burden of proof upon the person benefited to show that the confidential relation has been, as to that transaction at least suspended and that it was not fairly conducted as if between strangers. In equity, persons standing in certain relations to one another—such as parent and child, man and wife, attorney and client, confessor and penitent, guardian and ward—are subject to certain presumption when transactions between them are brought in question and if a gift or contract, made in favour of him who holds the position of influence, is impeached by him who is subject to that influence the Courts of equity cast upon the former the burden of proving that the transaction was fairly conducted as if between strangers, that the weaker was not unduly impressed by the natural influences of the stronger or the inexperienced overreached by him of mature intelligence. *Per Lord Penance in Parfill v Larling L R 2 P & D 462* One of the most important requisites of the validity of these transactions between persons acting under the influence of these confidential relation is that the party presumably under the influence of the other should have had independent advice for a lawyer who is devoted entirely to the interest of the party he is called upon to advise, and in whom that party has entire confidence. *Burr Jones § 180 In Rhodes v Bate L R 1 Ch App 257 Lord Justice Turner said* "I take it to be a well established principle of this Court, that persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which others may have conferred upon them unless they can show, to the satisfaction of the Court, that the person by whom the benefits have been conferred had competent and independent advice in conferring them." In other words every contract entered into by persons standing in such a relation is treated as being *uberrimae fidei* and may be vitiated by silence as to matters which one of two independent parties making a similar contract would be in no way bound to communicate to the other nor does it matter whether the omission is deliberate, or proceeds from mere error of judgment or inadvertence. *Malony v Kernan, 1 Dr & Wat p 29* The mere fact that the mortgagee was a money lender and that the mortgage was executed for funds advanced during a litigation on behalf of the mortgagor, is not sufficient to create such a relation of active confidence between the mortgagor and mortgagee as to throw the burden of proof good faith

under section 111 of the Evidence Act, on the mortgagee *Thakurdas v Jai Raj Singh*, 26 A 120 (P C) = 31 I A 46 = 8 C W N 569 Persons taking a benefit from another over whom they stand in a position of commanding influence, must take upon themselves
Portab Bahadur v Shcoraj, 1 O C W N 1903 70 To prove
stands, in a fiduciary relationship to the other, it is certainly not necessary to prove that all the accounts on which the contract is based are correct
Shamulthone Dutt v Sunita Bala 12 C W N 1102 = 36 C 493

Position of active confidence : The words "active confidence" indicate that the relationship between the parties must be such that one is bound to protect the interests of the other. This is the case between father and son, where the son is just come of age, and between legal practitioner and his client. *Markby Ev* p 86 Sub-sections (2) & (3) of section 16 of the Indian Contract Act, run as follows : (2) In particular and without prejudice to the generality of the foregoing principle a person is deemed to be in a position to dominate the will of another—(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other, or where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress. (3) Where a person who is in a position to dominate the will of another—

is in a position to exercise its influence in the particular case is presumed. But again, this habitual influence may itself be presumed

any of these suspected relations, as they may be called, to be in a position of commanding influence over those from whom they take a benefit. In either case they are called upon to rebut the presumption that the particular benefit was procured by the exertion of that influence and was not given with due freedom and deliberation. They must take upon themselves the whole proof that the thing is righteous. (*Gibson v Jesyes* (1801) 6 Ves 266 276) A stringent rule of law

(1806)

in such

by one and the influence which naturally grows out of that confidence is possessed by the other and this confidence is abused or the influence is exerted to obtain an advantage at the expense of the confiding party the person so availing himself of his position will not be permitted to retain the advantage, although the transaction had existed long asserted and who are placed in have influence over them by which acts the person having such influence obtains any benefit by himself in each transaction. L R 7 Ch 329 (Hatch 9)

'Position implies lawful relation See *Horsgreave v Everard* 6 Ir Eq

1. Vess 285 and adopted by Lord Cottenham in *Dent v. Bunnell*, 1 My & Cr 23 (277); *Bullage v. Southey*, 2 H. 331, 510; *Pollock's Contract* p 53. In *Parfitt v. Lauley*, L. R. 2 P. & D. 462 Lord Penzance, laid down that such position includes the positions of a parent and child, man and wife, doctor and patient, attorney and client, confessor and penitent, and guardian and ward. But the list is by no means exhaustive. His lordship added to the list of suspected relations that of promoters of a company to the company which is their creature *Erlander v. New Sombrero Phosphate Co* 3 App. Cas. at p 1230. But the soundness of this decision is doubted by Sir Frederick Pollock. He says: "The present doctrine is applicable? . . . in a promoter between them and the company was a fair one? *cf. Owen v. The Great Eastern Railway Ltd* and *Lighth Co.*, (1889) 23 Q. B. D. 568-58 L. J. Q. B. 519, where the duty is put on the ground of agency." So this section refers to transactions between attorney and client, doctor and patient, guardian and ward, trustee and *cest que trust*, spiritual advisers and those whom they advise, wherever in fact a real or apparent authority is calculated to give one party to the transaction the means of dictating terms to and robbing the other party of perfect freedom of will. *Huguenin v. Baseley*, 2 W. & T. L. C. 597, *Cum Contract*, 6. . . . in fact the Court is not bound by authority which the Court judges to be influence founded on the confidence exists, or to require such proof thereof. It may think fit. In the absence of any special relation from which such influence is presumed, the burden of proof is on the person impeaching the transaction and he must show affirmatively that pressure or undue influence was employed. *Blackie v. Clerk*, 15 Beav. 595, *Toker v. Toker*, 31 Beav. 629; *Pollock on Contract*, 581. To treat undue influence as having been established by proof of the relations of the parties having been such that the one naturally relied upon the other for advice and the other the will of the first in giving it, is erroneous. it must be further established that a person in a sed the position to obtain unfair advantage for himself and so as to cause injury to the person relying upon his authority or aid. *Fayyaz uddin v. Kutabuddin*, 10 Lah. 761-30 P. L. R. 288-116 Ind. Cas. 899-A. I. R. 1927 Lah. 309. Where the donee is in active confidence burden of proof of good faith of the gift is on the donee even if the donor is not a purdanasheen lady. *Fithal v. Narayan*, 31 L. W. 471-61 M. L. J. 878.

Relation of confidence is presumed to continue. "Where a relation of confidence is once established, either some positive act or some complete case of abandonment must be shown in order to determine it" it will not be considered as determined whilst the influence derived from it can reasonably be supposed to remain. *Per Turner L. J. in Rhodes v. Bate*, (1866) 1 Ch. 252, 257, 260-30 L. J. 267; *Holman v. Loyne*, 4 D. M. G. 270. Where the influence has its inception in the legal authority of a parent or guardian, it is presumed to continue for sometime after the termination of the legal authority, until there is what may be called a complete emancipation, so that a free and unfettered judgment may be formed independent of any sort of control. *Archer v. Hind* on various that without s. said that as a e authority before of course does not at time *Pollock's*

Contract p 587.

Agent. It is possible for an agent dealing directly with his principal to make a contract which the Courts will uphold, but such transactions, to be maintained, must be characterised by the utmost good faith. There must be no misrepresentation, and an entire absence of concertment or suppression of any fact within the knowledge of the agent, which might influence the principal, and the burden of establishing the perfect fairness of the contract, in such cases, rests upon the agent. Such transactions are never upheld, unless it is clearly shown that there has been, on the part of the person trusted, that most marked

integrity, that *uberrime fides*, which removes all doubts respecting the fairness of the contract. *Condit v. Blackwell*, 92 N. J. Eq. 481 (Am.); *Ex parte Lacey*, 11 Ves. 625; *Brookman v. Rothschild*, 3 Sim. 153; *Rothschild v. Brookman*, 2 D. & C. 100; *Phul Chand v. Lalji*, 25 A. 358-23 3 B. L. R. 127-21 W. II 340-11 A 1 L. II O. C. 31, *Wajed Khan v. Pushong v. Moonia*, 10 W. R. 129

Parer with his naturally when the circumstances are such that the former assumes a fiduciary relation. In the case of a child's gift of its property to a parent, the circumstances attending the transaction should be vigilantly and carefully scrutinized by the Court, in order to ascertain whether there has been undue influence in procuring it; but it cannot be deemed *prima facie* void; the presumption is in favour of its validity; and, in order to set it aside the Court must be satisfied that it was not the voluntary act of the donor. *Burr Jones* § 190. In the case of a conveyance by a child to its parent, just after attaining majority the burden is upon the parent to show, in the clearest, and most satisfactory manner that it is in every particular worthy of receiving the sanction of a Court of Equity. *Burr Jones* § 190, *Branbridge v. Brown*, L. R. 18 Ch. D. 188; *Wright v. Vanderplank*, 25 L. J. Ch. 753; *Hartopp v. Hartopp*, 25 L. J. Ch. 471, *Denisdale v. Denisdale*, 25 L. J. Ch. 806, *Bury v. Oppenheim*, 26 Beav. 694; *Potts v. Bury*, 21 D. & C. 142. With regard to the application of the rule to the case of a

applicable in cases of persons in *loco parentis* such as uncle 'in *loco parentis* and niece (*Vide Archer v. Hodson*, 7 Beav. 551; *Maitland v. Irving*, 15 Sim. 487) step-father in *loco parentis* and step-daughter (*Kempson v. Ashbee*, 10 Ch. 15, *Pace v. Pace*, 7 L. J. Ch. 260). As regards the application of the rule to the case of a donee (e.g.) father, to advise the donor (son), or even to manage his property on his behalf, the burden of proving undue influence is on him. *Lakshmi v. Lakshmi*

Husband and wife From the confidential relations which exist between husband and wife, a presumption of undue influence arises in relation to any transfer of property between them, and in order to sustain a conveyance or gift by the wife to the husband, the burden of proof is upon him to show that the transaction is fair and proper. *Omnia*, 11 M. I. A. *Najban*, 20 A. 417, 20 Beav. 521, relation between husband and wife, the husband is in a position of influence over the wife. In such a case, the burden of proving good faith is on him. To uphold the transaction, it must be shown she was given that care and advice which was due to her in her situation. *Duarka Prasad v. Nasir Ahmed*, 11 O. L. J. 219-78 Ind. Cas. 850-1925 Oudh. 16. Where the vendor had been living separately and was not under the vendee's influence the rule as to burden of proof in section 111, does not apply. *Jai Lal v. Sheo Chand*, 6 Lah. L. J. 408-85 Ind. Cas. 293-A. I. R. 1925 Lah. 123

Spiritual adviser According to the English law spiritual influence would be presumed between a clergyman and any person placing confidence in him. *Dent v. Bennett*, 7 Sim. at p. 564, see also *Nottidge v. Prince*, 29 L. J. Ch. 857;

1. Ves 287 and adopted by Lord Cottenham in *Dent v Bonnell*, 1 My & Cr 277, *Billage v Southree*, 2 Ha 531, 540; *Pollock's Contract* p 653. In *Parfitt v Lawless*, L R 2 P & D 162 it includes the positions of a parent and attorney and client, confessor and . . . list is by no means exhaustive. It includes relations that of promoters of a company to the company and their creature. *Erlanger v New Sombrero Phosphate Co* 3 App Cr at p 1230. But the soundness of this decision is doubted by Sir Frederick Pollock. He says "But is not personal confidence essential to make the present doctrine applicable? And has any case gone the length of casting in a promoter the burden of proving in the first instance that a contract between them and the company was a fair one? Cf. *Eden v. Mid-dale's Railway Locomotive and Lighting Co.* (1859) 23 Q B D. 368-58 L J. Q B 512, where the duty is put on the ground of agency". So this action rests on transactions between attorney and client, doctor and patient, guardian and ward, trustee and *cest que trust*, spiritual advisers and those whom they advise, wherever in fact a real or apparent authority is calculated to give one party to the transaction the means of dictating terms to and robbing the other party of perfect freedom of will. *Huguennu v Barely*, 2 W & T L C 537, *Cum Contract*, 69. As to certain well known relations, indeed, the Court . . . an influence . . . of as it may

think fit. In the absence of any special relation from which such influence is presumed, the burden of proof is on the person impeaching the transaction and he must show affirmatively that pressure or undue influence was employed. *Blackie v Clerk*, 15 Beav 595, *Toler v Toker*, 31 Beav 629; *Pollock's Contract*, 531. To treat undue influence as having been established by proof of the relations of the parties having been such that the one naturally relied upon the other for advice and the other was in a position to dominate the will of the first in giving it, is erroneous. That merely proves influence. It must be further established that a person in a position of domination has used the position to obtain unfair advantage for himself and so as to cause injury to the person relying upon his authority or aid. *Fayyaz uddin v Kutabuddin*, 10 Lah 761-30 P L R 288-116 Ind Cas 899-A I R 1927 Lah 369. Where the donee is in active confidence burden of proof of good faith of the gift is on the donee even if the donor is not a purdahshin lady. *Pithal v. Narayan*, 34 L W 424-61 M L J 878.

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Agent. It is possible for an agent to make a contract which the Courts maintained, must be characterised by no misrepresentation, and an entire absence of concealment or suppression of fact within the knowledge of the agent, which might influence the principal and the burden of establishing the perfect fairness of the contract, in such cases rests upon the agent. Such transactions are never upheld, unless it is clearly shown that there has been, on the part of the person trusted, that most marked

. . . principal to be . . . must be . . . of any . . . principal and

question and section 111 of the Evidence Act applies *Surat Singh v Daldeo*, S. 8 N. L. R 150.

Medical attendant and patients The rule applicable to a transaction

603, *Pratt v Barker*, 1 Sim 1.

gift sued the son
the deceased donor
could be seen that
was very intimate
with him and had sent money, and the son had not only disinherited his son
and his wife but he stripped himself of all the property he was possessed Held
that the donor's son had merely to prove that the donee was in a position
to dominate the will of the aged donor and that the gift was unconscionable and
by so doing he was able to shift the onus of proving good faith on to the
shoulder of the donee *Safdar Ali v Nur Mahomed*, A. I. R 1930 Sinl 25

underlying this section
high undue influence
Anderson v Weatherill,
Parfit v Laurels,
C 849 In *Venkata-*
C 849 Ind
Wills and
of proof
having been
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other matters or transactions But the principle must not be carried too far
When a jury sees that, at and near the time when the Will sought to be
impeached was executed, the alleged testator was, in other important transactions
so under the influence of the persons benefited by the Will, as to them, he was
not a f
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directly
influenc
H L. C 6

influence is presumed to have been exerted unless the contrary is shown It is
therefore, in all dealings with those persons who are so situated, always
incumbent on the person who is interested in upholding the transactions to show
that its terms are fair and equitable The most usual mode of discharging this
onus is to show that the lady had good independent advice in the matter, and

note 1 therein altogether at arm's length from the other contracting party and in the absence of such proof, the transaction would be set aside. *Bibee I Kh v Shaila Kh* 22 W R 443, *Kanailal v Kamini* 1 B L R O C 31 N, *Jogannam v Gangaiah* 9 W R 297, *Taloor Din v Awarab Sjed*, 21 W P 210 P C 13 B L R P C 427. Where a person seeks to bind a *purdanashin* by a document alleged to have been executed by her on her behalf by a third person on clear and strict proof of the agent's authority must be given. It is incumbent on the Court, when dealing with the disposition of her property by a *purdanashin* woman to be satisfied that the transaction was explained to her and that she knew what she was doing and especially in a case where for no consideration and without any

deprive her of all her property

81 see also *Furthums v*

Bu loor v Stamsonni sa 11 M I A 551, *Panna Lal v Bamasundari* 6 B L R 732, *Iam Ier let v Rince Hoohttee* 7 W R 99; *Hasanalli v P* 27 Bom I R 184-86 Ind Cys 896, *Deo Kuor v Man Kuor*, 17 A 1, *A hhaar Kuor v Thal ur Dis* 17 A 125-A W N 1895 24

To charge a *purdanashin* woman upon an instrument alleged to have been executed by her it is necessary that satisfactory evidence should be given that the document was explained to and understood by her. *Sudhistal v Solors* 8 C 215-8 I A 39 (P C), *Annala v Bhuban* 29 C 516 (P C)=23 I A 71-5 C W N 499-11 M L J 164-9 Bom L R 386; *Shandati v Jogo Bbi* 29 C 710 (P C)=29 I A 127-C C W N 682-4 Bom L R 444, *Kubra v Ajothia* 7 A L J 115-6 Ind Cys 699, *Muhammad Ali v Ram-an* 24 C W N 977 (P C), *Hasanalli v Rupulla* 27 Bom L R 181-86 Ind Cys 896, *Blagual v Choh* 2 Jh L J 689, *Annada v Bhuban* 3 Bom L R 36, *Amirbai v Al lul* 3 Bom L R 658, *Man Singh v Nauall bah*, 2 Pit 601=73 Ind Cys 892, *Muhammad Shafi v kalsuri Di*, 4 Lah 467, *Bholana h v Bhutnath* 40 C L J 393.

The Court when dealing with a deed alleged to have been executed by a *purdanashin* lady must before it gives effect to it satisfy itself first that the deed was actually executed by her or by some person duly authorized by her

that he notes that those who rely upon documents executed by *purdanashin* ladies should satisfy the Court that they had been explained to and understood by those who executed them. *Bindubasini v Giridhari*, 3 Ind Cys 330-1 P C L J 115, *Samsuddi v Abdul* 8 Bom L R 781-31 B 165, *Debroos Banoo v Nurib Sjed*, 15 B L R 167-23 W R 453, *Sivthri v Vasudevan*, 3 M 215, *Phundo v Bisra A* W N 1883 246, *Marian Bibi v Sakina*, 14 A 8-A W N 1891, 213. Where it is proved that the lady was of business habits was literate and of considerable intellectual capacity the Court will be less inclined to interfere with the deeds which have been *prima facie* properly executed or to interfere with transactions to which her consent had been deliberately given. *Bindubasini v Giridhari*, 12 C L J 115=3 Ind Cys 330 see also *Thirathman v Gunyswari* 96 Ind Cys 571-1906 P 529. Transactions with a *purdanashin* widow should not be enforced unless they are strictly fair and equitable. *Attahour v Bhoiraj* 3 C P L R 118. In a transaction with a Mahomedan *purda* lady it is the duty of the plaintiffs to show that they were free agents in the matter, and having a clear knowledge of what they were doing accorded their consent to it. *Behari Lal v Habiba Bibi* 8 A 767-A W N 1886 91 see also *Ram Chunder Dutt v Duarkanath* 16 C 330, *Sunder Koomatee v Keshores Lal* 5 W R 246. Where a person claims under a deed of sale alleged to have been executed by a *purdanashin* lady living apart from her relations without those natural advisers who would under ordinary circumstances help her with their counsel and especially where the person profiting by the transaction occupied a position of confidence he ought to give

the lady B L R 5=29 I al v The puttee 7 nuktair,

at an exorbitant rate of interest, the security being ample, appears to be a hard and unconscionable bargain on which the contract for such rate of interest would not be enforced. *Kamini Sundari v Kali Prasanna*, 12 C 225=12 I A. 215 (P C) Party relying on a deed executed by a *pardanashin* lady must prove that it was taken with full knowledge. *Ali v Rabi Begum*, 95 Ind Cas 506=A I R. always be careful to see that deeds taken fairly taken that the party int she was about the *pardanashin* V N 1133 The protection which the law throws around a *pardanashin* lady in respect of deeds executed by her demands that the burden of proof shall rest, not with those who attack, but with those who found upon the deed, and the proof must go so far as to show affirmatively and conclusively and that the deed was not only executed by, but was explained to and was really understood by the grantor. It must also be established that the deed was not signed under duress but also from the free and independent will of the grantor. *Kali Bakshi v Rungopal*, 18 C W N 282=(1911) M W N 112=16 O C 371=19 C L J 172 (P C), see also *Keshub v. Kailha*, 17 C W N 991=20 Ind Cas 717, *Kaminee v Krishna*, 16 C W N 649=39 C 933=16 Ind Cas 110, *Sharukh v Shro Prasad* 41 Ind. Cas 435, *Mariam Bibi v Shauk Mahommed Ibrahim*, 28 C L J 306=48 Ind Cas 561, *Kailash Chandra v Latifannessa*, 51 Ind Cas 556 In order to enforce a document executed by a *pardanashin* lady all that is necessary is to convince the Court that the transaction was a fair one and that the lady understood the act to which she was subscribing. *Bhaquati v Choti*, 2 Lab L J 689=55 Ind. Cas 636; see also *Motilal Das v The Eastern Mortgage and Agency Co Ltd*, 25 C W N 265=47 I A 265 (P C), *Kamauati v Digbijai Singh*, 43 A 525=15 L W 1=48 I A 381 (P C) The Court when called upon to deal with a deed executed by a *pardanashin* lady, must satisfy itself upon the evidence, first that the deed was actually executed by her or by some person duly authorized; secondly, that she was about to do; and thirdly, that the transaction was had independent and competent approval, it simply means that the advice shall be removed entirely from the suspected atmosphere and conveyed from the clear language of an independent mind, free from that taint of interest, and the party acting should know precisely the nature and consequences of the transaction. It is not an inflexible rule that a *pardanashin* lady must have independent legal

declaration by the transferor, a *pardanashin* lady subsequently made, that she had not understood what she was doing obviously is not in itself conclusive. It must be a question whether, having regard to the proved personality of the lady, it has been established that the transaction was fair. If the answer is in the affirmative, the onus which

rests on them. Of course matters *Birlat Unnasa L* 693=25 A L J 311-8 Pn who takes a document from a *pardanashin* lady is bound to prove the validity of the document from every possible angle of attack, when the *bonafides* of the document are challenged. *Kalamjan Bala v Sahajan Bala*, 117 Ind Cas 799= A I R 1926 Pn 529; *Ram Sumran v. Gobinda Das*, 5 P 616= A I R 1926 P 582.

112 The fact that any person was born during the continuance of valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

Principle "The legal presumption that he is the father whom the nuptials show to be so, is the foundation of every man's birth and status. It is a plain and sensible maxim which is the corner stone, the very foundation on which rests the whole fabric of human society; and if you allow it once to be shaken there is no saying what consequences may follow." *Rutledge v Curdthorpe* Nicholas Adlt Birt. 161, *Lawson Pre Ct* 141, "Maternity admits of positive proof, but paternity is a matter of inference because the connection of a child with its father is secret, but it may be established by a substantial fact (bed) that is, a legally constituted relation between him and the mother of the child."

Origin and growth of the rule In accordance with the maxim *pater est quem nuptiae demonstrant* (he is the father whom the marriage indicates) the rule is the same where the child is born in wedlock, whether begotten before or after the marriage. *Garner*, 2 App Cas 723, 723. By the ancient common law, if the husband was within the four seas at any time during the pregnancy of the wife, the presumption was conclusive that her children were legitimate. *R v Murray* 1 Salk 122; *R v Allerton*, 1 Ld Ray 123, *Lawson Pre Ct* 141. In the case of *Allen de Martone v Simon*, the son of Gullan (1301) Y. B. 32 & 33 Edw 1 p 1.

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and refused—except in the case of natural impossibility—to make any enquiry into the paternity of a child whose mother's husband was within the realm. In *Fletcherham v Julian*, Year Book, 7 Hen IV 9, decided in the seventh year of the rei

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decided that the presumption could be rebutted by other proof. In 1807, Lord Ellenborough laid it down that the illegitimacy of the child might be shown where the legitimacy was impossible, in the five cases, (1) where the impossibility arose from the husband being under the age of puberty. In a case in the Year Books it was held that the issue was a bastard where the husband was under fourteen

the impossibility arose from the husband by natural infirmity. In *Ivrcraft's Case* a man was married in that state twelve weeks child was adjudged illegitimate. (3) W length of time elapsed since the death of

sibility arose from the absence of the husband—as where he was outside the realm at the time the child was begotten (*R v Allerton*, 1 Le Roy, 395; *R v Maidstone*, 12 East 550). (5) Where the impossibility was based on the laws of nature. In *Perdrell v Perdrell & Stearns* 4 Cr 1 was held that it was necessary to show

and wife, after 1 and he going to St

born. The evidence being strong that the husband had not visited the wife during that time, the presumption of the legitimacy of the child was held to be overthrown, and he was declared to be illegitimate. *Goodright v Saul*, 4 Term Rep 358

In *Horgrate v Horgrate*, 9 Beav 255, Lord Langdale laid it down that the presumption that a child born of a married woman is legitimate may be rebutted by showing that the husband was (1) incompetent; (2) entirely absent, so as to have no intercourse or communication of any kind with the mother, (3) entirely absent at the period during which the child must in the course of nature have been begotten, (4) only present under circumstances affording clear and satisfactory

House of 1 Case, 1 Sim husband no intercourse

unsatisfactory take to the

modern English law in concise language the ancient policy of the law of

doubt may be excluded from other circumstances, although the husband be within the four seas, the modern practice permits the introduction of every

other question of fact, when you answering a presumption it may be answered by any evidence that is appropriate to the issue."

Under this section, there is conclusive presumption that a child born during the continuance of a valid marriage is a legitimate issue of parents no matter how soon the birth be after the marriage. *Umra v Muhammad Hayat*, 79 P R 1907. Under this section, the onus is on the claimants to prove that he was born within 280 days after the death of his father and the burden of proving non-access between his mother and father is upon those who deny his legitimacy. *Narendra Nath v Ram Gobind* 29 C 111 P C = 29 I A 17 = 6 C W N 146 = 4 Bom L R 213. It is a peculiarity of the English law that it does not concern itself with the conception, but considers a child legitimate, who is born of parents married before the time of his birth, though they were unmarried, when he was begotten. That peculiarity of the English law has been imported into India by this section. *Muhammad v. Muhammad*, 10 A 289. The legal presumption as to paternity raised by the section of the Evidence Act is applicable only to the off-spring of a married couple. *Gopalaswami v Arunachalam*, 27 M 32. Where the husband charged his wife with having committed adultery and prayed for dissolution of marriage and where the charge of adultery rested on the bare fact that she gave birth to a child 330 days or 333 days after the date when petitioner had last access to her. Held that, though, under the circumstances, very considerable doubt is thrown upon the honesty and truth of the wife's assertion that the petitioner was the father of the child, Courts are not justified in the absence of any other evidence,

v Gatham, 27 M L J 580 = 16 M L T 50. According to English law a child and *Hethe* nine months *Gopi*, A I R *Bhasson v* (P C) = 123

consider and act upon the opinion of experts contained in treatises to which it is referred. *John Howe v Charlotte Howe*, 25 M L J 54 = 14 M L J 447 = 1913 M W N 983 (F B). Where a boy was born about seven months after his father and mother were lawfully married and it was not disputed that they

Jai Singh v Jagir Lal *v Palani* 49 M 533 = A I 1923 and the wife was living 1924 held that this section need, to disprove legitimacy,

2

Had no access to each other now proved. In this section it should be remembered that the words "access" and "non access" mean the existence or non existence of opportunities for sexual intercourse. *Banbury Perrage*, 1 Sim & Sta 179, 5 CL & F 250. In the above case Lord Eldon said: "Lord Hale in *Hosyell v Collins*, decided that the issue for the jury was as to the fact of access, or as I understand it, the question is of a reference to the of the word but

result, namely, the procreation of children. By access I mean opportunity of having sexual intercourse." Per Alderson B in *Cope v Cope*, 1 M & R 275. "Access is such access as affords an opportunity of sexual intercourse." *Bury v Philpot*, 2 M & K 349. Lord Longdale in one case calls it "generative access" saying "The absence of sexual intercourse, where there has been some society, intercourse, or access has been called 'non generating access'." *Hargrave v Hargrave*, 9 Beav 225. In *R v. Inhabitants of Mansfield*, 1 Q B 444 it appeared that a wife was deserted by her husband, who went to live with another woman, that the wife at the end of three or four years married another man and had two children, that eleven years after the second marriage she again co-habited with her husband. It not appearing where the husband was between the time of his deserting and returning to his wife, it was held that the evidence was insufficient to show non access when the children were begotten. "The question is" said Lord Denman, "whether in this case there be any evidence of illegitimacy, and to establish that it is necessary to show non access of the husband. That may be proved by circumstances, one of which certainly is an adulterous intercourse between the husband or wife and another party. But here the whole proof consists only of that fact. We are not told what the husband was doing or where residing at the time the children were begotten." In *Bury v Philpot*, 2 M & K 349, the wife of P left him and went to live with her father. Shortly after, her father dying, she formed a connection with one H, with whom she went to live. P took a house opposite where they resided and had frequent interviews with her. She had two children during this time. It was held that they must be declared legitimate. "Access" said the Master, "is such access as affords an opportunity of sexual intercourse, and where the fact of such access between a husband and wife within a period capable of raising the legal inference as to the legitimacy of an after born child is not disputed,

it were proved that she slept every night with her paramour from the period of her separation from her husband, I must still declare the children to be legitimate. The interest of the public depends upon a strict adherence to the rule of law." In *Van Aernam v Van Aernam*, 1 Barb Ch 375, the wife of the plaintiff was found to have been in adultery with another man. The court held that the presumption of sexual intercourse is very strong. *Ploices v Berry*, 31 J Ch 680. In that case B was married in 1829, became a lunatic in 1833, and was confined in a lunatic asylum until his death. His wife, who lived twenty five miles away, occasionally visited her husband, but the keepers of the asylum had strict orders not to allow them at any time to remain alone together. He was

presumption of sexual intercourse is very strong. *Ploices v Berry*, 31 J Ch 680. In that case B was married in 1829, became a lunatic in 1833, and was confined in a lunatic asylum until his death. His wife, who lived twenty five miles away, occasionally visited her husband, but the keepers of the asylum had strict orders not to allow them at any time to remain alone together. He was

Russell v Russell, (1924) P 1
the fact of sexual intercourse

fact of meeting, and, therefore, of sexual

But proof of access is not conclusive *R. v Inhabitants of Winstfield*,
1 Q B 441, *Cope v Cope* 1 M & Rob 275, *R. v Shepherd*, 6 Bing 283,
Pandaya v Pali, 1 M H C 478
for sexual intercourse had existed—
house—and the fact itself not being
the presumption that it did take place
four walls, and the fact of sexual
testimony, but by circumstantial evidence raising a strong presumption against
the fact. To state this principle briefly—the proof of sexual intercourse being
conclusive, the presumption cannot be attached, but the evidence by which such
fact is to be established may be contradicted. The law is not so unreasonable

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that the suit was governed by s 112 Evidence Act, and the burden of proof was
on the plaintiff *Pirlok Nath v Lachmin*, 25 A 403 (P C) = 7 C W N 617 =
5 Bom L R 474 = 30 I A 142

A sues B, his father, and C the adopted son of B, for partition. B dis-
owned
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tenance, and B met it by bringing one for restitution of conjugal rights, and
became reconciled to each other though she lived in her mother's house
the first wife
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id, that (1) in
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(1911) 1 M W N
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marriage had no access to each other at any time when he could have
been begotten *Delipa v Rela*, 49 P L R 1914 = 23 Ind Cas 409. The pre-

Cope v Cope, 1 M. & Rob 276; *Atchley v Spragg*, 33 L. J. Ch 315; *Stevens v S. Moss*, 2 Cowp 591; nor of opportunities for access (*R v A Cross v Cross*, 3 Paige, 139), or had not access or opportunity.

King v Inhabitants of Somton, 5 Ad & Ill 180, *Russell v Russell*, (1924) A C 687. Sir James F. James Stephen says: "Neither the mother nor the husband is a competent course with."

to be relevant whether the mother or her husband in applications for affiliation orders of the husband at any time when

the wife may give evidence as to the person by whom it was begotten. *Steph Dig Fr Art 98* are also *R v Luffe*, 8 East 207; *Cope v Cope*, 1 M & R 272 4; *Legge v Filmonds*, 25 L. J. Eq 125 (135), *It v Mansfield*, 1 Q B 444; *Morris v Davies*, 3 C & P 215, *Haues v Draeger*, L. R 23 Ch D 173. But a deposition of the husband is admissible to prove that he had never sexual intercourse with his wife before the marriage. *The Poulett Peerage*, 1000 A C 227. C said: "I shall submit to properly admissible. There was and and wife were within the

four years you must presume that there was intercourse, and that you could not possibly contradict it. I think that idea is completely exploded. The question is to be treated as a question of fact, and, like every other question of fact when you are answering a presumption it may be answered by any evidence that is appropriate to the issue. My lords that is not exactly the question which arises upon the objection taken here. The question is whether it is possible for a husband to be asked whether he had intercourse before marriage with the woman who afterwards became his wife. I confess I shall be startled if I thought that that which appears to have been in the mind of Sir John Romilly (*vide Anon v Anon*, 22 Beav 481; 23 Beav 278) at the time he gave the decision referred to could be held to be the law of England. Is it conceivable that a man taking to wife a person whom he imagined to be a pure virgin, and finding out that he had been deceived and that the woman was pregnant when he married her should not be at liberty to say afterwards that, so far as he was concerned, he had every reason to believe that she was not a virgin, having spurious issues put upon him he should not be at liberty to say, "I never had intercourse with my wife before marriage"? The testimony of the parents that they have or have not had connection has on the same grounds of decency, morality, and policy—been, until recent times, uniformly rejected by the Judges. *Taylor* § 950. But the rule is otherwise under this section. So in India a married woman can be examined as to non access of her husband during her married life, without independent evidence being first offered to prove the legitimacy of her children. *Roxaris v Ingles* 18 B 468, see also *John Haues v Charlotte Haues*, 38 M 466; *Bai Kamala v Babu Bhai* 9 J Ind Cas 834=28 Bom L R 607; *Parbati v Maharaj*, 10 Ind Cas 188. In *Premchand Harn v Ra Gahel A I R 1927 Bom 504* D. 1 " "

"Having laid down by effect that intercourse & divorce suit *Charu v Ma* 10 Ind Ca

(F B) The law of England is that the declarations of a father or mother cannot be admitted to bastardise the issue born after the marriage. The Evidence Act does not contain any such rule. *Bai Kamala v Babu Bhai* 28 Bom L R 607=A I R 1926 Bom 348

Proof of marriage. It is upon the person who claims to be the legitimate issue of his parents to bring forward satisfactory evidence in support of their marriage. In such case no certain inference can be drawn from the evidence as to the conduct of relations and friends. *Thakur Anjal v Narab Ali Khan*,

2. 9 Bom L R 264=5 C L J 1=17 M L J 56 It is a well recognised rule of law that when a particular relationship is shown to exist, such as marriage, for the purpose of s 112 divorce of the plaintiff from relying on the section show when the divorce took place. If the defendants are unable to show that the divorce took place at a time which excludes the plaintiff from the operation of s 112 then the conclusive proof in favour of the plaintiff arises and can only be displaced by its being shown that the parties to the marriage had no access to each other at any time when the plaintiff could have been begotten by the husband of his mother *Bluna v Dhudapp* applicable in any way to a marriage which is valid but is *fasid*, a division of marriages merely be applicable to Mahomedan *void ab initio fasid* and valid. In any case, it is held that the word 'valid' in that section should be construed as 'lawful' so that the presumption would not apply to *fasid* marriages *Kamru v Hasan Ahmad*, A I R 1926 Oudh 231=92 Ind Cas 82

in order to render a take place after L R 115 (1873)

P C

Question of legitimacy is question of evidence The question of a child's paternity is not one of succession, of any religious institution or usage within the meaning of s 112. *Tin v Michon*, U B R (1914) Where the point of decision is would be governed by s 112 and not by the personal law of the parties *Ibid*

Mahomedan Law The section proceeds upon adopting the period of birth as the point of legitimacy, but unless the date of the birth is referred to the date of the *Alqadad*

months. A remarriage between a husband and his death, but second husband, is to be considered legitimate under s 112 of the Indian Act. *Alqadad* happening within three months of the expiry of three months after the death of her first husband. In the *Indian*

the death of the husband, is a question to be determined *Mazhar Ali v Budh Singh*, 7

by this Act legitimacy can be legitimate under s 112 of the *Sobrab* 15 *babad High* *Hizra v* *idha Singh* L J 713, 721 The meaning of s 2, Mahomedan Law within the rule of the *Indian*

7 A 291 (F B), 1 *Sibt Mahamed* v rule of Mahomedan meaning of s 2, Mahomedan Law

Bibi v. Churagh Din, A I R 1930 Lsh 97, see also *Muhammad v. Ali Baksh*, 76 P. II 1891, *Hajira v. Amina*, A I R 1923 All 570

Presumption of legitimacy Where a party admits the paternity of the other party but pleads that he is not the father, the presumption is in favour of legitimacy the being in favour of legitimacy the to prove it *Dulari Singh v.*

1 practical purposes of, while the order is of proving access

Ma Mya v. Ma Shue Ban, 46 Ind Cas 620 Before a presumption of legitimacy can arise under this section all the facts specified in the section must be proved *Maroti v. Illahi*, 69 Ind Cas 465 Where plaintiff claims to recover property as the son of B by his lawfully married wife D and defendant denies that D ever gave birth to a child, and sets up that plaintiff is the son of one E the onus of proof is on the plaintiff to show that D gave birth to him or to any child before invoking the presumption under s 113 *Rao Nar Singh v. Batimaha*, 44 A. 470-20 A L J 271-66 Ind Cas 902 There is no presumption in favour

696 The presumption that a particular woman has passed the age of child-bearing is or by the light of general knowledge and partly l son in question It has several times been of fifty-three years has been passed, but each case must depend on its particular circumstances *Haynas v. Haynas*, 80 L J Ch 303, *Re White* (1901) 1 Ch 570; *Hills Ev* 2nd Ed 57; *Widow's Trust*, L R 11 Eq 403, *In re Millner's Estate* L R 14 Eq 245, *Davidson v. Hampton*, 18 Ch D 213, *Lyddon v. Elleson*, 19 Beav 565, *Croxtan v. May*, 9 ch D 388 *In re Hooling* (1893) 2 Ch 567 Where divorce in the sense n must be taken woman and her

113. A notification in the Gazette of India that any portion of British territory has been ceded to any Native State, Prince or Ruler, shall be conclusive proof that a valid cession of such territory took place at the date mentioned in such notification

Proof of cession of territory Scope of the section St 24 & 25 Vict c 67, s 25 does not protect s 113 of the Evidence Act, though it does not disallow it This section has provided that a notification shall be conclusive proof that a valid cession of such territory has taken place at the date mentioned in such notification

of prerogative of the law is valid other hand, that it follows, as a matter of course, and that section v *Ganesh Dev*

by the Act 24 & 25 Vict chap. the sovereignty or dominion of the Crown over any part of its territories in India, or as to the allegiance of British subjects, could not by any legislative Act, purporting to make a

notification in a Government Gazette conclusive evidence of a cession of territory exclude inquiry as to the nature and lawfulness of that cession. The British Crown has the power without the intervention of the Indian Parliament to make a cession of territory within British India to a foreign prince or feudatory. *Lachminarain v. Partap Singh*, 2 A 1 *Dinohar v. Deoram* 1 B 367 (P C) = 3 I A 10. This section was an attempt for political reasons to exclude enquiry by Courts of justice, into the validity of the acts of the Government. But it has been decided by the Privy Council in *Dinohar v. Deoram* 1 B 367 (P C) that the Indian Legislature had no power to do this, and the section is therefore, a dead letter. *Var b, Pt 87*

114 The Court may presume the existence of any fact which

Court may presume it thinks likely to have happened regard existence of certain being had to the common course of natural facts event, human conduct and public and private business, in their relation to the facts of the particular case

Illustrations

The Court may presume—

(a) that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen unless he can account for his possession,

(b) that an accomplice is unworthy of credit unless he is corroborated in

and the instrument was accepted or endorsed

within a period shorter than that within which such things or states of things usually cease to exist is still in existence,

(e) that judicial and official acts have been regularly performed

(f) that the common course of business has been followed in particular cases,

(g) that evidence which could be and is not produced would, if produced be unfavourable to the person who withholds it,

(h) that if a man refuses to answer by law the answer if given

ends of the

to such facts as the following in do not apply to the particular case

before it —

as to illustration (a)—a shop keeper has in his till a marked rupee soon after it was stolen and cannot account for its possession specifically but is

enter is tried for certain machinery the arrangement the common care-

sons A B and not apart from each and the accounts and the accounts

render previous concert highly

of exchange, was a man of ignorant person, completely under

A influence —

as to illustration (d)—it is proved that a river ran in a certain course five years ago, but it is known that there have been floods since that time which might change its course —

as to illustration (e)—a judicial act, the regularity of which is in question was performed under exceptional circumstances

As to illustration (f)—the question is, whether a letter was received. It is shown to have been posted, but the usual course of the post was interrupted by disturbances.

...ment which would
...d but which might
...which he is not
compelled by law to answer, but the answer to it might cause loss to him in
...h it is asked
...obligor, but the circum-

Scope of the section "The effect of this section, coupled with the general repelling clause at the beginning of the Act, is to make it perfectly clear that Courts of Justice are to use their own common sense and experience in judging of the effect of particular facts, and that they are to be subjected to technical rules, whatever on the subject" *Vide the Speech of Hon'ble Mr. Stephen in the*
...assumption to law of evidence *Vide*
...or the most part, cases of what in
...artificial rules as to the effect of
...vide its decision, subject however,
...to understand or to apply, but
...question *Ibid* A 'presumption'
...may draw a particular inference
from a particular fact or from particular evidence, unless and until the truth
of such inference is disproved *Lauson Pre Ev* 639 "Presumptions are of
two kinds, natural and legal or artificial. The natural presumption is when
a fact is proved wherefrom, by reason of the connection founded on inference,
the existence of another fact is directly inferred. The legal or artificial presump-
tion is where the existence of the one fact is not direct evidence of the existence
of the other, but the one fact existing and being proved, the law raises an
artificial presumption of the existence of the other" *Gulich v Loder*, 13
N J (L) 72 "The terms of this section are such as to reduce to their proper
position of mere maxims, which are to be applied to fact by the Courts
in their discretion, a large number of presumptions to which English law gives,
to a greater or less extent, an artificial value. Nine of the most important
of them are given by way of illustration' *Steph Intro* p 175 Presumptions
of law are in reality, rules of law and part of the law itself, and the Court
may draw the inference whenever the requisite facts are developed, whether
in pleading or otherwise, while all other presumptions, however obvious, being
only inferences of fact cannot be made without the intervention of a jury
Best on Presumptions, 18; *Lauson Pre Ev* 641, *Justice v Long*, 52 N Y
523 When certain facts are admitted or proven, the Court takes notice, without
further proof, of all such presumptions and inferences arising from them as
are warranted by uniform experience, and also all such consequences as are
known to flow from the laws which govern the matter, and which are applicable
to the proven or admitted facts *Heils v Silliman*, 93 Ill 261 (Am) A presump-
tion must be based upon a fact, and not upon inference or upon another
presumption *Lauson Pre Ev* Rule 118 A presumption cannot contradict

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presumption of law is *functus officio* as a presumption of law." Such a presumption, therefore, cannot shift "the burden of proof" in the strict sense of that term and the most that it can effect is a shifting of 'the burden of evidence'—the burden of going forward with new evidence. The Act indicates that it is for the Court,

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The illustrations appended to this section are not statements of the law qualified only by particular exceptions. They are merely what they call themselves illustrations or instances of the application of certain maxims out of many possible instances. *Gotinda v Emperor*, 69 Ind Cas 957=23 Cr L J 678

ILLUSTRATION (A)

Recent possession of stolen property. In a criminal case, the burden of proof always lies in the first instance on the prosecution, for the accused is presumed to have committed the offence.

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property recently after the commission of a theft is *prima facie* evidence that

the possessor was either the thief, or the receiver according to the other circumstances of the case. *R v Langmead*, 1 L & C 427, *Taylor* § 140, *Russell* L

of Crimes p 1482. In *R v Langmead*, 1 L & C 427, *Pollock* C B said: "If

no other person is involved in the transaction, and the whole of the case against

the prisoner is that he was found in possession of the stolen property, the evidence

no doubt points to a case of stealing rather than a case of receiving, but in every

case, except indeed where the possession is so recent that it is impossible for

any one else to have committed the theft, it becomes a mere question for the

jury whether the person found in possession of the stolen property stole it

or received it. The evidence, therefore, is that the person found in possession

of the property, having stolen it, it will be for the jury to decide whether he

received it. In the same case, *per Lord Russell*, the property has been

stolen, and has been found recently after its loss in the possession of the

prisoner, he is called upon to account for having it, and on his failing to do

so, the jury may well infer that his possession was dishonest, and that he was

the thief. If he had been found in possession of the property, they may

infer that he was the thief. It is more difficult to say that they are

satisfied that he is not the actual thief." See also *R v Smith*, Ry & M 290,

Bayju v King Emperor, 11 A L J 94=18 Ind Cas 681=14 Cr L J 121, *In re*

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section is merely an example, and it cannot be relied on as summing the presumptions which may be drawn from recent possession of stolen property. *Musem v Emperor*, 17 Cr L J 32-32 Ind Cas 160. The possession by the accused of the jewels of a person who has been murdered for the sake of her jewels, if unexplained is presumptive evidence that the accused was the murderer as well as that he committed theft. *In Nainamalai Konan*, 14 L. W 418; but see

property. In a criminal case the onus is on the prosecution to prove beyond reasonable doubt the guilt of the accused and the burden never changes. *Satiya Charan v. Emperor*, 62 C 223-68 Ind Cas 515, *Reg v Isaac*, (1914) Cr App.

of the accused in respect of property proved to have been stolen must be defined as a presumption but extends to a presumption. R 1930 Pat

Where accused persons are found in possession of stolen property soon after the theft and they are unable to explain their possession they can be held guilty of receiving stolen property knowing it to be stolen under s 411 I P Code. *Yaman v Emperor*, L R 5 A 81.

Possession unexplained The reasons on which this presumption is founded are well stated in a learned note to the report of *Cockin's case*, 2 *Levin*, 234.

If the change of possession has been forgotten, still less if it be an article of bulk or value. If, then, it be reasonable under such circumstances to call upon the party in possession to account for such possession it can not be unreasonable to presume against the lawfulness of that possession when he is unwilling to give an account, or is unable to give a probable reason why he cannot. Now there is no reason in general why an honest person should be unwilling to give an account, or unable to give a probable reason why he cannot. He is not honest and some one else is.

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of this nature, you should take it as a general principle that when a man in whose possession stolen property is found gives a reasonable account of how he came by it, as by telling the name of the person from whom he received it, and who is to be a real person, it is incumbent on the prosecutor to show that the account is false; but if the account is not reasonable or improbable on the face of it. Suppose, for instance, a I were to say, I bought it for *prima facie*, a reasonable account, and I ought not to be convicted of felony unless it is shown that that account is a false one. See also *R v. Smith*, 2

4 C & K 206, see *R v Schuma* 86 L J K B 395, *R v Norris*, 86 L J K B 810 *R v Grunberg* 33 F L R 425 (i) The presumption under the section is discretionary with the Court having due regard to the circumstances (ii) the presumption means that the law exempts the crown from proving the guilt of the accused unless he gives some explanation as to how he came by the goods. If he gives any explanation which in the opinion of the jury may possibly be true although they do not necessarily believe it then the crown cannot rely upon the presumption and must prove the guilt of the accused just as in any other criminal case and did not prove his innocence affirmatively *Buthnath v Emperor*, 35 C W N 291.

Explanation not inconsistent with the identity of the property The explanation to be given by the accused of his possession of the stolen property must not be inconsistent with the identity of the property. A beetle head stolen from the house of W and identified by W as his. E says, 'I cannot remember where I must be acquitted. But if E says, "I bought this beetle head at a sale eight years ago this contradicts the identity, which remains a question on which E's guilt or innocence depends." *Queen v Evans*, 2 Cox C C 270, *Lairson v E. Gou*. In that case *Allerson B* said to the jury "If the prisoner said in the first instance, 'why, really I cannot tell where or how I got this beetle I should have said that I have been indicted for stealing it. I does not deny that the prosecutor. Where however the prisoner is shown to have claimed the property found in his possession, and sworn by the prosecutor, to be his own property by right of a purchase made eight years ago and a continued possession up to the present time, I should say that that was not so reasonable an account of his possession as to exempt him from the necessity of accounting for it to the satisfaction of the jury, for if it be true the prosecutor is wrong and the identity of the thing found with that is disputed. If the prosecutor should satisfy the jury that the beetle in question was his, then the statement of the prisoner accounting for his possession of it must be false, and he must be presumed to have stolen it, although it was fifteen months after the loss. The thing which was eight years ago, or of the prosecutor case, the prisoner is guilty.

of the articles stolen: i.e. whether they are of a nature likely to pass rapidly from hand to hand; or of which the accused would be likely from his situation in life or vocation, to become possessed innocently. *Best* § 211. So what is or is not recent, within this rule depends upon the cost, bulk or transferability of the thing stolen. Suppose the Pitt Diamond or the Crown Jewels were stolen and, after the lapse of one or two years found in the possession of a person in a comparatively humble station of life, who refused to give any account of where he got them would there be anything harsh or violent in presuming that he had not come by them honestly? But suppose the goods lost were merely a pair of shoes or a coat, such as in his station of life it would be natural and proper for the prisoner to wear, and that these were not traced into his possession until after a few months from the loss, would it be violent a presumption as to deem 'Even if the point were not settled process of reasoning to the conclusion, from recent possession without reference to the nature or paper piece of money of the stolen might have less weight as of Harvard University or Powers Greek Slave, or an elephant, and after the larceny of such property It would ordinarily be more probable

that the possessor could prove by other evidences than his own testimony, how he obtained the possession in the latter case than in the former. It is equally clear, upon authority and upon reason that the presumption from recent possession of stolen property depends upon the nature of the property. "*Lairson Pre Ev* p 606 'A couple of sacks are stolen from a farmer. A month afterwards they are found in the possession of another person. This alone cannot raise an inference that the latter stole them. *Cochran's Case*, 2 Lewin, 235. The reason for this limitation to the rule is well expressed in a learned note to this case, by the author. 'If the property' says the writer 'has not

difficulty of giving an account. After an interval of time the means of proof are the here the die and little circumstances subsequent or antecedent tending the truth may not the recollection of facts or enmities may have grown up and the occasion may be laid hold of to gratify a vindictive feeling. Again the circumstances in life of the party may be a

bulk, and as it may happen to be an article that is more or less frequently brought under the party's view. Judges therefore hold and most reasonably hold that a person is not to be called upon to give an account at a distant period after the theft. The question however of distance of time or recent possession must be at all times one of fact under the circumstances and a jury under the Judge's direction must ultimately decide.' In *Cochran's Case*, 2 Lew 235 Coleridge J said to the jury. 'If I was now to lose my watch and in a few minutes it was to be found on the person of one of you it would afford the strongest ground for presuming that you had stolen it. but if a month hence it were to be found in your possession the presumption of your having stolen it would be greatly weakened because stolen property usually passes through many hands.'

Two bundles of woollen cloth were stolen from M. Two months after they are found in the possession of P. The presumption is that P stole them. *R v Patridge* 7 C & P 340. The presumption is that P stole them. *R v Patridge* 7 C & P 340. time is to be considered. stolen. If they be a long time be

March 1st. On June 1st they are found in A's possession. This raises no presumption against A. *R v Adams* 3 C & P 600, *R v Hewlett* 2 Russ on Cr 728 (note), *R v Delerst 2 Stark Ev* 449 note *R v —*, 2 C & P 459. A horse disappears from the possession of its owner on December 17 1849. On June 20 1850 it was found in the possession of C. This does not raise a presumption that C is the thief. *R v Cooper* 3 C & K 318. In that case Maule J said he thought there was no case to go to the jury—the possession was not sufficiently recent. Where a man is found in possession of a horse six

to make it necessary for the prisoner to account for his possession. *In re Puthenvithal*, 2 Weir 777. Where a bullock which has been stolen was sold by the accused in another place about two or three months afterwards and thought

Possession of stolen property to any presumption under this 800=32 Cr L J 614=A I R: underneath a house during the to find it, if he were given Rs 1 complainant where the bullock in the place indicated by the accused. *Held* that it must, from the circumstances spoken to, be presumed that the accused was in possession of the bullock when it was tied up in the jungle, from which possession, it might undoubtedly be presumed that he was the person who stole the animal. *Don Be v Crown* 1 L B R 333. An accused cannot be convicted for the possession of stolen cooking utensil fourteen months after theft. *Empress v Keshub Dutt*, A W N 1881, 155. But when stolen property is traced to the possession of an accused person three weeks after the theft took place, the proper presumption is, not that he was one of those who committed the theft, but that he received the stolen property knowing or having reason to believe it to be such. Whether a presumption of theft or of receipt of stolen property should be drawn would depend on

would arise where the accused is in possession of the stolen property three weeks after it was stolen. *Sen Be v Crown* 1 L B R 30=7 Cr L J 30: *Empress*. 1914 M W N 84. fact that the accused does not give rise

tion would arise when of such stolen articles. 101=32 Bom L. R.

possession of articles is recent or otherwise. But every case must be judged on its own facts. If a few stolen articles are found in possession of a person under circumstances

which may give rise to the probability of his coming by them honestly sometime after the theft the presumption under the law might not arise against him. *Emperor v Ekabbor*, 27 Cr L J, 617-91 Ind Cas 361-A. I R 1926 Cal 925; *Necha v Emperor*, A I R 1928 Nag 213-103 Ind Cas 801. Where, more than six months after the dacoity, some ornaments consisting of a pair of bangles, a bracelet and ear rings were found in the possession of the accused, held, that having description, and covered by upon to explain L J 436-29 A. 133. Where the possession of property, stolen some years before, reasonably and circumstantially explained, such explanation should not be rejected merely because it is unproved *Talu v Empress*, 15 P R

as soon after the theft *Jannullahdin, In re*, 26 M L T 389-11 L W 43-53 Ind Cas 119, *Joenuallah v Emperor*, 22 C W N 597-46 Ind Cas 158-19 Cr L J 702, *Ramhit v. Emperor*, 20 A. L J 178-65 Ind Cas 849-23 Cr L J 722-26 Cr L J 578-A. Cas 650-27 Cr L J 986, Cas 471-A I R 1926 Lah Ind Cas 514-A I R 1926

Possession must be exclusive In order to give rise to the presumption in this illustration the possession must be exclusive. The possession of a watch by the wife of the accused is not sufficient *Sorenson v U S* 8th C C A 168 Fed 785. It is not sufficient that the stolen goods were found in the house of the wife of the accused, where he does not live *People v Kubulis*, 298 Ill 523, *Wigmore* § 2513, *Lauson Pre Ev* ¶ 599. The two accused in this case were husband and wife and both were in possession of the stolen property within such a short time of the theft as to raise the usual *prima facie* presumption

Empress, U B R (1897 1901) Vol I 171. Where stolen property was found in the Camp of a party of refugees, it was held that it was not proved in whose possession it was, to justify the conviction of any one of them for theft *Nga* ed that and in Held and it arise

ILLUSTRATION (B).

Corroboration of evidence of accomplice. Although as a matter of law, of of are

the less liable would the evidence of the accomplice be to suspicion and discredit
Emperor v Lakshmi, 6 Bom L R 1091=29 B 251 For further discussion on
 this topic vide notes under s 133 *infra*

ILLUSTRATION (C)

Presumption as regards Bills of Exchange Bills of exchange and promissory notes enjoy the privilege of being presumed *prima facie* to be founded on a valuable consideration *Collins v Martin*, 1 B & P 651, *Holliday v Atins*, 5 B & C 501 The law raises this presumption in favour of these negotiability in fact, may reasonably be

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is that a note is of the value of the sum promised thereby to be paid in order to encourage the free circulation of negotiable paper by giving confidence and security to those who receive it for value, and this principle is so comprehensive in respect to bills of exchange and promissory notes which pass by delivery that title and possession are considered as one and inseparable and in the absence of any explanation, the law presumes that a party in possession holds the instrument for value until the contrary is made to appear, and the burden of proof is on the party attempting to impeach the title. These principles are certainly in accordance with to correspond with the general pursuits. *Goodman v Simo*

But where fraud or illegality is shown, the burden is on the holder to show that the instrument is not tainted. *Jones v El & B* 238 said It certainly proven to have been a presumption that of it and would place that such proof casts upon the plaintiff the burden of showing that he was a states of America, want of consideration holder *Wallace v Bank* 1 Ala 667

no fraud nor any suspicion of fraud on to prove that he gave value for Ell 638, overruling *Thomas v Newlon* 2 B & Ald 294; see also *Robinson v* 3 M & W 72, *Berry v Alderhan* B 244, *Moti v Mahomed* 20 B 267,

Sulhasam v Gulab 16 Bom L R 743, *Madhoram v Nanda*, 53 Ind Cas 930 But this presumption does not arise where the endorsement is forged or the consideration is unlawful *Banla v Secy of State*, 36 C 239, *Rindas v Lal Chand* 101 Ind Cas 325=1927 Lah 137

ILLUSTRATION (D)

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the existence of a person, or personal relation, or a state of things, is once established by proof, the law presumes that the person, relation, or state of things continues to exist as before, till the contrary is shown, or till a different presumption is raised, from the nature of the subject in question. *Price v Price*, 16 M. & W. 232. When things are once proved to have existed in a particular state, they are presumed to continue in that state until the contrary is shown. *st Ev* § 405. Although

contrary, the settlement of a pauper, or the appointment of a party to an official situation, will, at least for a reasonable time, be presumed to remain in force

M I A 194. Section 104 of the Evidence Act relates to the continuance of the existing state of things and not against a new state of things. 24 A L J 76. 745-24 A L.

Section relates to the existence of certain facts and not their probative value. *Nanda Kumar v Emdad Ali* 44 C L J 265-A I R 1927 Cal 49. Where in

existence at a particular time of a fact of a continuous nature gives rise to a rebuttable presumption within local limits that it existed at a subsequent time or has previously existed. The limits of time within which the inference of continuance possesses sufficient probative force to be relevant must obviously

existence at a particular time as long as it continues to exist either backwards or forwards, whether onwards or downwards, is an inference of fact and may therefore be rebutted. *Secretary of State v Upendra Narain Roy*, 71 Ind Cas 212, 1900 Cal 212, 20 C L J 212, 20 A L J 212.

presumption as to the continuance of the state of things. *Hiranmoy v Rangan*, 29 Ind Cas 691-26 C. W. N 43; see also *Soudamini v Secy of State*, 33 C L J 1 E A-152.

1 J 47 Under this illustration a person who is once proved to be a professed member is presumed to continue as such during his lifetime. But the presumption is rebuttable. *Mussammatt Shahat v Allah Bachayo*, 9 S L R 196 = 34 Inl Ca 501. It is not right to presume from the fact that a man is a member of an association when it is lawful that he continues to be a member after it is declared unlawful. This is not a matter of presumption, there must be evidence of continuing membership. *Emperor v Dharmanand*, 33 Bom L R 233 = A I R 1931 Bom 263, *Emperor v Sripad*, 55 B 481 = A I R 1931, Bom 120.

Subsequent existence. Similar considerations affect the use of subsequent existence as evidence of existence at the time in issue. Here the disturbing contingency is that some circumstance operating in the interval may have been

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formality or detail of required procedure, in the routine of a litigation or of a public officer's action, next that it involves to some extent the "security of apparently vested rights" so that the presumption will serve to prevent a too wholesome uncertainty and finally, that the circumstances of the particular case add some element of probability. *Wigmore* § 2534. There is a well known maxim of law *omnia praesumuntur rite esse acta* this is an inference of reasonable probability arising out of the experience of mankind. The law assumes

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of the peace, constables etc, it was sufficient to prove that they acted in those characters without producing their appointment. Where successive decisions are inconsistent with a general order of the Court, a reversal of that order ought to be presumed. *Bohun v Delessert*, 1 Coop 21. *Man v Richells* 2 Coop 8. Again on an indictment of bigamy, proof of the solemnization of the first marriage in a Warrant is sufficient to prove the solemnization of the first such marriage.

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it was so promulgated *Khurshid v Rimigany Municipality*, A I R 1932 Cal. 833=35 C W. N. 823 From the mere fact that the warrant for the arrest of a judgment debtor bore the signature of the *sheristadar* it cannot be presumed under s 111 (a) that the *sheristadar* had been duly appointed to sign warrants *De v F*, A I R 1932 Cal. 845; see also *Girdhar v Emperor*, 3 Pat L J 636 an offence under Penal Cod the back of the paper instead of in the body of the sanction merely because there was not sufficient space left on the front side held that the initial presumption was that all the official acts were done in a regular manner hence the sanction was valid. *Emperor v Dhan Chand*, A I R 1930 Lah 81 Where a committing Magistrate writes at the foot of the deposition that the cross examination is being reserved by him and that the accused has not been given an opportunity for cross-examination done properly and be presumed to have cross-examination to *Emperor v Mahtab*, A I R 1930 Sind 54

Regularity of Judicial acts Where a Court having general jurisdiction acts in a case, its jurisdiction so to act will be presumed *Lauson Pro Ev* R Co to all "t to his R In ings by Magistrates, the maxim *omnia praesamuntur rite esse acta* does not apply to give jurisdiction has never been questioned Here, then, the jurisdiction, should at all events have appeared on the face of the examination, supposing proof of it *abunde* not to have been necessary" But where the *ral* in a special must be shown

Under all judicial v *Blackwood* general pow diction being *acta* finds, proceedings Ind Cas 5 will assume correctness id v *Kanto*, the Peace minutes of a

be drawn that it was given up To hold others
and to presume that the Court failed to do so
1923 Lah 121=68 Ind Cas 710 After a
filed his accounts and they have been accepted
tion as to their accuracy does certainly arise and it is open to parties to rely
on guardian and ward Gopal v
San e presumption arising under this
sect 'ourt's proceedings can only be
ove Sheo Darshan v Assessor Singh
5 C applicant before the Court is
attempting to rebut that presumption it is not for the Court itself to give
assistance to the otherside or to deal with the matter otherwise than impartially
Sohaglati v Surendra Mohan, 4 Pat L W 296=41 Ind Cas 661 Before the
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the prisoner's presence It should not be merely presumed under s 14
illustration (e) to have been so taken and attested Queen Empress v Riding
9A 720=A W N 1887, 228 Where a point is definitely raised in the ground is
of appeal and the Court makes no mention thereof in its judgment, it must still
be presumed to have performed the judicial act of writing a judgment regularly
and properly Har Charan v. Lachman, A I I 1928 Lah 91

Regularity of Official Acts The presumption is that one who is proved to
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C. W. N 242, *Emperor v Mahrab*, A. I R 1930 Sind 51-31 Cr L J. 121 S.
 An order issued under s 31 may be oral order by a police constable issued

disregard s 114 illustration (c) and assume irregularity in official acts. A Sessions Judge should presume that a confessional statement placed on record by the Magistrate was voluntarily made. *Public Prosecutor v Nagaraju*, 129 Ind Cas 229-32 Cr L J 262-A I R 1931 Mad 42-59 M L J 114. The presumption as to official acts can be applied to a sanction order under s 196, Mysore Cr Pro Code Reg 1904. In the case of *Setharama Sastry* 8 Mys L J.

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procedure. The regular performance of official acts does not imply that the representation made to them must be correct. *Jagdeo Narain v Balak Gope*, (1921) Pat 343-63 Ind Cas 226. The action of a Deputy Commissioner under Regulation XVII of 1836, is purely ministerial. His acts therefore, are official acts and the presumption contained in s 114 illustration (c) of the Evidence Act applies to them. *Juala Baksh v Nevarish*

is short, a Court might require stricter proof that all the formalities for publishing the notification had actually been carried out. *Emperor v Bal Krishna*, 55 B 356-A I R 1931 Bom 132

ILLUSTRATION (I)

Presumption as regards common course of business In commercial

4. or that his name could not have been adopted by any other person. In the absence of all evidence the mere fact that the full name was his name does not justify the conclusion that he and nobody else could be the author thereof. *Ranjit Singh v The Crown* 26 P L R 403=83 Ind C 13 308=96 Cr L J

of a particular case can form a foundation for a fair presumption that an appointment was made. *Mulchand v Jaman* 443

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the time when a receipt was given for them the presumption under this section is that the ordinary course of business was followed in the case in question. The mere statement by appellants' counsel that these sums are not always paid at the time when the receipts are given are sufficient to throw the onus on the prosecution of proving that the plea was wrong. *Empress v Imetshah* 193 Lah 566. This illustration is not exhaustive and the general language of the section applies to all acts and proceedings which might be presumed to have been done in the usual course of business. *Laxmi Pillai v Ram Chitra* 193 M W N 183=20 M L T 223=31 M L J 311=35 Ind C 13 421

ILLUSTRATION (G)

Withholding evidence—presumption from. The illustration refers to evidence which can be and is not produced. *Girish v Emperor* 1 I R 183

in the power of the other to have testified to facts within his knowledge. The testimony is proper subject of inquiry and in the Courts of law. *Laxmi Pillai v Ram Chitra* 193 M W N 183=20 M L T 223=31 M L J 311=35 Ind C 13 421

he claims. The presumption is that if produced the deed would injure his claim. *Haldane v Harley* 4 Burr 2486. In cases like this it is laid down that the case of written evidence presents the strongest illustration of the extent of the rule. The non production of documentary evidence within the party's power raises it is said in several cases a very strong presumption that if produced it would militate against him who withholds it. Therefore in an action of trespass where the plaintiff relied upon bare possession although it appeared that he had taken the premises under an agreement which was not produced the Judge charged the jury that the possession of the close at the time of the trespass was more than nominal.

In affirming the verdict of showing the lease to be a good one. *Try* 1217. *Gen v Dean of Windsor*, 21 Berr 6-9 the court is always to be taken most strongly against the persons who keep back a document and the circumstance that the body keeping it back is a corporation does not in the slightest degree affect the inference that the present members from blame in that respect if willful suppression is shown. *Corporation and yet the they cannot now*

receive" It is well observed by *Mr. Evans* in substance, that if the weaker and less satisfactory evidence is given and relied on in support of a fact when it is

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uncertain testimony was intended to conceal 2 *Evans Pothier*, 149.

In *Draithurite v Coleman*, 1 *Hurr & Well* 239, which was an action by the indorsee against the drawer of a note, the only evidence of notice of dishonour was the statement of the defendant to a witness "I have good time"

Lord
oduced,
Denman
ceived

the letter, and as he does not produce it, it might be fairly inferred by the jury that it was in time" But the other members of the Court were of a contrary opinion and a new trial was ordered. But in the case of *Cutler v Corfield*, 1 Q B 814, which six years later came before the same Court, and nearly before the same Judges, a different conclusion was reached. In *Bell v Franks*, 4 Mon & Gr 447, also an action by the indorsee against the drawer of a bill of exchange it appeared that the defendant had told a witness that he expected to receive by post a notice of its dishonour, and afterwards gave him a letter he received by post, requesting him to negotiate a renewal of the bill, but the letter, which had found its way into the defendant's hands, was not produced at the trial. It was ruled that the jury was dishonour had been given. See also *Lobl*. party does not produce a document in that its production will damage his case

carrying on business and the non-production was not sought to be explained, held that the Court was entitled to draw an inference under s 114(g) of the Evidence Act. *Gu, Sankar Das*, 111 I account books by

L J 47; *Sankara Linga*

Every deed being the best evidence of its own content, its non-production raises the presumption that it contains some defence, in other words, there is some endorsement on the document which the plaintiff does not like. *Mahammad v Zakur*, 21 A L J 961-97 Ind Cas 82-A I R 1926 All 741, *Ahmed v Ali Ibrahim*, 27 Bom L R 746-1925 P C 177, *Sreenath Roy v Secretary of State*, 50 C 276-70 Ind Cas 510-1923 Cal 230-36 C L J 315, *Secretary of State v Upendra Nath Roy*, 36 C L J. 316, *Harendra v Durga*, 62 Ind Cas 697. Where a document is a very old one the possibility of its having been lost and being no longer in existence is naturally much brighter than in the case of a document of recent date. Consequently the presumption

arising
an old
Cas 65

saying that they have been destroyed and the matter dealt with by the books could be easily proved by secondary evidence which is admittedly in the possession or power of the party and which he does not attempt to place on the record. the opposite party is entitled to the presumption that these books if produced would have gone against the contentions of the party, not producing them. *Secretary of State v G T Sarain*, A I R 1930 Lah 364. But no presumption can be made of their title deeds in respect of which they did not produce. A I R 1

quite as strong in the case of *my Das v Mihar Lal*, 71 Ind Cas not produce certain books

Exception. A does not produce one of his muniments of title. He proves that it is in the possession of B from whom he cannot obtain it. There is no presumption against A. *Gilbert v Ross*, 7 M & W 121. *Marston v Downton* 1 Ad & Ll 32. In the first case it has been ruled that where the evidence alleged to be withheld is unattainable, the presumption does not arise. Therefore if a deed be in the possession of an adverse party, and not produced, or if it be lost and destroyed, no matter whether by adverse party or not, secondary evidence is clearly admissible, and if the deed be in the possession of a third person who is not by law compellable to produce it, and he refuses to do so the result is the same. *Lanson Pre Ev* 169

Necessary witnesses not called. Where a witness is not called by the

in this illustration arising from non production of evidence to the contrary inference supported by adequate evidence. *Demissetti v Demissetti* 13 L W 293 = 63 Ind Cas 749 (P C). Where in a suit for profits of land the recorded collections are suspiciously low, and the defendant neither produces nor gives any evidence to show what was collected the Court would be justified in presuming that the full amount of the rents had been collected and is

Comp v ... A I R 1930 Lah 163 = 120 Ind Cas 606 = 31

Cr L J 131

Where the plaintiffs are the best persons to give evidence as to the 'interest' possessed by them in a religious institution to prove the *locus standi* for the purposes of s 92 Civil Procedure Code, and they merely put the defendants into the witness box, their failure to go into the witness box goes strongly against them. *Kirpa Singh v Ajaypal Singh* A I R 1937 P C 230, *Allah Ditta v Bhagwan*, A I R 1930 Lah 401, *Kirpa v Ajaypal* 11 Lah 142 = A I R 1933 Lah 1.

ILLUSTRATION (II)

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Refusal to answer—presumption for This illustration does not contemplate the testimony of a party in a civil or criminal suit, because "every person in the kingdom, except the sovereign, may be called upon and is bound to give evidence, to the best of his knowledge, upon any question of fact material and relevant to an issue tried in any of the Queen's Courts; unless he can show that he is exempted by some exception in his favour" *Per Willes J in Baird v Fernandez*, 12 C M N S 3, 39. So in such a case he is compellable by law to give answer. So also this illustration does not contemplate the case of witnesses who are not compelled to answer on the grounds of privilege (*Vide ss 121-129*). To make adverse presumption for not answering in those cases would be extremely inequitous. This illustration contemplates cases where a person is not bound to answer but can answer if he so desire, e.g. the case of an accused under s 342 Cr. Pro Code Sub-section (2) of that section runs thus "The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them; but the Court and the jury (if any) may draw such inference from such refusal or answers as it thinks just" So the

which can serve the ascertainment of the truth, this duty includes equally the

ILLUSTRATION (I)

Documents in the hands of obligor—Presumption from When, in the course of dealing, a debtor gives security to his creditor for the payment of the debt in the shape of documentary evidence either alone or accompanying muniments of title, it follows that on the payment of debt, the document should no longer be allowed to remain in the creditor's custody, and hence has arisen the rule that possession by the debtor of the evidence of a debt, as a note, bond, *Burr Jones* § 70(a); *Abdul Karim Teming* 5 M L R 619; *Ganesh v Ind Cas* 308. So the obligor's

circumstance in favour of payment, and should turn the scale if the other

evidence of its discharge when it is proved not to have been paid or satisfied? I think it is not" *Pothier* (Obligations, 73) says that *Boisen* holds that possession of the note affords a presumption of its payment but if he allege a release he must prove it, for a release is a donation, and a donation ought not to be

1. presumed *Pothier* differs, and thinks it should be presumed unless the creditor shows the contrary. But *Pothier* agrees with *Boisen*, that if the debtor was the general agent or clerk of the creditor, having access to his papers, possession of the document has been removed on or if he was removed on the Here me with his ept " The document has been

discharged is subject to the qualification that, when the bond is in possession of the obligor but the circumstances are to maxim would apply or in *v Harri*, 12 Lah L J 21 = suit to enforce a mortgage, the defendant's case was that the mortgage deed

C L J 43 = 48 Bom L R 1888 The presumption of discharge on him L R to the inds of the obligor the obligation is discharged. But in raising such a presumption the Court has to take into regard any might have been stolen the burden when, both the parties produce their initial 175 =

the drawer alleges that the is on him to prove Cas 650, *Chaudhary (P O)*, *Binayal v*

Dinkur, 20 Ind Cas 308 Illustration (i) only refers to presumption that may be raised. It does not follow that such presumptions would shift the onus of proof. Where, in a suit on a usufructuary mortgage bond, the defendant pleaded discharge and produced the discharge written thereon and the persc have been paid was not examined, held that the mere production of the bond proving the discharge which lay on the W 604-18 M L T 94-(1915) M W N 638 In a claim for recovery produced the agreement a Court placed the onus on the defendant. Held not discharged. Held (1)

that the onus was wrongly placed as the presumption under s 114 illus (1) would be a piece of evidence in defendant's favour but did not shift the onus of proof which was on the defendant to show that he had discharged his obligation *Jagannath v Amra*, A I R 1931 Lah 299-134 Ind Cas 495

OTHER PRESUMPTIONS.

Acceptance At estate is devised to, or a gift is made to A. The law presumes that it is beneficial to A, and that he accepts it. He may disclaim it, but to work thus a disclaimer must be proved. *Towson v Ticknell* 3 B & All 31. *Thompson v Leach*, 2 Salk 618 In the first case it was said "I think that an estate cannot be forced on a man. A devise, however, being *prima facie* for the devisee's benefit, he is supposed to assent to it until he does some act to

show his dissent. The law presumes that he will assent until the contrary is shown.

Advancement. The English doctrine of advancement in the country as being under English law also *Kernick* prevailing in the Bombay Presidency, a purchase by a husband in the name of his wife does not raise any presumption of a gift to the wife or of an advancement for her benefit *Motibahu v Purshotam*, 11 B.M. L. B. 975=29 B. 306. There is no presumption of an advancement by the name of a son being used as purchaser, other than in the case of a stranger being used *Sayyad v Ullap*, 13 M. I. A. 232, *Gopas Krist v Ganga Proshad*, 11 M. I. A. 53.

Adultery. A married man enters a house of prostitution and remains there all night. The presumption is that he committed adultery while there *Evans v Evans*, 41 Cal. 103 (Am), *Asiley v Asiley*, 1 Hagg. Ecc. 720, *Lawson Pre. L.* 323.

Alteration. Alterations, erasures and interlineations appearing on the face of writings, whether under seal or not, are presumed to have been made before their execution or completion *Lawson Pre. L.* 452. In the early history of the common law, the law examined the instrument for the purpose of

in an ordinary case, part of his case, or the mere infirmity or factorily explain the state of the document. But this wholesome rule admits of exceptions if there be, independently of the instrument, corroborative proof strong enough to revert the presumption which arises against an apparent and

who seek to enforce an altered instrument, to show the circumstances under which it was made. 3 M. H. C. R. 247. The party, although in avoiding the has the custody of its original state. it on a contract to indemnify A on certain notes made on March 16th. The contract is also dated March 16th.

... should be presumed to
I think this rule is demanded by
s of this country, and especially
e contracts made are drawn by the
rd to interlineations and altera-
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tolerated—might, perhaps, in
country, like that of Great Britain, in regard to a negotiable
upon stamped paper, the very cost of which would induce special care in the
drawing of it, but I
than injurious. It
neous evidence, and
without regard to any suspicious appearance of the alteration, would I think,
in many instances, be doing such manifest injustice as to shock the common
sense of most men. "In this conflict of opinion," says Woodruff J in *Maybro*
"Smyth v E D Smith 1 (Am), after an exhaustive review of all the authorities
most in accordance with the

seal or otherwise, it was made with the intent
greatly to the disadvantage of the holder or party getting up the instrument
that he made them unlawful against his own interest.
No pre-
ration is in
different ink,
its face, or
f proof, rests
it to the satisfaction of the

Assent A statement is proved to have been made in the presence of H
It will be presumed that H heard it. *Hochreiter v People*, 2 Abb App Dec
363

... of a deed does not necessarily import an
Imam Ali v Bay Nath, 10 C W N
igh v Bhagwant, 5 Ind Cas 202;
Jagathishore, 21 C W N 225 (231)=
ss who has seen the deed executed
v Laxmanrao, 10 Bom L R 913-33
B 44 Where there is nothing to suggest that the attesting witnesses signed
after the mortgagor the Court can rely on the presumption under s 114 and hold
that he signed after mortgagor. *Radha v Nagendra*, 134 Ind Cas 767-53 C
L J 586-A I R 1931 Cal 806

Benami The mere fact that the deeds are in the possession of the mort-
gagor does not of itself prove that the mortgagee was a mere benamdar for the
mortgagor. *Hiraji v Vishnu*, 1923 Bom 429 Property purchased by the father
of a joint Hindu family in the name of his minor son is presumed to be
becomes the property of the family. *Bhaghat*
Pat 20 W. R 269, *Sayyud v Ullap*, 13 M 1
6 I A
W N
M 214;

Kumudbala 28 C W N 151,
226-26 C 871-4 C W N 1; 5
409 (P. C); *Sreman v Gopal*,
Narshina v Srinivasha, 43 M 112

Best evidence Best evidence not produced though available raises adverse
presumption. *Rameshwar v Baji Lal*, 33 C. W N 430-27 A L J, 261-49
C L J 403-31 Bom L R 721.

Bond Independently of a statute of limitation or in the absence of one, S. after a lapse of time the law presumes that the claimant was conscious of the lapse of time and that he intended to relinquish it. *Law Pre Ev* in the case of a claimant who has been in the possession of property for a long time, it will sit still and not be disturbed, and to acquire it, there must be a demand. *Ch 545* "Ever *Stamford*, 2 Vt. 211, where the claimant made a demand.

to make the demand affords a presumption either that the claimant was conscious it was satisfied or intended to relinquish it" *Lauson Pre Ev* 371 But in India this presumption is of little value as a bond becomes time barred after a lapse of the time mentioned in the Indian Limitation Act (IX of 1908)

Blank-paper Where a person places his thumb impression on a blank paper, the understanding between him and the person to whom he delivers the paper ordinarily is that it is to be converted into a valuable security. *Balisa v Emperor*, A I R 1932 Pat 335=13 P L T 568 Where it is shown either by proof or by admission that the thumb impression on the suit hand note is

233=A I R 1931 Pat 219

Character The character, habits and personal appearance of a person are presumed to continue as proved to be at the time of the past. *Law Pre Ev. Rule 32* "It might be presumed that a person who has been in the possession of property for a long time, it will sit still and not be disturbed, and to acquire it, there must be a demand. *Ch 545* "Ever *Stamford*, 2 Vt. 211, where the claimant made a demand.

Child bearing age The presumption that a particular woman has passed the age of child bearing is one of fact to be determined partly by the light of general knowledge and partly by the facts of the person in question. It has been held that a woman who has been married for a long time, it will sit still and not be disturbed, and to acquire it, there must be a demand. *Ch 545* "Ever *Stamford*, 2 Vt. 211, where the claimant made a demand.

three months, who had never had but one child (born when she was between twenty one and twenty two years of age) and lived afterwards with her husband for twenty-four years until his death, is presumed to be past child bearing. *In re White*, (1901) 1 Ch 570 In delivering the judgment, *Buckley J* said "A number of cases have been cited, but the material ones to my mind are these, *Haynes v Haynes*, 35 L J Ch 303, where it was held that a spinster aged fifty three years and two months must be presumed to be past the age of child bearing. *Dandoon v Kimpton*, 18 Ch D. 213, where the lady was a spinster of the age of fifty-four, and

Hyddon v Edison, 19 Beav 565, where she was a spinster and aged fifty &c. It will be observed that in all the cases to which I have referred the ages were less than . . . will also be remarked that I have . . . children in re *Widour's Trust*, I . . . so to consider whether the cases relating to spinsters do not equally apply to widows who have had children. The only difference that occurs to me is that there is nothing to show in the case of spinsters whether they are or have been capable of child bearing which in the case of a widow who has had a child there is. On the other hand, if there has been a long lapse of time since the birth of a child—in this case twenty four years—the presumption will be that the capacity of child bearing has ceased." See also *Payne v Long*, 19 Ves 571; *Groves v Groves*, 12 W R 45, *Levy v Hodges*, Jac 395, *Miles v Knight*, 12 Jur 686, *Dodd v Wake*, 5 Deg & Sm 226; *Brandon v Woodthorpe*, 10 Beav 453, *Brown v Pringle*, 4 Hare, 121, *Edicard v Tuch*, 23 Beav 271; *Davis v Birch*, 8 Jur 114.

Conduct From a person's conduct in not claiming the property while others were actually contesting their right to it, an inference against his title can certainly be drawn. *Kumarswami v Narayanswami*, A I R 1932 Mad 762=36 M L W 186=1932 M W. R 850=159 Ind Cas 760.

Conflicting presumption In the case of conflicting presumptions the presumption of payment is stronger than, and will prevail against, the presumption of life, of the presumption of innocence is stronger than, and will prevail against, the presumption of knowledge of the law.

of innocence, and the presumption of knowledge of the law against the presumption of innocence. *Law, 1 re 122* (Jayne v Price).

contrary and stronger presumption will prevail after his departure from his native country and conflict of the presumption of the second party indicted at have been contended.

answer is that the presumption of his being so is that But when it is recognized that when certain facts are presented in an invariable formula the finding thereon shall always be the same way, the logical impossibility of a conflict of presumptions becomes apparent.

affix inconsistent conclusions to the same state of facts at the same time. 9 Encyclop Ev "Presumptions" p. 891. The market values, so to speak, of the various presumptions have been sometimes sought to be established, but so Keeping, then, to the expression as it is one party to a cause relying upon a given party upon another. Which party is to prevail in every case is a question on the nature of the respective presumption.

Burr Jones § 101.

Co-sharer's possession Mere possession or occupation of the property by one co-sharer does not constitute adverse possession against the other co-sharer of hostile title or otherwise. 52 Where property is in the possession of one of the co-owners

was advised *Bharat v Ganga*, 9 Ind Cas 425 The possession of joint S. property by one co sharer does not

v Sheikh Akbar Ali 1 C L R 364;
Udaram v Dujan, 78 P L R 1909,

Death Where among some relations the evidence on the question who died first is quite evenly balanced, the Court is entitled to say that the probabilities are in favour of the younger man surviving the elder *Kulkarni v Laxmibai*, (1922) Bom 347

Debts Debts once proved to exist are presumed to continue until the contrary is shown *Isa B v P B*, 20 Ind Cas 1000
an entry
indebted
the debt is
in money
without o
demanding payment the presumption is that the debt has been paid *Laxman v Durga Singh*, 22 O C 335-54 Ind Cas 95

Delay in enforcing rights Where the long delay of the plaintiff in bringing the suit has prejudiced the defendants and has prevented them from bringing the best evidence that would otherwise have been available to them, the tendency of the Court must invariably be to make an inference against the plaintiff unless good cause
tance to such presumption in
given *Brij Raj Saran v Bas*
561 Under a possessory m
not transferred to the mortgagee and no steps had been taken by the latter or his heirs to recover the amount *Held* that under the circumstances it was
hat the
tabai v
ence of
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1896.

Documents It is a general though not a conclusive presumption that a document was made on the day of the date it bears *Mina Kumari v Rajah Bijoy Singh* 21 C W N 585 P C, *Parshatani v Nazer* 84 Ind Cas 846
Davies v Loundes, 7 Scott N R at 214, *Queen v Waters* M & W 95, *Hunt v Marsey* 5 B & Ad 902 When a document is not produced after due notice to produce and after being called for, it is presumed to have been duly stamped, unless it be shown to have remained unstamped for some times after its execution *Closmadene v Correl* 18 C B 36
5 H L 624, *Steph Dig* 7th Ed Art
regard the regularity of
417, *Lau son Pre E*
Nanka, 106 Ind Cas
unregistered and such
it has been shown the
produced but was not produced the presumption is that the document is not

necessary to effect the purpose for which they were executed *Tajesicar v Ajab Singh*, 118 Ind Cas 865-A I R 1929 Nag 257

Duty All persons are presumed to have duly discharged any obligation imposed on them either by unwritten or written law, *Best Ex* § 318, *Lam v Kalab*, 36 Ind Cas 100

by her invalid. The husband's consent is, in the absence of prohibition, always to be implied. *Laxmibai v Suranathbas*, 1 Bom L R 420=23 B 789. Where an adoption has been requested in for a period of 33 years, it is presumed that the necessary consent of some person competent to give away the adopted son had been obtained. *Anandiao v, Ganesh*, 7 B, H C App 33. The Court, when it is satisfied that permission to adopt exists, will exact slight proof of the

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Law one they prevc
409 Where a family migrates from Guzerat where the *Mayukha* prevails, it must be assumed that the family has settled *Chandra Dassia*, 20 C 409. Where a family migrates from Guzerat where the *Mayukha* prevails, it must be assumed that the family has settled *Chandra Dassia*, 20 C 409. Where a family migrates from Guzerat where the *Mayukha* prevails, it must be assumed that the family has settled *Chandra Dassia*, 20 C 409.

Hindu Law—Endowment A person seeking to set aside an alienation on the ground that the property alienated is *debutter* or endowed property, must adduce proof that the same was endowed in perpetuity. Proof that the rents and profits have been utilized for the idol is insufficient. *Konuar Doorga Nath v Ramchunder*, 2 C 311 (P C)=4 I A 52.

Hindu Law Joint Family Hindu families are ordinarily governed by the law of their origin, not by that of their domicile. *Lalkea v Gunga*, W R 1804, 56. Where parties, who are not Hindus, reside in a Hindu country and, adopt the customs of Hindus, have lived as Hindu families do joint in food, and

in Hindu family, there is a presumption of continuance of joint right of every member. *Moonaye v Lomun*, 2 W R 283. If brothers are found to be living together as a joint Hindu family, they must be presumed to be joint in property. *Dharm Chand v Raj Mohshee* 5 W R 445, see also *Gane v Kanae*, 3 W R 165 & W R 82, *Lukhun v Madho*, 5 W R 278, *Gane v Kene*, 4 B H C A C 169, *Nandiani v Chootoo*, 1 Agra 255. Where the family is joint and there is a nucleus from which the property may be

training at the expense of the joint family property. *Golul Chand v Hukun Chand*, 145 P L R 1916=109 P W R 1916.

Hindu widow One who claims title under a conveyance from a woman, with the usual limited interest which a woman takes, and who seeks to enforce

1. reasonable to satisfy himself of the existence of such necessity *Bhagant v Debi Dayal*, 12 C W N 393=35 C 420 (P C) It is general presumption of law that the acquirer of property intends to retain dominion over it, and in the case of which estate in her husband's estate. I L J 5

Husband and wife In *R v Hughes*, 2 Lewin 229, Thompson J said "The law out of tenderness to the wife, if a felony be committed in the presence of the husband, raises a presumption *prima facie* that it was done under coercion" See also *R v Connolly*, 2 Leon 230; *R v Knight*, 1 C & P 116 The mere fact of marriage raises no presumption with regard to any property standing in the name of a wife that the beneficial interest must be in her husband Before a fact added to indicate fact to the husband *Subudhi Tatuani* I wife, but in *Kumari* v

Identity Identity of name raises a presumption of identity of person where there is similarity of name is an unusual one; but *alide* for several persons known of drawn if the name were only John Smith which is of very frequent use there might not Rhydes are there is every But Henry Thomas

Infancy Infancy once contrary is proved *Law P* that a son is over age It is emancipated as in the days *Re Lillieshall*, 7 Q B 158

In *R v Smith*, 1 Con 260, *Earl J* said to the Jury "Where the child is under the age of seven years, the law presumes him to be incapable of committing a crime, his actions as e

unacquainted with guilt, yet this presumption will diminish with the advance of the offender's years and will depend upon the particular facts and circumstances of his case' 1 Russ 109; *Mayne Ev Law*, 402

Innocence The law presumes the innocence of a person charged with crime until the contrary is proved beyond a reasonable doubt *Law Pre Et Rule 90* "It is greatly to be regretted that the so called presumption of innocence in favour of the prisoner at the bar is a pretence, a delusion an empty sound It ought not so to be, but it is *Rufus Choate* said that this presumption is not a mere phrase without meaning; that 'it is, in the nature of evidence for overcome,' that 'trial,' that 'it to one witness' it is of no avail

hazardous to say, by prosecution, very one, as he self and answer if criminal procedure from inception to close, is designed to shut out presumptions of innocence and

invites the presumptions of guilt. The secrecy of complaint making at the magistrate's office, the mysterious inquisition of the grand jury room, the publicity of the arrest, the commitment to the lock up, the demand of bail, the delay of trial, the enforced silence of defence till prosecution has done its worst, are all so many steps and strokes to blacken the accused before he is

when he is put on trial, is he put in the dock? Why does he not have place with the by-standers, who are simply presumed innocent? The 'presumption', in the presence of such things, is a contradiction of terms. How can a person be presumed innocent who is presumably guilty? The fact that he is restrained of his liberty presumes guilt. There is no other construction to be placed on the restraint. Human nature is not capable of any other. Yet human nature ought to presume innocence till the contrary is proved. From *Ten years a Police Court Judge* New York, Funk and Wagnalls, 1884.

Professor Thayer says 'To sum it up the substance of all this is, as I have said the proof—appears to the party in

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moment these conceptions give way to the perfectly distinct notion of evidence proper—i.e., probative matter, which may be a basis of inference, something capable of being weighed in the scales of reason and compared and estimated with other matter of the probative sort—so that we get to treating the presumption of innocence or any other presumption, as being evidence in this its true sense, then we have wandered into the region of shadows and phantoms." Prof. Thayer's article in *Yale Law Journal* of March 1897.

The rule underlying the presumption of innocence merely means, that a person who is accused of a crime is not bound to make any statement or to offer any explanation of circumstances which throw suspicion upon him. He stands before the Court as an innocent man till he is proved to be guilty. It is

the other by a
to rely on th
the Crown is h
in making out this case, the prosecution is to get rid of every presumption in
favour of innocence The great majority of mankind manage to get through
life without committing a crime, and those who assert that a particular person
is guilty of a fact against which there is a presumption
insuperable to something evanescent
convince a jury that the Commander in
and a pocket In the case of a member of
the natural thing in the world Mayne's Cr
duct or crime was alleged whether in a criminal
offender or in
strictly
R 1929

st B, A alleged that B, who had chartered his
by which a loss happened with

Ellenborough said 'that the declaration, in imputing to a highly dangerous com
having wrongfully put on board a ship, an article of a highly dangerous com
bustible nature, imputes to the defendants a criminal negligence, cannot well
be questioned In order to make the putting on board wrongful, the defendants
must be cognizant of the dangerous quality of the article put on board, and if
being so they yet gave no notice, considering the probable danger thereby
on board for which
your at least. We
are, therefore, of opinion, upon principle and the authorities, that the burden of
proving that the dangerous article in question was put on board without notice
rested upon the plaintiff alleg
out notice of its nature and qu
is, in favour of innocence,
intentions, the law presumes th
wrongfully intended, till the
has, in clear language, pointed out the distinction between these cases where
criminal intent must be proved, and those where it will be presumed "Where
an act, in itself indifferent, if done with a particular intent becomes criminal
there the intent must be proved and found but where the act is in itself
so lies on the defendant, and in
" R v Woodfal, 5 Burr 2667,
v Wallace, 3 Ir R S N 38, R v

"It seems well established that, where in a criminal case there is a conflict
the presumption
& Ald 356)
business of the
has been said that
(Re Hobson,
at C J in Re
case of Nibarin
a fact that an
after a gun was
hired, may be
error of law to
led under such
C 893
ers of criminal
loubt' A great
doubt beyond

the case? If the case is to turn on the matter of reasonable doubt, how can it turn aright, unless the turning point be ascertained and fixed beyond a reasonable question? The learning of the books on this subject is vast. It begins with the Bible—that is to say, the book writers make it begin there, though it does not appear that the inspired writers were sufficiently inspired to hit upon the favourite expression. Its equivalent, lawgivers since the time of Moses, find in the Mosaic provision, which forbade the death penalty till the crime 'be told thee, and thou hast heard of it, and enquired diligently, and, behold, it to be true, and the thing certain' (Deut. xvii. 4). This is said to be the amplification of Moses as definer of the doubt. Modern authorities do not seem to have done much better. But it is not because they have not tried. One author says that 'the persuasion of guilt ought to amount to such a moral

approach nearer a solution and resembles a definition once heard in a charge to a jury. The Judge who gave it is admittedly one of the ablest and clearest headed jurists who ever sat upon the Bench. He is the man whom *Rufus Choate* called one of the ablest minds of the state. As near as memory serves, his words were as follows: 'Just what a reasonable doubt is, gentlemen, it is

Insanity. Insanity once proved to exist is presumed to continue. But, *aliter*, as to temporary insanity, produced by drunkenness, violent disease or otherwise. *Lauson Pre Ey* Rule 31. In 1837 H. was inflicted with insanity, resulting from a violent disease. There is no presumption that H. was insane in 1838. *Crouse v. Holman*, 19 Ind. 30. In that case it was said: "Every man being presumed to be sane till the contrary is proved, the burden of proving insanity certainly rests in the first instance, on the party alleging the insanity. How

period, or even several months later. The force of presumption arises from our observation and experience of the mutual connection between the facts shown to exist and those sought to be established by inference from those facts. Now, neither observation nor experience shows us that persons who are insane from the effect of some violent disease do not usually recover the right use of the mental faculties. It is, therefore, a presumption of a general kind

in deciding upon its effect upon the burden of proof or law for it may authorize the jury to infer that the same condition or state of mind attaches to the individual at a later period. There must be kept in view the distinction between the inferences to be drawn from proof of an habitual or apparently confirmed insanity, and that which may be only temporary. The existence of the former,

1. once established, would or recovery, and in it to continue. But if th with some violent di alleging the insanity of time which bears directly upon the subject, he himself merely with proof of insanity at an earlier period' *Laurin v Pre* pp 22. It is proved it is presumed to continue. *Prin* v *Dy*. A lunatic un der a person, the mind when be O M 660, re also *Snool v Watts* 11 Beav 105; *Hill v Clifford*, (1907) 2 Ch 236, 1a; *Gruften v Foxwell*, (1897) A C 658-66 L J Q B 716

Intent and knowl
doing to have intended
result *Lau v Pre* Li
colluded with an incol
action for libel broug
whether W intended to
tendency of the libel being injurious to H. W is presumed to
do so *Haire v Wilson*, 9 B & C 643. "The Judge", said *Trutercher C J* in
that case, "ought not to have left a question to the jury whether the defendant
intended to injure the plaintiff, for every man must be presumed to intend the
natural and ordinary consequences of his own act." And *Littledale J* added
'If the tendency of the publication was injurious to the plaintiff, then the law
will presume that the defendant, by publishing it, intended to produce the
injury which it was calculated to effect." A baker is charged with delivering
adulterated bread for the use of a public asylum. It is proved that A delivered
the bread. The presumption is that he intended it to be eaten. *King v Dero*
3 M & S 12. Lord *Ellenborough* said, that it was a universal principle that
when a man is charged with doing an act, of which the probable consequences
may be highly in the doing the act, the use and supply of
for otherwise they A debtor makes
makes also a "conveyance" law presumes that the intent of the conveyance was to defraud
creditors *Ex parte Villars*, L R 9 Ch App 413. Lord *Chancellor Cairns*
said "It is true that under this as under previous statutes of bankruptcy
the acts are specified which if done by the bankrupt are not only acts of
fraud but are also, if followed by bankruptcy, void. One is a con
veyance of property for the benefit of creditors
it fraudulent or by way of fraudul
of these acts, namely, a conveyance
of these special provisions have always
and as to the other
id from the rule
veyance must be
to delay or to
against, and perhaps
B forges C's
as no account will. The presumption
ish 2 Den C C 493. "The recorder"
t in order to prove an intent to defraud
defrauded, or who might possibly have
been defrauded. But it is not necessary that at all necessary. A man may have
an intent to defraud and yet there may not be any person who could be
defrauded by his act. Suppose a person with a good account at his bankers
and a friend with his knowledge forges his name to a cheque, either to try to

credit or to imitate his handwriting, there would be no intent to defraud, though there might be parties who might be defrauded, but where another

per . of the act *Lauson*
Pre *R v Munslow*, 1 Q B
 758 P 276, *R v Cooke*
 8 C & P 582, *R v Shefford*, R & R 169, *R v Beard* 8 C & P 143 'A
 same man' said Chief Justice Shaw in *Com v Yonl*, 9 Meto 93 (Am) 'a
 voluntary agent
 intend the neccs
 therefore, one
 destroy another's life the natural and necessary conclusion from the act is

harm to the person accused the intention to take life or do him some great
 bodily har *Empress v Tulsha*,
 20 A 143, *Imperor* 37 C 317,
Reg v G etically impossible
 for the pro establish affirm
 tively the is fair and justifi-
 able presur abducted it is un-
 doubtedly The intention is
 more or less a matter of inference though there may be cases where the matter is
 capable of direct proof It is for the accused to explain away incriminating
 circumstances *Jouaya and others v Emperor*, A I R 1930 Lab '63

Issues me
 impossibility v
Boldero 15 ion
 — *Frazer v Frazer*, Joe 586,
 1 Cox 325, *Overhills Trusts*
Monton v May L R 11 Ch D
 presumption that a person
 see also *Pounaloori v Chela-*

Lapathi 33 M L J 295

Joint Property Where a piece of land is adjacent to a piece of joint
 ners of the joint property
 the assertion *Ma Bi*

Knowledge of Law Every one is presumed to know the law when
 ignorance of it would relieve from the consequences of a wrongful act or from
 liability upon a contract *Lauson Pre Ex Rule 1* The presumption that every
 body knows the law is often spoken of but it is clear that there is no such
 general presumption When Mr Dunning in arguing before Lord Mansfield,
 said The laws of this country are clear evident, and certain, all the Judges
 know the laws and knowing them administer justice with uprightness and
 integrity That learned Judge replied As to the certainty of the law men-
 tioned by Mr Dunning it would be very hard upon the profession if the law
 was so certain that every body knows it,
 that it costs much money to know what it
 v *Rinfall Cowp* 38 Is it not a mock
 on the *Louisiana*, *Pend Cole* to ref
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4. which the law itself ought to have afforded, he would hint that he lived by his profession, and that the knowledge he had acquired by hard study for many years, was "imparted" We may, therefore, safely say with

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shows
715

L R

who saw him presiding at the election must have known as a fact that he was the returning officer, and every elector who was a lawyer and who had read the case of *Reg v Queens*, 2 E. & E 56, would know that he was disqualified. B was mayor and returning officer, was every law that he was disqualified? I agree that

But I think that in *Marlindale v Falkner* explains the law." And *Lush J* added "A maxim has been cited which it has been argued imputes to every person a knowledge of the law. The maxim is *ignorantia legis neminem excusat*, but there is no maxim which says that for all intents and purposes a person must be taken to know the legal consequence of his acts." The maxim properly understood is true, but it is a rule of presumption, adopted from necessity, and to avoid an evil that would otherwise constantly perplex the Courts in the administration of the criminal law, that is the plea of ignorance. Hence the maxim, 'that ignorance of law excuses no one' *Lawson Pre Et* 11.

Legitimacy It is well established that every reasonable presumption will be indulged in for the purpose of upholding a marriage and establishing the legitimacy of the offspring *Lawson Pre Ev* 139. A child born in India must under ordinary circumstances be presumed to have his father's religion and his corresponding civil and social status *Mahomed v Raja Sayed*, A I R 1931 Oudh 177-8 O W N 349

Cas 551

But presumption of a valid marriage from two persons living together as man and woman cannot be drawn where the union is between a man who is an *Ahir* and a *Brahmin* widow, who cannot *prima facie* contract a valid marriage *Gulab Chand v Bhayatal*, 119 Ind Cas 698=A I R 1929 Nag 343. A

Mahomedan Law The Mahomedan Law is only the law of this country *ya Ashore* & action between that converts community may

since their conversion have voluntarily imposed upon themselves would be governed by the Mahomedan Law *Mahomed Sidick v Haji Ahmed*, 10 B 1 There is no presumption of joint family in Mahomedan Law *Jal e Ali v Raj Chandra* 10 C L R 469=8 C 831 N, *Karim Balsh v Rahum*, 21 P L R 1900

injury to
Lauson
902 (N)

But when the thing is under is such as ordinarily does proper care a presumption accident *Lauson Pie Co* Rule 14(b) Where a person is under a duty either by law or by contract the failure to discharge the duty raises a presumption of negligence against the person charged with such duty *Ibid* Rule 19 (c), see also *Ash Kanta v Chandra Kanta* 28 C W N 104 *Tishu Digambar v B B & C I Ry Co* 85 Ind Cas 415 A presumption of negligence arises against a common carrier of passengers where an injury is received by a passenger caused by the breaking down, or failure of the carrier's vehicle, roadway or other appliances for transportation, or by some error of his servants in operating them In other cases the mere fact of injury does not raise a presumption of negligence on the part of the carrier *Lauson Pre Co* 129

Personal appearance Personal appearance of a person is presumed to continue as proved to be at a time past *Lauson Pre Et* Rule 32

Possession Where little or no evidence of actual possession or title can be procured it would be almost impossible to administer justice, without having recourse to legal presumptions *Moharuel v Toofany* 4 C 206=2 C L R 446 When evidence of possession is conflicting, the presumption is that possession follows title *Hastir Singh v Raj Kumar Babu* 3 C W N 876

Religion The opinions of individuals, once entertained and expressed and the state of mind, once found to exist are presumed to remain unchanged until the contrary appears Thus all the members of a Christian community being presumed to entertain the common faith, no man is supposed to disbelieve from his own

Justice *Greaves* such and law under which the parties are born In the goods of *Jnanendra Nath Roy* 26 C W N 799 But the sounder view tend to the presumption that he still continued Where in consequence of the conversion

Barlow v Orde 13 M I A 377 But to acquire a new status the change of religion must be made honestly and without any intent to commit a fraud upon the law *Per Lord Watson in Skinner v Skinner* 25 I A 31 (41)=25 C 537 (746) *Skinner v Orde* 11 M I A 309 (374) Even where the conversion is *bonafide* the convert is not allowed to cast off an obligation which he had previously contracted and which at the time of the contract was in his sole duty by any act of his own *Wayne v Cr Lau* § 650, *Emperor v La ar* 30 M 331

Sanity Sanity once proved to exist is presumed to continue *Lauson Pre Et* Rule 31 Every man being presumed to be sane till the contrary is proved the burden of proof certainly rests in the first instance on the party alleging the insanity *Crouse v Holman* 19 Ind 30, *Lauson Pre Et* p 27

Services An agreement to pay for services rendered and accepted is presumed unless the parties are members of the same family or near relations

A and his wife board and lodge in the house of B the brother of A, and as to him in carrying on his business. There is no presumption that either the services on the one hand or the board and lodging on the other were paid for. *Davies v Davies* 9 C & P 87

Solvency Solvent contrary is proved. If day A is presumed. *Ball, 9 Barb 271, 1*

Statutory Presumptions There is no impropriety in referring to a thing as having been done when that thing is required to be done by a section in a statute. *Brindaban v G I P Railway Co*, 21 A L J 825=90 Ind Cas 1039=A I R 1929 All 369 (F B)

Tenancy, nature of—Presumption The presumption in favour of permanent tenancy implies that there is ground for inferring that the nature was always intended to be and always was hereditary, or that it acquired that character by subsequent grant. But a presumption in favour of a transaction is unusual regularity, it cannot be made in favour of that which offends legal principle. *Satiya Sri v Kartik* 15 C L J 237=16 C W N 227=13 Ind Cas 596

— that her husband is left presumption arises. *R 1929 Nag 127* Where was compounded it is to be presumed that the criminal Court acted according to law and the presumption is that the criminal case was withdrawn and not compounded. *Sadho v Jindra* 116 Ind Cas 749=A I R 1939 All 456. Where in a charge of misappropriation and that there was some that there was no conclusion on the basis of the confession and Cas 605=A I R 1935

M 493=54 M L J 607 The mere signing of a particular entry does not raise an irrebuttable presumption of law against which no evidence can be adduced by the maker of the signature. *Emperor v Ram Rang* 109 Ind Cas 221=29 Cr L J 493=A I R 1928 Lah 820 The tendency of English Courts to presume a tenancy in common rather than a joint tenancy has no ally the reverse

Presumpt on the absence dict on of a 329 There he course of accused for a preliminary enquiry and no inference can be drawn against the non disclosure of his defence at that stage. *Kumar Prosad v Emperor* 5 Pat L T 656=A I R 1927 Pat 292 Where there is nothing to indicate that the Court had not satisfied itself of the service of notice, it must be presumed that the Court was so satisfied. *Amar Singh v Rala Singh* 102 Ind Cas 17=A I R 1927 Lah 506 Where the posting of a registered letter is proved but it was returned with a note of the postman that the addressee refused to receive it the presumption arises that he refused to receive it. *Sher Afal v Mohan Lal* 94 Ind Cas 103=A I R 1926 Lah 520, see also *Girish Chandra v Ashore Mohan* 23 C W N 319 A school leaving certificate issued by a public servant in a native state can be presumed under s. 114 Evidence Act to be of the same character as a school leaving certificate issued in British India. *Maharaj Bhanudas v Krishnabai* 28 Bom L R 1225=50 B 716=A I R 1931 Bom 11 It is a violent presumption drawn from one's knowledge of human nature and of Indian village life which it is the duty of a tribunal in a case of dhatura poisoning to apply, namely, that the food pertaken at the evening meal by a husband in an ordinarily constituted house is prepared for him and served to him by his wife. *Emperor v Har Puri*, A I R 1936 All 73=9 Ind Cas

The mere fact that in the Revenue Records the sons of a particular person are shown as jointly owning land is not sufficient to raise a certain presumption that the person was the owner of the land. *Nath Singh v Mohan Singh*, 8 Lah

L J 485=27 P L R 721=97 Ind Cas 241=A I R 1926 Lah 659 By S.
 taking over the sale and paying the full price a co owner waived his own claim
 to sue, held such action on the part of the co owner is presumptive evidence
 that the sale by another co-owner was not bad for want of necessity *Basant*

Iddepalli v Itukmaramma, A I R 1935 Visu 222 When a person is at
 liberty to stop something done in his house and is found not to do so the
 presumption is that he is an accessory to the doing of that thing and he may
 loing of it *Marika v*
 the vacant plot of land
 it was he who built

to prove that it was he the
 Sind 716 The fact that
 been committed many
 any inference against
 347 An attempt to fr
 against a convict of
Crown, 86 Ind Cas 344
 (c) of s 64 A of the Be
 being proved that Cl (a) h
 under s 144 of
 manner required

(b) and
 ed, and it
 been published in the
ya Prasad, 9 A L J.

evidence or by both The question of the loss of the original is only material in
 so far as it may raise a presumption one way or the other under s 114 of the

and consideration therefor from long continued payment of higher rate *Idia*,
 see also *Pena Kasupha v Raja Rajeswar* 42 M 475=50 Ind Cas 16 Conceal-

taking along in a cart persons one of whom has blood stained clothes and a
 broken head and these persons are subsequently found to have taken part in

5. Jacoity recently before being taken away in the cart, the burden lies upon the cart man so found in the circumstances to disclose what he knows about the circumstances in which he was found. Failure to discharge the burden will lead the Court to the irresistible conclusion that he must have known that those persons were in that cart. Where by one bigger Gobind Ram A I R 1930 Pat 293-126 Ind Cas 369

CHAPTER VIII.

ESTOPPEL

115. When one person has, by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing

Illustration

A intentionally and falsely leads B to believe that certain land belongs to A and thereby induces B to buy and pay for it

The land afterwards becomes the property of A, and A seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title

Estoppel meaning of "Estoppel is when one is concluded and forbidden in law to speak against his own act or deed, even though it be to say the truth." *Co Litt* 35 (a); cited in *Ashpital v Byron* 3 B & S 474 (1889), *Simon v Anglo American Telegraph Co* (1879) 5 Q B D 188, C A per Bramwell, L J at p 202, *Halsbury Vol 13 para 488*. So there is said to be an estoppel where a party is not allowed to say that a certain statement of fact is untrue, whether in reality it be true or not. Estoppel, or conclusion, as it is frequently called by the older authorities, may therefore be defined as a disability whereby a party is precluded from alleging or proving in legal proceedings that a fact by the matter giving rise to that

The rule on the subject is thus laid down: "But words or conduct wilfully causes another things, and induces him to act on a position, the former is concluded from averring against the latter a different state of things as existing at the same time." "The whole doctrine of estoppel of this kind, which is fictitious statement treated as true, might have been founded in reason, but I am not sure that it was. There is another kind of estoppel—estoppel by representation—which is founded upon reason and it is founded upon decision also." *Per Jessel M R in General Finance & Co v Laborator*, L R 10 Ch D 15(20). So also in *Simon v Anglo American Telegraph Co*, L R 5 Q B D 202 Bramwell L J said: "An estoppel is said to exist where a person is compelled to admit that to be true which is not true and in act upon a theory which is contrary to the truth

"On the whole, an estoppel seems to be when, in consequence of some previous act or statement to which he is either party or privy, a person is precluded from showing the contrary of the state of facts. Estoppel is not to be taken as a rule of law, but as a rule of equity, and it is not to be presumed that a person is bound by it de jure

■ taken to be true, not as against all the world, but against a particular party, S. and that only by reason of some act done it is in truth a kind of *argumentum ad hominem*. Hence it appears that 'estoppels' must not be understood as synonymous with conclusive evidence,—the former being conclusions drawn by law against parties from particular facts, while by the latter is meant some piece or mass of evidence, sufficiently strong to generate conviction in the mind of a tribunal, or rendered conclusive on a party either by common or statute law." *Best Ev* § 533. Estoppel may accordingly be taken to be that which concludes the party against whom it is set up, from disputing his own averment, whether that averment be direct as for example the statement of any given fact or constructive as legally deducible from the circumstances, and the " can be Some m

description of Lord Cole in which he says—"An estoppel is where a man is concluded by his own act or acceptance to say the truth' (*Co Litt* 352) as though the doctrine were based on the principle of shutting out truth by a technicality. It is founded however in fact, on no such absurdity. The whole principle of estoppel is, that what has once been affirmed or represented to be truth, or established to be so in a judicial controversy shall not be contradicted by either the affirmant, the party against whom it has been established or those claiming through him, to the disparagement of those who, being in a position to avail themselves of it, have acted on it, *Goodere Ev* p 532

Principle "In our old law books, said Mr Smith in his notes to the *Duchess of Kingston's* case truth appears to have been frequently shut out by the intervention of an estoppel, where reason and good policy required that it should be admitted. However, it is in no wise unjust or unreasonable but on the contrary, in the highest degree reasonable and just that some solemn mode of declaration should be provided by law, for the purpose of enabling men to bind themselves to the good faith and truth of representations on which other persons are to act." The general principle is thus stated by Lord Chancellor (*Campbell*), with the full concurrence of Lord Kingsdown, in the case of *Cumincross v Lorimer*, 3 H L C 829. The doctrine will apply which is to be found, I believe in the laws of all civilized nations that if a man either by words or by conduct has intimated that he consents to an act which has been done, and that he will offer no opposition to it although it could not have been lawfully done without his consent and he thereby induces others to do that from which they otherwise might have abstained he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith

previous licensee * *Sarat Chandra v Gopal Chunder* 20 C 296 (311)=10 I A 203. The principle that a party cannot both approbate and reprobate the same transaction, is applicable to Indian cases. The maxim is founded not so much on any positive law as on the broad and universally applicable principle of justice *Shah Mahanlal v Srilishna Singh* 2 B L R P C 41=11 W R P C 19=12 M I 157. It is a principle of natural equity which must be universally applicable that where one man allows another to hold himself out as the owner of an estate and a third person purchases it, for value from the apparent owner, in the belief that he is the real owner the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title unless he can overthrow that of the purchaser by showing either that he had direct notice or something which amounts to constructive notice of the real title, or that there existed circumstances which ought to have put him upon an inquiry that if prosecuted would have led to a discovery of it *Maung Lee Gale v Maung Kyau Yau*, L B R. (1893-1900) 158

Estoppel is a rule of evidence. "An estoppel is not a cause of action—it is a rule of evidence which precludes a person from denying the truth of some statement previously made by himself *Per Lindley L J in Lou v*

5. *Bowen*, (1891) 3 Ch 82 at p 101. In the same case, at p 105 *Bowen L J* added "Estoppel is only a rule of evidence, you cannot found an action upon estoppel" Estoppel is only important as being one step in the progress towards relief on the hypothesis that the defendant is estopped from denying the truth of something which he has said. An estoppel filling up the gap in the evidence to produce this right to relief is found in the *Railway Company*, L R 3 Q B 581 "estoppel itself" *Per Bowen L J* in (1893) 1 Ch 618 at p 628. Similarly in *Manman v Manman* (1890) 15 Q B 503, *C A, Farwell L J* at p 144=78 L J P & A 74, said "No consent or admission can justify a decree, it is the duty of the Court to protect the public by seeing that a divorce is obtained only on proper evidence, and so fully is the interest of the public recognised in the matter that by the Act of 1860 (23 & 24 Vict C 144) s 7, any person may intervene between decree nisi and a decree absolute to show cause why the decree should not be made absolute on the ground of collusion or the suppression of facts, and the King's Proctor may intervene at any time during the progress of the cause or before decree absolute. The grounds and the only grounds on which a decree for dissolution can be made are set forth in section 27 of the Act of 1857. It is sufficient to say that a decree for judicial separation is not made available by the Act as one of such grounds. If such a decree is available at all, it is by virtue of the ordinary rules of evidence. I do not doubt that, as between the parties, the ordinary doctrine of estoppel applies, as was held by the Judge Ordinary in *Finney v*

by express section 31 by per oral
any substantive right in rem representative. No estoppel of a point of law. *Diamant Cas 665=A I R 1919 All* both by plaintiffs as well as 9 Ind Cas 472=A I R 1977
Oudh 97 Estoppel is a rule of evidence which in certain circumstances prevents a person from denying established facts and compels him to abide by a declaration. *Per Lord Shand in Sarat Chander Dey v Gopal Chander Laha*, 20 C 296 (311)=19 I A 203
Perally v Saler Khanubai 7 Bom L R 100=A W N 1886, 101. Rule of estoppel affects substantive rights. *Wahidan v*

the Indian statute mainly act, and the principle to be most inequitable and or by conduct amounting to representation, has induced him to act as he would not otherwise have done the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it. *Per Lord Shand in Sarat Chander Dey v Gopal Chander Laha*, 20 C 296 (311)=19 I A 203

Rule of estoppel whether applicable in criminal cases. The principle of estoppel has no place in criminal law. *Mohoram v Emperor*, 40 A 393=16 A L J 414=19 Cr L J 615=45 Ind Cas 51

Estoppel is neither admission nor presumption. The branch of the law of Evidence of which that of estoppel forms part is referred to by text writer as "a Good piece of evidence". It is therefore to be distinguished from those statements which become in themselves the foundation of independent rights for other persons, by virtue of some doctrine of substantive law—in other words binding estoppels, etc. Thus, if A claims that his boundary line runs to an oak tree, and B admitted this, B's extra-judicial admission of the boundary is not merely evidence for the truth of the other facts on which A rests his claim.

But if B has made his statement to A under such circumstances that A was justified in acting on it and has built up to the line he claimed, B's concession may by estoppel become the foundation of a new right for A, wholly irrespective of the validity of the grounds of his original claim. Here the field of substantive

from that of presumptions in the circumstance that an estoppel is a personal disqualification laid upon a person peculiarly circumstanced from proving peculiar facts. A presumption is a rule that particular inferences shall be drawn from particular facts whoever proves them. *Steph Introduction p 175*

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all right to deny, for the purposes of the trial, i. e., it removes the proposition in question from the field of disputed issues. But statements which are not estoppels or judicial admissions have no quality of conclusiveness and on principle cannot have. *Wigmore § 1059* Estoppel like judicial admissions has the similar effect of concluding all dispute of the fact. But here the distinction is that the estoppel is an obligation made by a rule of law, of the same

§ 2539

Different kinds of estoppel according to English law. Estoppels according to English law have been divided into three classes (1) By matter of record (2) By deed (3) In pais

(1) By matter of record. A matter of record, as its name would import, is something that has been recorded in a court of law. It is at once the narrative and the more usual form in which the

of the Civil Procedure Code and sections 40 and 41 of the Evidence Act

Estoppel by deed. An estoppel by deed is that which binds the parties to the instrument and those claiming through them to its statements and operation, as an admission of the truth, thus, at least as to the matter intended to be affected by the instrument, and the facts recited in it. The solemnity of good Ad cense d for

by the deed, and the deed contained a recital of the plaintiff having invented the improvements in question, invention being of course of the essence of the validity of the patent. The defendant pleaded that the invention was not, in fact, a new one; setting up the defence as a ground why he should be relieved from the liability to payment, contracted on the faith of the patent's validity. The Court, however, held him concluded, that is to say estopped, by the recital. It was observed by *Mr Justice Farnham* "The law of estoppel, is not so unjust or absurd as it has been too much the custom to represent. The principle is,

of either fraud, illegality, or immoral purpose, it would not apply, and any of these grounds could be set up to displace the estoppel. The meaning of estoppel says *Baron Morton* 'is this—that the parties agree for the purpose of a particular transaction to state certain facts as true, and that so far as regards the transaction, there shall be no question as to the truth of the statement. It is opened where the statement is made for the purpose of the contract, for persons cannot be allowed to make a statement and then deny it.' *Horton v Westmins*.

Indeed it is not necessary that there be suppression or omission of the real truth. A woman securing to her a pecuniary payment in return for future cohabitation would naturally be silent as to the consideration, but being in fact for an immoral purpose it would be bad and the obligor would not be estopped from showing the nature of the consideration. *Goodale* L.R. 535. So also a party may prove that he never executed the deed, or that it was obtained by fraud or duress or otherwise tainted with illegality. *Collins v Blenkinsop* 15 Q.B.D. 369. *Priestman v Thomas*, 9 P.D. 70, 210, R. & H. 117. *Q.B.D. 300*, *Poulton v Adjustable etc Co*, (1903) 2 Ch. 430.

In general however in order to conclude the party by his deed by way of estoppel it should be pleaded for if his adversary does not rely upon the estoppel the Court and jury are not bound by it, but the jury may find the matter at large according to the fact and the Court will give judgment accordingly. He asks them their opinion, and they are bound to give it. Where, however, the title of the party is barred by estoppel and he has no opportunity of pleading it the jury are bound to find for him. *Evans* p. 461. In India the recital of the deed is binding as an estoppel. *100 Ind. Cas. 1037*.

Ba. Bahar. A.I.R. 1927 All. 395. The strict technical doctrine of the English law as to

C. 1035. Where the plaintiff executed a deed of mortgage, he cannot afterwards sue to cancel it alleging that it was a fictitious one for the purpose of depriving the next reversionary heir of his right to the property. *Mutazid v Bhogwan*, 11 P.R. 1875. The doctrine of estoppel by deed in its technical sense cannot be said to exist in India. *Johnstone v Gopal*, 12 Lih. 516—A.I.R. 1931 Lah. 419.

Estoppel in cases of recital in documents. When a person with a limited interest in certain property styles himself the owner of it and mortgages it to another he would be estopped if he subsequently acquires the property from setting up his limited interest as against the claim of the mortgagee. And the auction purchaser of such proprietary interests of the mortgagor with notice of all the facts, being a person claiming from them would be equally estopped.

That the mortgagor had mortgaged the property to the mortgagee in pari delicto portion of the property to which he was himself a party, will not interfere to relieve him from its obligation. Where a person is guilty of a fraud in the acquisition of property, the law will not allow him to set up the fraud as a defence. Showing its real character, the claims of justice, equity and good conscience will be established. It is by allowing the law to be applied to the case of a party who has committed a fraud that the law is able to do its duty.

Sabuktulla v Hari, 10 C L R 199 In a suit for possession of lands, a plaintiff is not bound down by the recital, as to his vendor's title to the lands, in the document of sale, but is at liberty to prove such title differently. *Gour Monee v Krishna Chandra*, 4 C 397 The mere fact of a vendor declaring in her deed of sale of a moiety of a landed estate, that the other moiety did not belong to her was held not to be conclusive against her being the proprietor. *Aunhoo v Boodhoo*, 13 W R 2 The rule of estoppel by deed or by writing as now in force is this that, if a distinct statement of a particular fact is made in a deed and a contract is made with reference to that statement then the party who makes that statement cannot deny the truth of it. *Thakur Abdul v Miyan Wahid Ali*, 6 O C 355

Estoppel in pais. An estoppel in pais is that which, though not existing as matter of record or under the solemnity of a deed, may nevertheless under the circumstances, conclude equally with the higher species of averment. It may exist in writing not being under seal in oral statement, or even in conduct as were but few, and these existed its ownership. It was said by W 285 The acts of parties by way of estoppel are but few, and are pointed out by Lord Cole Co Litt 352 (a). They are all acts which anciently really were and in contemplation of law have always continued to be acts of notoriety not less formal and solemn than the execution of a deed such as livery, entry acceptance of an estate and

doctrine that the maxim—(on applied under circumstances of great variety)—has grown up that a tenant or those claiming under him, cannot dispute the title of the landlord under whom they came into possession. This has been applied to the case where the letting was by an agent and the landlord unnamed, and the principle would extend to that of any party coming in under the permission of the owner as in the instance of a lodger a servant or any other licensee. Indeed so far has the doctrine been carried in practice, that where the object is the only course to be pursued to be pursued ejectment *Goodere Ev* 547 tance of a bailment *Standard* Bing 330 *Biddle v Bond* 6 B) 1 Q B

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Extension of the doctrine in modern times. In modern times and in more complicated relationships of society which have been growing up the doctrine of estoppel has been considerably extended in application beyond its more ancient limit, and especially in reference to the mercantile and more general transactions of mankind. It has been rested too less upon technical grounds than upon the broad basis of good faith and personal honesty—and the principle is to hold men to those representations whether written or unwritten—whether by word of mouth or of conduct—whether intentional or unintentional—upon the faith of which others have been induced to act to the change of any previous position. In a case which has always been regarded as a leading one on this subject, that of *Richard v Scars* 6 A & M 1148 the law was thus laid down by Lord Denman C J. But the rule of law is clear that, where one by his words or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to

alter his own previous position, the former is concluded from averring against the latter a different what later case of *Gregg* appendix to *Pickard* v my mind at the time of the trial, and the principle of that case may be stated even more broadly than it is there laid down. A party, who negligently or culpably stands by, and allows another to contract on the faith and understanding of a fact which he can contradict cannot afterwards dispute the fact in an action against the person whom he has himself assisted in deceiving. The former case, it will be observed might possibly seem by the expression 'wilfully cause almost to imply a fraudulent representation only; and to limit the application of the doctrine to that state of things,—while the latter extends it to a case of mere omissive silence or passive acquiescence, and that not culpable merely in the more obnoxious sense of the term but even negligent, and a good deal of discussion has arisen as to the precise limit of the rule. It is now, however, established that the word 'wilfully' is to be understood not in the sense of intentionally, but practically deceptive. *Good E 551*

The discussion of the proposition as laid down by Lord Denman came before the Court in the case of *Freeman v Cooke*, 2 Ex R 604, where Lord Mansfield in delivering the judgment, after adverting to the rule as laid down by Lord Denman, thus commented on it — "Whether that rule has been correctly acted upon by the jury in all the reported cases in which it has been applied is not now laid down in the term."

the party represents that to be true which he knows to be untrue at least, but he means his representation to be acted upon, and that it is acted upon accordingly and if, whatever a man's real intention may be, he so conducts himself that it is to be true, and believe that it was it as true the party asking from contesting its truth and a duty cast upon a person truth may often have the same

effect. As for instance, a retiring partner omitting to inform his customers of the fact in the usual mode, that continuing partners were no longer authorized to act as his agents is bound by all contracts made by them with third persons on the faith of their being so authorized. Lord Mansfield's statement of the law was reviewed by Lord Campbell C J in *Howard v Hudson* 2 El & Bl 1 where he said "Now I accede to the rule laid down in *Pickard v Sears*, and in *Freeman v Cooke*. If a party wilfully makes a representation to another meaning it to be acted upon and it is so acted upon, that gives rise to what is called an estoppel. It is not quite properly so called but it operates as a bar to receiving evidence contrary to that representation as between those parties. Like the ancient estoppel this conclusion shuts out the truth, and is odious, and must be strictly made out. The party setting up such a bar to the reception of the truth must make the representation."

the rep makes exposition of the law given in the later case of *Freeman v Cooke* which in effect expounds the word wilful to mean simply intentional—and this probably accordingly, was what Lord Mansfield in the same case of *Howard v Hudson* too. A particular expression, observed in *Pickard v Sears*, has been used in the judgment in *Freeman v Cooke*. As it is important in any commercial case, in which a rule or criterion of law is a part of the law, and a principle of law is a principle of law.

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to another, and that other acts upon that false representation, the person who has made it shall not afterwards be allowed to set up that what he said was false, and to assert the real truth in place of false hood which has so misled the other. This is a principle of universal application, and has been particularly applied to cases where representations have been made so as to state the property of persons about to contract marriage, and where, upon the faith of such representations, marriage has been contracted. There, the person who has made the false representation has, in a great many cases, been held bound to make his representation good. And in a later part of his judgment, he thus adds — "These principles are plainly and perfectly intelligible, and quite consistent with good sense, and I am of opinion or decision to which I am a slightest degree, question their propriety."

has been carried, and may be carried necessary that the party making the representation should know that it was false, no fraud need have been intended at the time. But if the party has unwillingly misled another, you must add that he has misled another under

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of the Rolls. An appeal was then preferred before the Lords Justices, and finally it came before the House of Lords. But up to this point,—(the doctrine as laid down by Lord Cranworth)—both in the lower appellate Court, and on the final appeal in the House of Lords, there was no difference of opinion among the Judges. Lord Cranworth, however, who, on the original appeal to the

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the three Lords by whom the appeal was heard, Lord St Leonards, was in the minority, and the ultimate decision was accordingly in conformity with the opinion of Lord Cranworth and Brougham. Had Lord Cranworth

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5 alter his own the latter n what later cas appendix to my mind at the time of the trial and the principle of that case may be stated even more broadly than it is there laid down A party who negligently or culpably of a fac against it case, it will be observed might possibly seem by the expression wilfully caused almost to imply a fraudulent representation only, and to limit the application of the doctrine to that state of things,—while the latter extends it to a case of mere omissive silence or passive acquiescence, and that not culpable merely in the more obnoxious sense of the term but even negligent, and a good deal of the rule It is now, however be understood not in the sense of *Lit 551*

laid down by Lord Denning in *Woolley, 2 Ex R 604*, where Lord adverting to the rule as laid down whether that rule has been correctly in which it has been applied is not now the question but the proposition contained in the rule itself as above laid down in the case of *Pickard v Sears* must be considered as established By the term 'wilfully' however, in that rule we must understand if not that the party represents that to be true which he knows to be untrue, at least that he

the representation would conduct, by negligence or omission, where there is a duty cast upon a person by usage of trade or otherwise to disclose the truth may often have the advantage of longer author ed with third person ment of the law was reviewed by Lord where he said Now I *Freeman v Cooke* If a party wilfully makes a representation on which it is acted upon and it is so acted upon, that gives rise to what is called an estoppel It is not quite properly so called but it operates as a bar to receiving evidence contrary to that representation as between those parties Like the ancient estoppel strictly made out must show, both the representation and that he did so act

Though Lord Campbell in enunciating the proposition he was laying down makes use of the expression wilfully, it will be noticed that he adopts the exposition of the law given in the later case of *Freeman v Cooke* which in effect expounds the word wilful to mean simply intentional—and this probably accordingly, was *Howard v Hurd* particular expression in *Pickard v Freeman v Cooke* As the rule is there explained, it takes in all the important commercial cases in which a representation is made, not wilfully in any bad sense of the word not *maliciously* or with the intent to defraud or deceive but so far as

as an estoppel it must be a representation of an existing fact and of not mere intention or future promises. Also, estoppel, does not confer any title but is merely a rule of evidence which prevents one party from denying the existence of a fact which he represented as existing and upon which representation another person had been induced to act to his detriment. *Hindustan Co-operative Society v Secretary of State*, 56 C 939. A mere representation of an intention cannot amount to an estoppel. An estoppel must be a representation of an existing fact. If binding at all a representation *de futuro* must amount to a promise. *Dhundo v Keshab*, 7 Bom L II 179.

Estoppel in equity The modern or equitable estoppel is founded upon representations and arises out of Caspert, Estoppel p 18 The gener thus laid down "No body ought asserting a just demand unless by the truth or asserting the demand who would work some wrong to some other person mething, by Collie L R representation, I on this basis it seems to me that it is of the very essence of justice that between those two parties their state of facts which the two parties show Per Lord Blackburn in *Burkin Caspert Estoppel* p 19 It is a principle of natural equity which must be universally applicable that where one man allows another to hold himself out as the owner of an estate, and a third person the re permit purch amour which led to 376 67 L vide A 550, *Pacific*

The section whether exhaustive of all kinds of estoppels In *Ganges Manufacturing Co v Souraymull*, 5 C 669 at p 678 Garth C J said 'It has been further contended by the appellants, that ss 115 to 117 contained in Chapter VIII of the Evidence Act lay are now intended to be in force in British India as rules of Evidence; and that they are repealed, except those which the Act contains But if this argument were well founded the consequences would indeed be serious The Courts here would then be debarred from entertaining any questions in the nature of estoppel which did not come within the scope of ss 115 to 117, however important these questions & fallacy of the argument of evidence The enactment evidence It is founded upon *Scars*, II Ad & E 469 and other cases, that where a man has made a representation to another of a particular fact or state of circumstances, and has thereby wilfully induced that other to act upon that representation and to alter his own previous position, he is estopped as against that person from proving that the fact or state of circumstances was otherwise' - The rule of estoppel admissible to disprove facts stated by a party.

are matters of infinite variety, and are which are dealt with in Chapter VII of the estopped, not only from giving particula

relying upon any particular arguments or contention which the rules of equity and good conscience prevent his using as against his opponent. A large number of cases of this kind will be found collected in the notes to *Doe v Oliver* 1 C. & D. 775; and whatever the true meaning of section 2 of

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19 admittedly not a case of estoppel by misrepresentation which is dealt with by section 115 of the Evidence Act. Sections 116 and 117 of the Evidence Act deal with cases of this kind of estoppel viz of a Bill of Exchange.

It has been argued in part on the analogy of the tenancy law, but it has however been correctly submitted that these sections are not exhaustive of the doctrine of estoppel by agreement. See also *Bharganta Beulah v Hummat Bida'ar* 20 C W N 1935 (140); *Gotta v Sivaram*, 23 M L J 330, *In re United Indian Sugar Mills Co Ltd* 1930 A L J 305=A I R 1930 All 330, but see *Asiatic Petroleum Co v Harendra Lal* 35 C 901=12 C W N 721=8 C L J 31, where none of the previous cases were considered. This equity differs essentially from the equity of estoppel by representation, which is not a rule of law.

of the previous cases were considered. This equity differs essentially from 115 of the Indian Evidence Act, 1872, which is not a evidence that was formulated and applied in Courts by its origin from the jurisdiction assumed by the Courts in the case of, or to prevent fraud, *Munir v. State of India*, 29 B 580-7 Bom L 115 of the law of estoppel, by which the Courts in

India are to be governed are found in s 115 of the Act there is no need to fall back upon the analogies of the Mahomedan Law in a case of presumption arising between the Hindus. *Ajundhia Chaudhuri v Chhatarpal* 4 A L J 10-
A W N 1907, 88

Requisites of section 115 To constitute an estoppel under this section
the following are necessary, namely, —

It must have been made known to the party that it (5) The other party must have been induced to act upon it (Brynum v Preston 69 Texrs, 287-5 Am St Rep 49) (6) Or acts conduct or declarations of a person, by which he designedly induces another to alter his position injuriously to himself but it must be executed and not merely executory Camp Rul Cas Vol XL 104

Declaration, act or omission This section deals with a case of estoppel by misrepresentation. *Rup Chand v Saraswar*, 33 C 915 (921) Under this section such misrepresentation may be made by declaration act or omission. *Jetha bhai v Aasha bhai*, 28 B 399 (407) "It is a very old head of equity" said Lord Eldon in *Erans v Bidel* 11 Ves 183 "that if a representation is made to a person, and he acts upon it, it is a matter of interest upon the faith of that representation that he should not be treated as not having seen it."

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is no representation by a person to whom the plaintiff has been induced to believe and truth must have been unaccessable. *Mohammad v Mohammad*, A I R 1930 All 817, *Johnstone v Gopal*, A I R 1931 Loh 419, *Abdul Mahboob, G Luck* 382. The law on the subject is thus stated by *Brett J* in

City & London & North Western Railway Co., L. R. 10 C. P. 347—H. L. J. S. C. P. 10.

"If a man by his words or conduct wilfully endeavours to cause another to believe in a certain state of things which the first knows to be false and if the second believes in such a state of things and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist."

"If a man either in express terms or by conduct makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way and it is acted upon in that way in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts."

"If a man what ever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts and that it was a true representation and that the latter was intended to act on it in a particular way and he with such a belief does it in that way to his damage, the first is estopped from denying that the facts are as represented."

"If in the transaction itself which is in dispute, one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading and has led the other to act by mistake upon such belief to his prejudice, the second cannot be heard afterwards as against the first to show that the state of facts referred to did not exist." This view was approved of in the much later case of *Stonington & Co. v. Lyons*, L. R. 19 Q. B. D. 68, by a unanimous judgment of Lord Fisher and Lords Justices Fry and Lopes. In that case Lord Fisher said: "An estoppel does not in itself give a cause of action; it prevents a person from denying a certain state of facts. One ground of estoppel is where a man makes a fraudulent misrepresentation and another man acts upon it to his detriment. Another may be where a man makes a false

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represents that to be true which he knows to be untrue, at least that he means

his representation to be acted upon, and that it is acted upon accordingly and if whatever a man's real meaning may be, he so conducts himself that a reasonable man could take the representation to be true, and believe that it was meant that he should act upon it and did act upon it as true, the party making the representation would be equally precluded from contesting its truth, and conduct by negligence or omission, when there is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect—as for instance, a retiring partner omitting to inform the customers of the firm in the usual mode

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and 'The word 'wilfully' which is used in the judgment of *Pickard v Sears* has been well commented upon in the judgment in *Freeman v Cooke*. As the rule there explained it takes in all the important commercial cases, in which a representation is made, not wilfully in any bad sense of the word, not maliciously or with intent to defraud or deceive but so far wilfully, that the party making the representation on which the other

That is the true criterion' See

Coventry v Great Eastern Railway

Lafone, L R 19 Q B, D 68, *Cornish v Abington*, 4 H & N 549

no ground for the suggestion that the person making the representation which induces another to act must be influenced by a fraudulent intention

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majority of the Judges that if the element of fraud be wanting there

that case also) the Court seems to have taken the view that in order to constitute an estoppel, the representation founded on must have been made with an intent on to deceive, and an opinion was indicated that the law of estoppel under the Indian Evidence Act in some respects differed from the law of England. It was there said (7 Mad 8) 'The term intentionally was, no doubt, adopted advisedly. By the substitution of it for the term 'wilfully' in the rule stated in *Pickard v Sears* 6 A & E 469 and explained in *Freeman v Cooke*, 2 Exch 634 and *Cornish v Abington* 4 H & N 549, it was intended to exclude cases in which it was not intended to deceive. In this view On the contrary, as the rule had been modified in England by there substituting the word 'intentionally' in the rule established for the word 'wilfully' which had been previously used it seems to their Lordships that the term intentionally was used in the Evidence Act for the purpose of declaring the law in India to be the same as the law in England. A person who by his declaration to act upon the meaning of true, and believe was given

'Estoppels arise on various grounds, says *West M A* in *L R 19 Q B D 68*, 'all of which the judgment in *Carr v North Western Railway Co*, L R 10 C P 307, endeavours to state, and each of the grounds on which an estoppel may arise, there stated, is intended to be independent and exclusive of the others. An estoppel does not in itself give a cause of action; it prevents a person from denying a certain state of facts. One ground of estoppel is when a man makes a fraudulent representation, and another man acts upon it to his detriment. Another may be where a man makes a false statement negligently, though without fraud, and another man acts upon it. And there may be circumstances under which, where a misrepresentation is made without fraud and without negligence, there may be an estoppel.' While it is not in all cases necessary to show actual knowledge of the facts on the part of the one against whom the estoppel is claimed, it should at least be shown that the declarations were made under such circumstances that he ought to have had such knowledge or that they were made negligently and recklessly. *Lafone*

Thorn's, 13 Corn R 772. He cannot urge, as an excuse, that he had forgotten them. When a person through misapprehension, ignorance or inadvertence, does acts or makes declarations which mislead another to his injury but when at the same time there is no wilful deception or culpable negligence and no intention that the representation should be acted upon as true by the other party and when nothing accompanies it that is equivalent to a promise that the representation is true, the person making the declarations or doing the acts is not estopped from proving the truth against the party thus misled. It follows that there is no estoppel when the declarations are made in good faith and in ignorance of the real facts in other words when made innocently and by mistake. *J. & J. nee & 277, Westminster v. L. & L. 26 P. L. R. 1903*. It is not essential that the intention of the person making the declaration should be to induce another to act or abstain or that he should not have been under

Dun v. Dugan 118 Cal. 411 L. 1421. Under this section it merely may there be active inducement on the part of the declarant of a belief in the mind of another person but it is enough if declaration is such by which the declarant in the ordinary course permits some body declaration and to act on that belief. *Barclay N. 473 = 41 R. 1923 Cal. 419*. It is not present received that there should be any connection with the misrepresentation which is the subject of estoppel. *Barber v. Jugel* 3 Pat. L. J. 451 = 35 Ind. C. 173.

Who can take advantage of the representation. Only the person to whom the representation was made or for whom it was designed can avail himself of it. A person who receives statements at second hand, not intended for him, clearly has no right to act upon them. In fact it is equally clear that a mere by-stander who has overheard a statement made to and for another has no better right to act upon it than if it had been communicated without authority to him; and so it has been decided. If however, the declaration was intended to be acted upon by some third person who is not here it, but to whom it was time to be allowed for acting of the law more than that act not his own or that of his

Only such person can take advantage of a representation for whom it was meant. *Jogesh Chandra v. Entaz Ali*, A. I. R. 1927 Cal. 31 = 97 Ind. C. 625. Estoppel applies not only in favour of the person induced to change his position but also in favour of a transferee of such a person. *Bhujilal v. Shro Gohul*, 7 L. R. 213 (Rev) = 15 Ind. C. 770 = 22 C. W. N. 891. To the decree holder it is likewise. *Sicaminatha Vallala v. Durnahiga*, representations, induce others to

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presentation a party cannot be estopped. *D. 134 = 1922 P. C. 319 = 16 L. W. 692*. A representation to form the basis of an estoppel may be made by statement or by conduct; and conduct includes negligence. *Halsbury Vol. 13 p. 377; Freeman v. Cooke*, 2 Lx Ch 654.

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2 Pat L. T. & G.-61 Ind. Cas. 847; *East Srup v. Myers Stanton*, 46 P. R. 1918-35 P. L. R. 1918-37 P. W. R. 1918-37 Ind. Cas. 670; *Perennay v. Baid*, 47 Ind. Cas. 953; *Chand v. Sarda*, 22 C. W. N. 179. Defence of estoppel can always be taken if it is warranted by the facts proved or admitted even if these facts have not been specifically pleaded. *Cooperative Loan v. Shanmugam*, A. I. R. 1950 Nag. 25.

Onus of proof. To entitle a plaintiff to recover from a defendant, on the ground of estoppel, a loss occasioned through culpable neglect on the part of the defendant the plaintiff must prove that the negligence complained of occurred in the particular transaction in which his loss arose, and also that such negligence was the proximate direct or real cause of the loss. *Longman v. Bith*, 1 *Ch. Tr. Times*, 74 L. J. Ch. 474-(1905) 1 Ch. 616. A person who relies on estoppel by negligence must show that he was led into the belief on which he acted to his detriment. A solicitor was ordered by his client to investigate the title to and prepare a conveyance of property adjoining his (the solicitor's) property. In the conveyance a small portion of the solicitor's property was confused, but the client did not believe that he was buying the small portion in question. The client subsequently brought an action claiming the land. *Hell*, that the solicitor was not estopped from setting up the truth. *Bell v. Marsh*, 72 L. J. Ch. 30-(1901) 1 Ch. 574-581 L. T. 605-61 W. R. 925. The estoppel must be strictly interpreted and any point in doubt must be decided against the estoppel. *Abd. Smith v. Norman Smith*, 6 Lath. L. J. 45-50 Ind. Cas. 525-1924 Lath. 469. The onus of establishing facts giving rise to estoppel is upon the person who pleads it. *Ugra Sen v. Jind*, 35 A. 723, *Ahmed v. Safian*, 97 Ind. Cas. 597, *Brenley v. Butuntha*, 46 Ind. Cas. 474; see also *Sheo Tahal v. Bhanel Shukul*, 1931 A. L. J. 653-A. I. R. 1931 All. 659.

When truth of the matter known to both the parties no estoppel arises. When the party affected has received timely notice that the representation is not true, he cannot enforce the estoppel. *Dunston v. Paterson*, 2 C. H. N. S. 195, *Sandys v. Holgion*, 10 Ad. & El. 472. So the party claiming the estoppel must not himself have been negligent. "Where the condition of the title is known to both parties, or both have the means of knowing it, there can be no estoppel." *Brant v. Virji*, *Knouff v. Thompson* 16 Penn. State 361.

To learn the truth. *Morgan v. Farrell*, L. Vol. XI p. 103. This section does not apply to a case where the statement relied upon is made to a person, who knows the real facts, and is not misled by the untrue statement. There can be no estoppel where the truth of the matter is known to both parties. A false representation, made to person who knows it to be false, is not such a fraud as to take away the privilege of infancy. *Mohiree Dhee v. Dharmodas*, 30 C. 639 P. C. -30 I. A. 111-7 C. W. N. 411-5 Bom. L. R. 421. Estoppel by conduct does not arise where the party misled

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 not operate as an estoppel in the present suit *Mehra v Dew Ditta 2 Lab 88*
 =3 Lab L J 223=62 Ind Cas 1665 There cannot be a case of estoppel where
 the person pleading the estoppel was put on notice and would by reasonable
 ad v Ananda
 where the state
 is not misled
 by the untrue statement *Jaramath v Jaikishor Prosad, 1 Pat L J 16=31*
 Ind Cas 375 Estoppel does not arise where both parties have equal means of
 knowledge both of the facts and of the law *Tel Chand v Gopal Datta, 13 Ind*
 Cas 482=46 P R 1912, see also *Prasanna Kumar v Sitalanto Raut 16 C L*
 J 202=17 C W N 137 There can be no estoppel where the whole of the
 record, deed or document in which the statement relied on is contained, shows
 the truth *Menanji v Secretary of State, 14 Bom L R 651*

Estoppel by representation—change of position brought about by it A
 by word or conduct induces B to believe that a certain state of things exists
 and B in that belief acts in a way in which he would not have acted unless
 he so believed and is thereby prejudiced, then A cannot in any subsequent
 proceeding between himself and B or any one claiming under B be heard to
 deny that that state of things existed. But A will not be estopped from averring
 the truth in any other proceeding. The estoppel only arises in favour of some
 person whom A has induced by word or conduct to do or abstain from doing
 some particular thing *Powell v Maltby 469* Where one by his words or
 conduct wilfully causes another to believe the existence of a certain state
 of things, and induces him to act on that
 position, the former is concluded from aver-
 state of things as existing at the same time
 So it is clear that if a person so conduct
 draws a certain inference and acts thereon the person so conducting himself
 cannot gainsay such inference *Cornish v Abington, 4 H & N 519 Carr*
 v L & N W Railway Co, L R 10 C P 307, *In re Blackley Ordinance*
 Co, (1867) L R 3 Ch 154, *Hollins v Fowler, L R 7 H L 757, Newton*
 v Iddiard 12 Q B 975, *In re Collie 8 Ch D 817, Horsfall v Halifax and*
Huddersfield Union Banking Co, 52 L J Ch 599, Couldrey v Burtum 19 Ch
D 304 The other party must have acted upon the act or conduct *Daniels*
 v *Ev Ins Co 48 Connecticut, 105, Earl v Stevens, 57 Vermont 474* Before
 an estoppel can take place it would be necessary for the party relying on the
 same to establish that he had been led to do something detrimental to his own
 interest owing to the action of the other person *Nisar Ali v Muhammad Ali*
 119 Ind Cas 337=A I R 1929 Oudh 494=6 O W N 519 What this
 section mainly regards is the position of the person who has been induced to
 act, and the principle on which the law rests is that it would be most inequi-
 table and unjust to him that if another by a representation made or by conduct
 otherwise
 to deny
 of the
 without
 fortunate

for him, but it would be unjust even though he acted under error, to throw the
 consequences on the person who believed his statement and acted on it as it was
 intended that he should do
 estoppel has been occasioned
 to whom

v *Shafi 1931*
 R 390=A I R 1931
 been created, the main
 person, to whom it has
 v *Das, 4 C. L. J 373*
 act on the faith of a fact
 the question such fact

in an action against the person whom he has assisted in deceiving. An estoppel of this kind is not created by a wilful, negligent and culpable misrepresentation, unless the person so deceived does not act in accordance with the misrepresentation. *Innes v Topley*, 70 P R 186. The meaning of this section is that no declaration, act or omission will amount to an estoppel unless it has caused the person whom it concerns to alter his position and to do this he must both believe the facts stated or suggested by it and act upon such belief. *Durga v Jhinnora*, 7 A 111-A W N 1885 1886 see also *Silino v Lally Lam Lal*, 7 C L R 481, *Jhinnora v Durga*, 7 A 1886 (1 R)-A W N 1886 10,

the statement not having been made to the person who seeks to render the other liable, and not having come to his knowledge as a matter of no avail, and it not being shown that he has acted on the faith of such statement. *Timmenson v Thompson*, 31 L J 12 267. It is a settled principle of the rule of estoppel that in order that a particular declaration, act or omission of a certain person may constitute estoppel against him the person to whom it is made must show that he in accepting the truth or the truth thereof has acted upon such detriment. *Immed v Gaffan*, 97 Ind

Person making a representation cannot subsequently deny what he represented when the person to whom it was made acted upon it. *Deval Nigpur Pulchay v Co-Operative Hindustan Bank*, 111 53 C (22-97 Ind Cas 606-A I R 1926 Cal 10-9. Where the plaintiffs made statements in a suit inconsistent with those made by their father in a previous suit against the same defendants but the plaintiffs did not claim the property in suit through their father and there had been no change in the position of the defendants by reason of the prior inconsistent statement, the plaintiffs were not estopped. *Nripendra Nath v Bisanta Kumar*, 29 C W N 861-89 Ind Cas 207-A I R 1925 Cal 1105. A tenant desiring to erect jucca structures on the leased land asked the permission of the landlord whose agent in reply wrote to say that the lease was a permanent lease and gave the tenant right to erect buildings, but it did not entitle him to hold at fixed rate and that the rent was liable to enhancement after proper legal notice and that pending consideration of a proposal to fix the rent permanently, the tenant might commence the house if he liked. Held that the statement of the latter was a statement of fact and not an expression of opinion, and the house having been erected, the landlord was

estopped. *A H Forbes v L J 543 (P C)* In effect prevents the plaintiff, the plaintiff, induced by had a fixity of tenure, them. It gives effect

to the representation that induced them to act as they did. In the case of *Tamsdin v Dyson*, L R 111 L 129, the principle which governs this class of cases is stated by *Lords Kingsdown* in the following terms—"The rule of law applicable to the case appears to me to be this. If a man, under a verbal agreement with a landlord for a certain interest in land or what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord and upon the faith of such promise or expectation, with the

detriment his previous position *Bhagwan Singh v. Dhanraj*, 22 Ind (Rev), *Gusain v. Ram Ralha*, 50 Ind Cas 123, *Abdulla v. Fateh* 62 Ind Cas 809

Before advantage can be taken of the doctrine of estoppel, the presentation of the action of the party seeking to estop as cause and effect. There must be admission on the part of the person sought to be estopped, a declaration, act or omission the person seeking to estop was led to believe a thing to be true and, thirdly, that by such act or omission the party seeking to estop was not only led to believe a thing to be true which in fact was untrue but to act upon such belief to his prejudice. *Ram Boran v. Ram Nihora*, 57 Ind Cas 263, see also *Giriyabai v. Sadasiv*, 22 Bom L R 974-58 Ind Cas 394; *Kannulal v. Gaur Saha*, 5 P L J 521-1 P L T 546-57 Ind Cas 353; *Rajib Hussain v. Ling Raju*, 54 Ind Cas 962; *Harlal v. Basanta Singh*, 75 P. W R 1918

Where by his admission of a compromise before the Revenue Court, the plaintiff induced the defendant to withdraw his suit in that Court, he is estopped from bringing another suit in a Civil Court. *Gulab v. Badhana*, 45 Ind Cas 331. Before applying the rule of estoppel it must be shown that a previous inconsistent statement in some way affected the result of the litigation in which it was made. But if the defendants were never proper parties to the previous litigation they cannot in any way be estopped from pleading something inconsistent with their former statement. *Raghunath v. Sheolal*, 13 N L R 69-39 Ind Cas 849. If a man under a verbal agreement with a landlord for a certain interest in law, or what amounts to the same thing, under an expectation created and encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation with the knowledge of the landlord and

a Court of equity will give effect to the expectation. The Crown Act, 1872, which is not limited and applied in its jurisdiction as limited by fraud. There is no estoppel where a person seeks to deny a promise made by him in land was not originally moulded in a form recognised by law; the Court of Equity will give effect to the promise. *Secretary of State v. Morrison*, 52 L J Ch 622. *Morrison v. Universal*

Marine Insurance Co, L R 8 Exch 197, *Hell v. Marsh*, (1903) 1 Ch 622. *Halsbury Vol XIII p 384*. The mere payment of money under a mistake of fact induced by the representation in circumstances when there is not the slightest difficulty in getting it back is not such damage or prejudice as will

stand by while the owner of the land afterwards for the contrary. *Murray v. Murray*, 11 Ch 622. The fact that the owner of the land has asserted a certain right on the assumption of fact against persons who were parties in the previous suit. *Edwards v. Edwards*, 11 Ch 622.

v. Sheo Chaudh, 102 Ind. Cas. 481. A party cannot approbate and reprobate with knowledge of the facts, and if the husband or the wife once deliberately affirms the marriage he or she cannot subsequently object to the marriage. Therefore, where a previous petition for declaring the marriage a nullity has been dismissed by consent of parties a second petition is not competent. *H. v. H.*, 20 Bom. L. R. 523-110 Ind. Cas. 26-A. I. R. 1928 Bom. 27. Where the widow of a deceased co-partner who died divided in status from the other co-partners allowed the other co-partners to sell to one of the family members including herself in order that the heavy debts due by the family may be discharged, thereby here by participating in the benefit that had accrued from the transaction, she

Munshi Chaudh v. I.
 advantage of the de
 loose with justice and

Ind. Cas. 286-A. I. R. 1925 Fmd. 175. A Hindu co-partner who takes property under the Will of another co-partner and acts up to the terms of the Will is estopped from subsequently contending that the Will is invalid. *Lakshminamma v. Sreenivasa*, 101 Ind. Cas. 679-A. I. R. 1927 Mad. 1066. Where a testator having either no title or an imperfect title to land devises it by specific description to or upon trust for a person for life with remainder over, one who obtains, or accepts, or retains possession of property under the Will and who neither has, nor proposes to have, any title thereto except under the Will, is estopped as against any remainder man or other person claiming under the same Will from asserting that the testator was not entitled to such an estate in the property as to be entitled to be executor, test and generally from setting

adverse to,
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 by him to
 12. It is a
 that, where
 to, and a
 third person purchases it for value from the apparent owner, in the belief that

he is the owner, he cannot afterwards allow the other to set himself out

Unless a person is found guilty of either an overt act or of an act of omission which is likely to induce the other side to believe that he is entitled to commit the particular act complained of there can be no question of estoppel. A plea of estoppel in such case can only be maintained if the conduct of the person against whom the estoppel is alleged, is found to be fraudulent. *Ram Dutt v. Chhotah*, 4 O. W. N. 1019. Where the vendor by his conduct induced a belief in the vendee that he had a good title to the property he is estopped from going back on the same, even where he was not fully aware of his legal rights. *Uatu Doyal v. Lalji Sahai*, 25 A. L. J. 878. Where certain lands belonging to a talukdar were wrongly described as rent free lands in the village accounts but on a reference to the they were
 accounts
 ped from

by giving effect to their previous the lands.
Sur Singh v. Secretary of State, 28 Bom. L. R. 1213-A. I. R. 1926 Bom. 590. No actual verbal representation is necessary to give rise to estoppel. It is quite enough that the conduct of the party leads another to act in the belief that he asserts no claim to the property. *Azizullah v. Ghellam*, 17 S. L. R. 63-80 Ind. Cas. 991.

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Mullesar, 21 A 316 = A W N 1899, 101 In order to avail him self of the doctrine of estoppel, the plaintiff should prove that the defendant, by representation which he knew to be unfounded intentionally misled the plaintiff into a position prejudicial to the interests which he would otherwise have possessed *Pichurayyan v Subbayyan*, 13 M 178 In order to prevent the owner of land who is charged with standing by and allowing another person, who believes he had a good title thereto, to enter on the land and spend money in improving it, from recovering possession thereof, fraud and deceit on the part of the owner must be clearly proved, *Langlois v Rattray*, 3 C L R 1 In order to raise an equitable estoppel against the lessors, it is incumbent upon the lessee, to show that the conduct of the owners, whether consisting in abstinence from interfering or in active intervention is sufficient to justify the legal inference that they had by plain implication, contracted that the right of tenancy, under which the lessees originally obtained possession of the land should be changed into a perpetual right of occupation *Beni Ram v Kundan Lal*, 21 A 496 (P C) = 3 C W N 502 A plea of estoppel by general conduct raised by the plaintiff will fail if it is proved that a proper inquiry would have acquainted the plaintiff with facts *Phundo v Bhisma*, A W N 1883, 246 The plaintiff who upon misrepresentation by defendant, released a right to him, believing his statement in preference to getting information any where, which information he might have easily obtained, is relieved from fulfilling the terms of the release *Meli Ravi v Denu Dayal*, 73 P R 1869

The rule of estoppel ought not to be applied rigorously as against a poor woman The same inferences should not be drawn from or same construction should not be placed upon, her silence and delay in bringing a suit as might be reasonable and proper in another case *Kaniz Fatima v Abbas Ali*, A W N 1887 84 The Court ought to decline to relieve a party asking for it who has countenanced the acts of which he complains *Bhyro v Mussammal Lekhrane Kori*, 16 W R 123 Where a representation is such that a reasonable person would act on the faith of it the person who has made the representation cannot get rid of the estoppel by saying that the person, to whom he made the representation would not have been deceived if he made proper enquiry *Nandalal v Sukkman* 13 C P L R 30

Parties who, by false representation, induce others to enter into contracts are estopped from afterwards falsifying their statements, and, if necessary may be compelled to make them good *Radha Krishna v Shureesunnisa*, W R 1864, 11

A judgment by consent raises an estoppel, just in the same way as a judgment after the Court has exercised a judicial discretion in the matter *Laxmishankar v. Vishnuram*, 1 Bom L R 534 = 24 B 77 An attesting witness to a Will cannot sue to have it quashed on any ground, as he is estopped from doing so by being an attester of the Will *Jumma v Juam*, 188 P. R 1893 Though the person, who elects to take a legacy under a Will, may be estopped from setting up a title contrary to its provisions, still, if such person be in possession, he cannot be ousted except by one who can prove a better title to the property *Probodh v Harish*, 9 C W N 309 On a decree being passed on compromise, the judgment debtors will be estopped from objecting to the execution of the same *Kashi Das v Ishan Chander*, 31 C 314 (P C) = 9 C W N 49 The Civil Procedure Code allows of a decision by an umpire in certain events and hence, parties, who have submitted to the decision of an umpire without taking any objection cannot afterwards call that decision in question in a Court *Kupru v Venkatarammaya*, 4 M 311 A person can be precluded by his conduct from objecting to an irregularity in procedure which he himself invites *Timmanna v Putabhatta* 2 Bom L R 90 Where interest has been paid by a banker to a depositor at a certain rate per cent, a renewed deposit will also carry interest at the same rate, in the absence of an agreement to the contrary; and the banker will be estopped from questioning such rate *Mikundi v Balakrishna*, 3 A 328 The owner may be, in respect of a trade-mark, as in respect of any other right, estopped by his conduct from denying the title of another person *Larouque v. Hooper*, 8 M. 149 A purchased possession of property, in the name of B, and allowed B to occupy and retain possession of the property B mortgaged the property to C for a valuable consideration If A and those claiming through him were estopped from asserting as against C, his or their title to the property and the mortgage was valid *Hally Dutt v*

And Chandler, March 29; *Putnam v. Putnam*, 3 W. R. 87; *Putnam v. Putnam*, 18 W. R. 120; *Putnam v. Putnam*, March 29. On a decree of compromise, the judgment of the court will be stayed from effect to the execution of the same. *Kish v. Putnam*, 31 C. 214 (P. C.) 1 C. W. N. 42.

If a gentleman entrusts to his own men of business a blank paper duly
mimed as a bond, and signed and sealed by himself in order that the instrument
may be duly drawn up, or money raised upon it for his benefit, and if the instru-
ment is afterwards drawn up, and money obtained upon it from persons who have
and must in the absence
up in accordance with
Super. Div. 5 C. 39)
by X and Y's omission
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fusing a registered letter

A person having right of pre-emption may dispute or affirm the validity of the sale of the land to a third person. If, by his conduct towards the venditor for the sale, he makes the latter believe that he has elected to affirm the sale, he is estopped from attacking the sale or enforcing his right of pre-emption over the property. *Bura John v. Jiganna* 135 P R 1948. In a pre-emption suit on the foreclosure of a mortgage, the mortgagor did not appeal from the foreclosure decree but allowed the auction to take place under it. *Hell* that such conduct was sufficient to impute that the mortgagor had acquiesced in the sale being made absolute. *Jouaher Ali v. Kalandar* 135 P R 1842. A obtained a decree for pre-emption against B on condition that the price should be paid by A. A mortgaged the land to C and A did not pay the price. In a suit by C to enforce his right of pre-emption, *Hell*, that B having accepted the mortgage from A and made A believe by such conduct that he treated him as the proprietor of the land in question was estopped from pleading as he did. *Gulrang v. Panna* 131 P R 1830.

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✓ mortgages property as unencumbered when as a matter of fact, it is subject
✓ to a charge, cannot, when he subsequently becomes himself entitled to enforce
✓ such charge, set up such charge against the mortgagee *Ridhey Lal v. Mahesh*
Prasad 7 A 864

If a creditor, in execution of a money decree which he holds against his debtor, sells certain property as that of the latter, he will be estopped from afterwards setting up, as against the purchaser, a previous mortgage which had been created in his own favour of which he had given no notice to the purchaser at the time the property was sold and in ignorance of which the

purchaser bid for the property and paid the full price *Agoichand v Balkha*
the mortgagee, and
the decree for paying off the mortgagee,
the mortgagor passes to the purchaser
the effect of
may
not

A mortgagee, who has the mortgaged property, disclosing his mortgage lien,
against the title of a *bonafide*
id v. Shib Sahar, 21 A 309=
execution of a money decree puts
in property for sale without notice of his mortgage and thus allows an innocent
he is estopped

possession was given to defendants in virtue of an unregistered mortgage deed
and gave their consent to the mortgage, they could be equitably estopped from
claiming possession of the same property under a registered instrument as
against the
Where a
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v. Mayer, 11 C 100
case of *Pickard v. Sears* (6 Ad. & El 40), that where a man by his words
conduct wilfully induces another to believe in a certain state of facts, so as
embodied
under *Roy & C*

Where a mortgagee relinquished the debt and the bond and the
mortgage security in consideration of his getting some other land instead and
the relinquishment was acted upon by a third person to his prejudice the
as not made
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Shina Redi

was unencumbered, held that by such conduct he
the prior date of his encumbrance would, had he acted otherwise, have entitled
him. *Rai Seeta Ram v Kishun Dass*, 3 Agra 402 A man who has represented
to an intending purchaser that he has not a security in property to be sold,
and induced him under that belief to buy, cannot, as against that purchaser,
Munoo Lal v Lalla Chooner

of half of a certain piece of land
only two-fifths of the said land the
spectively to a brother and sister
it was endorsed by his sister This
an assignment amounted to an estoppel as against her, or any one claiming
empowered
his acquie-
from setting
escence took
induced him
P. R. 1882
to enter into the sale transaction *Nihola v. Dhanoo*
Where without objection, a defendant allowed a purchaser of the plaintiff's
interest in the suit to substitute his name on the record (the original plaintiff

having withdrawn from the suit), he was estopped from contending that the suit had abated. *Bar Chandra Roy v Bansi Dhar Roy*, 3 R L R A. O 215. An auction purchaser not questioning the acts of his predecessor within 12 years will be estopped from objecting. *Sidyal v Goura Roy* 18 W. the judgment debtor, with the co. and asked for time for paying. contest the validity of the sale if. On his prayer being granted, he without paying the full decretal amount on the day fixed, took further time. Held, that it would be contrary to reason and equity that he should turn round and repudiate the agreement, and that the agreement estopped him from contesting the legality of the sale. *Ultam Chandra v Khetra Nath*, 29 C. 577.

A purchaser of land, who lies by for five years allowing another person to occupy the land and afterwards to sell it, is estopped by his own conduct from afterwards claiming the land from a bona fide purchaser without notice. *Mohesh Chandra v Kaur Chander*, 1 Ind Jur N S 266. A plaintiff suing to realise his security under a mortgage is estopped from recovering on the or to buy without notice of brought the property to sale. a person in execution of a hypothecation to his partner, ascer, and the sale has taken place, obtains an assignment of the hypothecation deed and sues on it, he is estopped from denying that the sale took place free of encumbrances. *Kastura v Venkatasahayappa*, 15 M. 412. Where a decree holder, by mistake, put up to sale he is purcl purcl Propri 265. Person who steps in during an auction sale, assumes the character of a principal

laches in questioning the alienation, but are also found purchasing the land from the transferor to the exclusion of the other collaterals, or cultivating the lands under the purchasers, or exchanging it with them, they must be taken to have acquiesced in the alienation and estopped from suing to contest it. *Amur v Zelo*, 42 P. R. 1902.

should have been sued against does not operate as an estoppel against him from contesting its validity in a subsequent suit. *Mohunt Das v Nil Komal*, 4 C. W N 283.

The maxim *caveat emptor* applies to execution sales. In execution proceedings a judgment-debtor is not bound to come forward. In the absence of any misleading on his part so as to estop him from asserting his title, mere silence on the part of the judgment debtor, or his omission to come forward, cannot operate as an estoppel. *Gurupada v Irappa*, 14 B 558. A decree altered

by agreement of parties with respect to the mode of payment and the interest payable, cannot be executed as a decree. And the acquiescence of the judgment debtor in it *Debi I* debtor for

under section 115 of the Evidence Act so as to preclude him from maintaining that the execution of the decree is barred by lapse of time *Mina Koonuar v Jagat Setam* 10 C 196-13 C L R 385-10 I A 119 P C. A judgment creditor by putting up the rights and interest of his judgment debtor in a talook for sale in execution is not estopped from afterwards claiming a portion of that talook under a different title, e.g. under a mortgage *Chunder Kant v P* 11 W 17 W I. the sale thereby at a high anterior

Hossain, 10 C L J 605-4 Ind Cas 739. The auction purchasers at the execution of a decree were not estopped from asserting, as against a person claiming to be a mortgagee prior to the sale of the property purchased that in fact the property was their own independently of the auction sale. *Pantil Hanuman v Musti Issadullah* 7 N W P 145. There could be no question of estoppel by conduct by who derives his title from the former *Tasanji v* heir, though he cannot prove a Will, under which he claimed a larger share in a former litigation in which no question of inheritance was raised. *Moulvi Ahmedoolah v Gour Huree*, 15 W R 251. When in a suit for redemption the assignee of a usufructuary mortgage put forward or consented to put forward the original mortgagor as the person entitled to redeem, he is not thereby estopped from afterwards giving for redemption in his own account, for the defendant could not be said to have been in any way induced to alter his position or to do any act in consequence of any conduct on the part of the plaintiff. *Mahammad v Vannu* 11 A 386-A W N 1859 136. Where a plaintiff, who was the nearest heir, allowed other heirs to join him in a redemption suit and such heirs spent money and actively assisted in prosecuting the litigation the plaintiff could not, after recovering the property, assert his superior title as the nearest heir, and that he was estopped by his conduct from asserting such superior title the principle being that where a person has conducted himself so as to mislead another he cannot gainsay the reasonable inference to be drawn from his conduct. *Bhagwant v Rayu* 9 Ind Cas 415. Where a person brought on the record, at the instance of the decree holder, as the representative of

his brother and had also claimed a share and it was then decided that the property was the sole property of the deceased and that neither he nor his brother had a right to share therein *Rajamannor v Venkata Krishnayya* 25 M 361-12 M L J 183. Where a purchaser under a registered instrument purchased the property with full knowledge of the existence of an optionally registrable but unregistered encumbrance thereon the doctrine of equitable estoppel applied and the purchaser could not claim as against the said encumbrancer. *Miran v Ramasa*, 6 C P L R 112. In a suit for pre-emption under the Oudh Laws Act, the defendant, in order to establish a plea of estoppel has to prove that the property was offered to the plaintiff at a certain price and that he expressly consented to the purchase of the property by the defendant.

venue and the Court should not be satisfied with anything short of this. Some Judges have thought that such a plea should not be allowed at all in a case like this. *Bank of Upper India v. Muzila Hoj, Prasad* 10 O C 257. Where tenants have paid, for a period extending over fourteen years, an enhanced rate of rent an implied contract to pay at the same rate in future years may be inferred though they now and then expressed discontent without however resorting to the Revenue Courts for redress. Their conduct in accepting rates containing these terms even after protest may operate as estoppel in subsequent years. *Bangthi v. Ringappa Appa* 1 Ind 17 M 51. A grantee of lands as long as he holds a religious office in a temple is estopped from setting up a title inconsistent with that of the grantor and an alienee from such grantee is similarly estopped and the alienation itself is invalid as against the trustees of the temple. *Thayilagam v. Venkatarama Krishnayyan* (1916) M W N 119-33 Ind Cas 688. When a grantor, by a recital is shown to have stated that he is seised of specific estate upon the assumption that such an estate was to pass an estate by estoppel is created between the parties and those claiming under them, in respect of any after acquired interest of the grantor, the newly acquired title being said to feed the estoppel is applicable to Hindu conveyances in cases before the Privy Council. *Krishna Chandra v. Iyad Lal* 33 C L J 701-21 C W N 218-53 Ind Cas 663. It is not competent to a mortgagee to go behind a mortgage to dispute the right of the mortgagor to enforce redemption. *Jingji Ram v. Sheoraj Singh* 30 Ind Cas 231. In a suit by a creditor to recover money the debtor pleaded that the plaintiff was bound by the terms of a contract arrived at between the debtor and a third person for the purpose of paying off the plaintiff's debt. There was no proof that the defendant was induced by the plaintiff to break his contract with the third person. In the circumstances the defendant could not invoke the aid of the doctrine of equitable estoppel against the plaintiff, and content that he was bound by the contract entered into with Commercial Bank Ltd. Compromise is not estopped the instance of another. *111 v. Prasanna Kumar* 31

In Cas 859. Agreement of rent by a lessee held from the mortgagee on behalf of the mortgagor. Invalidation of the mortgage on behalf of the mortgagor. 764 On the of a share

be allowed but without co is it a that the alienation of the 1st defendant giving up his section 115 does not apply and there is *Jana* (1915) M W N 237-28 Ind Cas

536 Where land stood in Revenue Registry, and the tax receipts appeared to be in the joint names of husband and wife the very fact that the wife was living on the property sought to have put the mortgagee on enquiry to ascertain what her real interest was. So she was not estopped from showing that the land was her sole and separate property. *P L R M Mejappa v. Ma Mejel* 8 Bur L J 124. Under Hindu Law a son has from birth an indefeasible right as a coparcener in the family property and mere unfriendliness on the part of his father cannot destroy that right unless and until he is regularly separated off and given his share of the family estate. He is therefore competent to contest the alienation of ancestral property if opposed to the principles of Hindu Law. But he loses his competency under s 115 of Act I of 1872 where he has condoned all that his father has done and he

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the Court to grant him a declaratory decree
Alam Shah v Nur-anah Shah, 63 P
 8 Ind. Cas 801. An act may involve, and
 may create an estoppel. So, if a man
 take an active part in carrying out a mortgage on behalf of another, as by
 signing the deed, his acts may amount to a declaration of the validity of the
 mortgage as against any claim but his own. *Mussammal Buro v Mir Muham*
 100 D. I. P. 1019, 201-1 C. 201.

debtors who were jointly liable under the decree in his favour no
 under the decree. Held that the person who omitted to raise the objection was
 estopped from denying that the judgment debtor was still the owner of the
 decree. *operative Town Bank v S V K*
Shunni, 0 Rang 265. Persons opposing
 appeal in particular Court is estoppel

then accepted the payment of Rs 10 and the case was remanded to the
 The defendant having accepted the compensation money was equitably

1584 = A I R 1930 All 8
Sheikh Dhannu v Sheolal,
Ram Samej, 134 Ind Cas
uadu, 131 Ind Cas 669 =
 A I R 1931 All 216, *Mh*
v. Tirunarayana, A I R 1932 Mad 198; *Omrao v. Ramkis*, 11
 Lah 281

Mistake A mere mistake in a deed common to all parties or, on account
 of which no one
 create an estoppel
 L. R. 11 Eq 12
 party *Halsbur*
 Bom 64; *Syed*
 Ind Cas 639 =

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 id No 133
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the deed cancelled on the ground that it was an infant. This could be interpreted by *Ganesh I* that having regard to that section proof of fraud on the part of the infant is not essential. The learned Judge in that case relies on the fact that in *Sarat Chunder v Gopal Chunder*, 20 C 296 and in *Mills v Fox*, 37 Ch. D. 153, no

the Evidence Act in respect, I am unable to which the learned

Judges in that Court rely as substantiating their proposition when carefully examined appear to one not to warrant the conclusion arrived at. This has been pointed out by Mr. Justice Jenkins, and concurring as I do in his criticism I need not refer to what he has said. The case of *Mills v Fox*, 37 Ch. D. 153

I said "Then it was Evidence Act by his infant may estop him—would be practically contract by his ocation isability out of or it and *Barlett*

v Welle, 1 R. & S. 836. It follows therefore that when the present law declares that an infant shall not be liable upon a contract, or in respect of a fraud in connection with a contract he cannot be made liable upon the same contract by means of an estoppel under s 115. I, therefore, agree that there is no estoppel whatsoever in this case founded upon any representation or alleged representation on the part of the plaintiff. On appeal to the Privy Council, their Lordships said "But their Lordships do not think it necessary to deal with that question now. They consider it clear that s 115 does not apply to a case like the present where the statement relied on is made to a person who knows the real facts and is not misled by the untrue statement. There can be no estoppel where the truth of the matter is known to both parties." *Mohors Bibee v Dharma Das*, 30 C 639 (P. C.)—7 C. W. N. 441. In *Jagor Nath v Lalla Prosad*, 31 A 21—5 A. L. J. 674, *Banerjee J* said "I do not however, deem it necessary to express any opinion on the point, although it

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on the capacity to contract. So if a person sues an infant upon a contract such contract having been entered into on the faith of a representation by the infant that he was of full age the infant will not be estopped from pleading his minority in answer to a claim to fix him with personal liability for a money

But though this section acting on well recognized "ud" In the latest case of 'The question in this appeal estoppel against the minor led himself to them as a major leed in their favour. It is the view of this Court differing from a minor must now ons of their Lordships Jai Kishore, A I R the plaintiffs respondents it is argued that the question was expressly reserved by their Lordships of the Privy Council as early as *Mohori Bibee v Dharmodas Ghose*, 80 C 539 (P C) = 7 C W N 441 and the consistent decisions of this Court from *Ganesh Lal v Bapu*, 21 B 198, *Dadasaheb Dasarathrao v Bai Nahanit*, 41 B 480 = 41 Ind Crs 180 = 19 Bom L R 561; *Jasraj Basinal v Sadashiv Mahadev*, 46 B 137 cannot be held to be overruled by the observations in the recent Privy Council case, *Sadiq Ali Khan v Jai Kishore*, *supra*, particularly as similar observations of their Lordships of the Privy Council are to be found in *Mahomed Syedol v Yeoh Doi*, 43 I A 956 (P C) = 19 Bom L R 163. This last, however, was a case from the Strait Settlements and their Lordships observed 'A case of fraud by the appellant on the subject of his age was set up, but it cannot be doubted that the principle recently given effect to in the case of *R Leslie Limited v Shell* would apply and such a case would fail. In that case it was held by Lord Sumner and other Judges that where a minor by fraudulently representing that he was of full age induced the plaintiffs to lend him money, such an action by the plaintiffs to recover the amount of the advance on the ground that he had obtained it by fraudulent misrepresentation must fail, even though fraud was proved against the minor. On the present question, the other High Courts have differed from this Court. *Dhurma Das v. Brahma Dutt*, 25 C 616 = 2 C W N 53 on appeal 26 C 381, *Akhan Gul v Lakha Singh*, A I R 1928 Lrh 609, *Vaikentarama v Anthumoolam*, 38 M 1071 = 29 Ind Cas 749, *Jagannath v Lalla Prosad*, 31 A 21 = 5 A L J 674 = (1905) A W N 267, *Ganganand v Rameshwar*, A I R. 1927 Pat 271 = 6 Pat 398. As for the observations of the Privy Council in the recent case of *Sadiq Ali v Jai Kishore* *supra*, cited for the appellant, the arguments are not reported, but the Courts differed. Their held that the mort ecuted by them was a t of minority being s of the deed founded on is sufficient for the decision of the case such a deed executed by minors being admittedly a nullity according to Indian law and incapable of founding a plea of estoppel. I am unable to interpret this decision otherwise than as overruling the view of this Court and as agreeing with the view of the other Courts. No amount of argument can the view of this Court be utted by minors is incapable of his view of the law, even if in les minors, the general intention the rule of evidence in this section substantive law in s 11 of the Contract Act per *Best C J* in *Chitturam v Crase*, 5 Bing 177. *Balagowrada v Gadigippa*, 31 Bom L R 340 = 118 Ind Cas 698 = A I R. 1929 Bom 201, see also *Maung Sin v. Ma Lun*, A L J 1927 Rang 103 = 5 Bar L J 441. If a minor by his conduct, allow his mother to act as the guardian of her sons and manager of the family property and to mortgage it, it is immaterial for the purposes of estoppel that his conduct was due to a mistaken impression as to his age. *Nathubai v Mulchahund*, 3 Bom L R. 525. A minor, who manage his own affairs, and covering again the same *Singh v Shree Nanfin*, evidence of fraudulent

representation on the part of the minor, the principle of estoppel cannot be invoked. *Kumar Gangmanul Singh v. Utharaja Sir Rameswar Singh*, 6 Pat 338=8 Pat L T 739=102 Ind Cis 419-A I R 1927 Pat 271; but see *Jiraj v. Satriu*, 1923 H 169. The mere fact that the purchaser from the guardian of a minor of properties belonging to the minor took a letter from the minor stating that there was necessity for the alienation does not estop the minor from impeaching the sale, so long as it is not shown that the minor caused or permitted the vendee to believe that necessity existed. *Sitaram v. Mulchand*, 115 Ind Cis 175-A I R 1929 Nag 221. Where a minor executes a sale deed honestly representing that he was a minor and the vendee believes that representation and acts upon it, the minor is not estopped from setting up his minority and the sale is void as a plea. *Koluri v. Phumulari*, 23 L W 521=94 Ind Cas 853-A I R 1929 M 107. This section is no more than a nullity.

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contract. *Punjab v. Bhagat Rao*, 96 Ind Cas 803-A I R 1926 Nag 491. When in a suit a person then alleged to be a minor was represented by his brother with whom he the suit, he is estopped against him in majority just one.

In I C 603=24 A L J 817-A I R 1926 A 673. A minor is not estopped from setting up his minority. *Hari v. Roshan* 1923 Sind 6=71 Ind Cas 161. The conduct of minors cannot be pleaded in defence of their right to repudiate the act of their guardians during their minority. But if their guardians had acted for their benefit and after attaining majority they continued to derive the benefit which the transaction conferred on them, it is not open to them to take advantage of the absence of registration, particularly when the parties can

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is a bar to a suit for ejectment on the expiry of the lease. *Ponnuswami v. Subramanian*, 53 I J Cas 419. A minor is not estopped from pleading his minority.

another that he is a major, and that other lends money on a promissory note signed by the minor the minor may be in a suit on the promissory note estopped from pleading his minority. *Jasraj v. Sadashiv*, 23 Bom L R 975, see also *Harij Mal v. Abdul Halif*, 20 Ind Cis 267, *Lemudomal v. Ghurumal*, 14 S L R 101=62 Ind Cas 237, but see *Jambagathachi v. Rajamannarsami*, 57 Ind Cas 678. But where there have been no misrepresentations by a minor as to his age or where misrepresentation has not misled the opposite party there can be no estoppel and infancy can be successfully pleaded. *Wasinda v. Sita*, 1 Lah 389=59 Ind Cas 393. *Gadu*

Kundan v. Magan, A I R 1 minor, represented to the he was a major and sold to him possession of the house, he being a person within the contemplation of this section and having by direct declaration intentionally caused the plaintiff to believe that he was a major, was precluded absolutely from denying the truth of that assertion. *Dadasaheb v. Bai Nahani*, 19 Bom L R 561=41 B 480=41 Ind Cas 180. But the law of estoppel must be read subject to other laws such as the Contract Act, and a minor cannot be made liable upon a contract by means of estoppel under s 115 of the Evidence Act. *Golam Abidin v. Hem Chaudhari*, 20 C W N 418=32 Ind Cas 389. As a general rule, except in cases of fraud the doctrine of estoppel is not applicable to an infant, and the Court is never astute to hold

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Person "The term 'person' in this section is amply satisfied by holding it to apply to one who is of full age, and competent to enter into a contract and I cannot bring myself to think that it could have been the intention of the Legislature, by such in the law of estoppel in 26 C 381=3 C W N 413=111 Ind Cas 175=, that the person in this *Balanagouda v Godigeppa* 1929 Bom 201, but see "person" in this section should not be narrowed down so as to exclude *Asinda Ram v. Sita Ram*, 1 Lah 389=59 Ind Cas 393.

Admission whether operates as estoppel Admissions do not operate by way of estoppel but it is for the party making them to explain those admissions. *Secretary of State of India v. Tidyarat*, A I R 1929 Lah 718. An admission made by the defendant when both the plaintiff and the defendant were under *Manyan*, 7 L R 201 (Rev) in various cases that he was an ex-proprietary the law cannot create estoppel against 5 A 43 (2)

Attestor of a document—if and when estopped The mere attestation of a party does not estop him from asserting that he had the knowledge of the contents of a document or that he was not bound by the recitals in the document. *Shuba Ram v. Ram Pyara Mall*, 116 Ind Lah 224=112 Ind Cas 89=A I R agon Singh, 47 C L J 189=107 Ind V 533=26 A L J 553=A I R 1913. The mere attestation of a document cannot *Chrup v. Krishen Sahai*, A W N 1883, 142. *Abdul Aziz v. Abdulla*, 26 P L R 215=7 Lah 1 R 1925 Lah 413; *Azizullah v. Ghulam*, 10 Ind Cas

815. Attestation of a deed whatever except that he

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264. **Party estopped from pleading fraud** It is not open to a party to plead *Ram Lal v. Har Lal*, 237. Estoppel is an of his rightful claims further of his rights particularly to conceal his shall be allowed 3 A 257 (Rev) ged, fraudulently endorses it over to another person, cannot, in a suit by such person for the recovery of the consideration paid by him for the *hundi*, set up the forgery of it as a bar to the suit *Bishnu Churn v. Rajendra*, 5 A 302=A W N 1883, 6.

A person sued for possession of half the properties on the ground that it was joint property of himself and the defendant. The defendant pleaded that the plaintiff's share was sold to him by the plaintiff. The plaintiff was held under these circumstances to be estopped from denying that the sale was colourable. *to the rule of pari delictum* he 39 P. R. 1892; see also *I. Ojodhyaram, 6 W. R. 31 (P. C.)*—It is not possible for a party who does not come into Court to have recourse to the doctrine of estoppel. 20 C. W. N. 677—33 Ind. Cas. 762. A judgment debtor defeated by showing that the attached house did not belong to the judgment debtor, the judgment debtor cannot claim either the ownership in the whole house and site or the equitable interest to the extent of the sums spent in building the house. *Suba Rao v. Veeramayya Siam, A. I. R. 1930 Mad. 293*—126 Ind. Cas. 279.

Estoppel cannot be set up against a Court to give effect to a statute. *Mad. 622*. *Singh v. All India Co., 433*; *Cal. 1929*. A law giving rise to the jurisdiction of *India Ltd., A. I. R. 1928 Lah. 802* and unlawful by statute, a party cannot, by representation, any more than by other means, raise against him an estoppel so as to create a state of things.

cannot create a state of things which a Court can give effect to. *Cal. 1929*. A representation as to a question of law cannot give rise to an estoppel. *Rajambai v. Shanmuga, 70 Ind. Cas. 653*—

1923 Mad 11 There cannot be any estoppel against a statute and a statutory defence not set up in a prior suit can be set up in a subsequent suit. *Nisar Chandra v Bhust Molla*, 65 Ind Cas 851. So there is no estoppel against the Act. W N 329=1922 Cal 436=49 C 437=51 Ind Cas 403; *Bangshi v Umar*, 5 Luck 731=A I R 1930 R 1930 Nag 191, *Mirza v Hanta* Lou v Sulhara, 58 C 1452=50 Pat 431=30 C W N 354 P C, 1930 M L W 300.

Sibai Subramania v Subramania, A I R 1932 Mad 409=25 M L W 300. *Bimalabala v Deb Kinkar*, A I R 1932 Pat 267. An admission on a point of law is not an admission of a "thing" so as to make the admission matter of estoppel within the meaning of s 115 of the Evidence Act. *Jogant v Swan* 21 A 235=A W N 1=85, 66; *Tel Chand v Gopal Das*, 13 Ind Cas 482=45 P R 1912. No estoppel can be pleaded against the directions and prohibitions enacted by the statute law and against the rights accruing to any party by reason of such directions and prohibitions. *Chudambarachalliar v Vaidil*, 123, 38 M 519.

There can be no estoppel against an Act of Parliament or against an Act of legislature provisions of 135=35 B 67. 4 Ind Cas 4. *Ripusudan* mortgagee is inapplicable. *Haridas*, 42 C 455=19 C W N 203=20 C L J 183.

Declaration, act or omission must be of an unequivocal and unambiguous character. To create an estoppel against a party, his declaration act or omission must be of a certain character. *Vilo* 6 Bom L R 864. It must be clear. *India*, 2 H. *Raghunath* tion, act of *Astamoorth* as an estoppel cannot be created by an ambiguous document so too it cannot be created by an ambiguous act. *Mamasa v Sallayyu*, 46 Ind Cas 609. A representation, to found an estoppel, must be clear and unambiguous, not necessarily susceptible of only one interpretation, but such as will reasonably be understood in the sense contended for, and for this purpose the whole document must be read. *891* 8 Ch 82 C. A. *anagh*, (1902) A C 117. *rd Building Society v* his is merely an application. "must be certain to" 379; see also *Ram v* 25; *Goyanan v Nilo* Lab L J 45.

Plea of acquiescence—Necessary elements. Where one person constructs a building on another's land though the owner of the land was aware that the building was allowed to be constructed and that he could not after such lapse of time turn round and ask for a demolition of the building. *Muhammed Hussain* 891=255=A I R 1932 A I R 1932 years before the construction, c.

deception only where there is duty to speak; in other words, as *Digelow* points out, 'duty to speak, which is the ground of liability, arises wherever and only where silence can be considered as having an active property, that of misleading' (*Digelow on Equity*, vol I, p. 517). To take one illustration 'The silence of A in the presence of B and C who are negotiating in regard to a sale of property, from B to C, estops A from claiming the property as against C, upon the conclusion of the sale but knowledge by an owner of property that

silence may be treated as a true cause of the change of position, in the other case, it cannot be so considered. The question consequently arises, whether there has been on the part of the defendant a disregard of a duty to speak. As was observed by Lord Chancellor Thurlow in *For v Mackrell*, 2 W & T L C 703, has been taken which would not have taken obligation on the party to bring his silence

concealment which must amount to a fraud in the sense of a Court of Equity, and for which it will grant relief, is the non disclosure of those facts and circumstances which one party is under some legal or equitable obligation to communicate to the other, and which the latter has a right, not merely in *foro conscientiae*, but *jure et de jure*, to know" Per Moulsterjee in *Joychandria v Srinath*, 1 C L J 23 (25)=32 C 357, see also *Mohunt Das v Nil Komul*, 4 C W N, 283, Mier. *Doyal Mouji, II Bon* one of the three brothers knowledge of the building on the land fact that they knew asserting their own rights they were consequently estopped from asserting those rights in a suit *Dhanpal Das v Guwandutta*, 2 Lab 258=61 Ind. Cas 120=10 P L R 1922. An absence from interference on the part of the owner of land, upon which another man is building does not raise an equitable estoppel against him. In order to estop the owner, it must be proved that besides his abstinence there was a mistaken belief in the builder that the land was his own property. *Mahammad Umar Jarga v Mora*, 6 A L J 57=1 Ind Cas 821, see also *Ismael v Broughton* 5 C W N 816

thus, is no application where the person who is acting is under no duty to speak. *Kanchan v Kamala*, 21 C L J 441=29 Ind Cas 734. A duty to speak arises whenever a person knows that another is acting on an erroneous assumption of some authority given or liability undertaken by the former, or is dealing with or acquiring an interest

entire or main cause, but one of the causes of the change of position, and whether upon due regard to all the circumstances, it is just that the defendants should be prejudiced in the manner in which they have been prejudiced by the omission of the plaintiff to speak *Thomas Bonclay v Syed Hossem* 6 C L J 60 When silence is of such a character and under such circumstances that it would be a fraud upon the other party, for the party which has kept silence to deny what his silence has induced, it will operate as an estoppel *Jol pomull v Saroda*, 7 C L J 604

Estoppel by omission The acquiescence or estoppel which will deprive a man of legal rights must amount to fraud. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent to set up those rights. The element, or the requisites necessary to constitute fraud of that description are these — In the first place, the plaintiff must have made a mistake as to his legal rights (e.g. expended some money or must have done so (e.g. sold defendant's lands) on the faith of the defendant's representation. The possessor of the legal right must know that the defendant's representation is inconsistent with the right claimed.

inconsistent with the right claimed. If he is in the same position as the plaintiff and the doctrine of acquiescence founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly the defendant, the possessor of the legal right must have encouraged the plaintiff in his expenditure of money or in other acts which he has done either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it but nothing short of this will do. *Hemangini Debi v. Bijoy Singh* 73 Ind. Cas. 273, see also, *Bishan Singh v. Bulanda* 4 Lah. L. J. 419. The estoppel under this section may arise by reason of either a declaration, an act or omission, but in either case there must be an intention on the part of the person against whom the estoppel operates to cause or permit a belief in the mind of another. In the case of a mere omission, no such intention can well be imputed unless the true facts are known to the person whose omission is in question, but where there is a deliberate declaration or act causing or permitting such belief and inducing another to act upon it, it must be presumed that such declaration or act was intended to have its ordinary and natural effect upon the mind and actions of the other party. *Rail v. Forbes*, 3 Pat. L. T. 467-67 Ind. Cas. 744-(1922).

P 209 Mere acquiescence on the part of the true owner, or omission to volunteer any advice or assist in ascertaining the truth by such owner. A person acted in such a way as

The illustration to section 115 of the Indian Evidence Act sets forth what one is bound who intentionally and falsely leads a purchaser to suppose he is taking a perfect title. There is an obligation to truth in speech, and act, but no obligation to speak or act where no confidence is given or accepted merely for the purpose of guarding or furthering the interests of strangers proceeding wholly *in meritis* and with an omission to inquire which is equivalent to knowledge. *Basantappa v. Ranu*, 9 B. 96.

S died leaving three sons and a daughter H who was the plaintiff in this case. S died more than 12 years prior to the suit, and upon his death his three

share of inheritance under the Mahomedan Law, by avoidance of the deed of sale mentioned above. The defence to the action was that the plaintiff, having omitted to enter her name in the Government record, was estopped from maintaining her claim against the defendant who was a transferee without notice. *Held*, that there was no evidence on the record to show that the omission on the part of the plaintiff to have her name entered in the Government Revenue

records were intentional within the meaning of s. 115 of the Evidence Act or that it was by reason of such omission that the defendant altered his position so as to operate as an estoppel against the plaintiff and that, as the plaintiff's title was admitted, she should get a decree in her favour. *Gobardhan v Hirsat*, A W N 1887, 110. The doctrine of estoppel cannot be said to rest absolutely upon any notice of duty on the part of the person sought to be estopped; and the word "omission" used in section 115 of the Evidence Act does not mean only an omission to perform a duty as is prescribed by law. *Munak Ram v Rani Sutar*, 27 Ind Cas 611.

Estoppel by waiver. Where a party to a suit agreed to a decree in favour of his opponent on certain conditions which were not afterwards fulfilled and

by their conduct in the course of a suit preclude themselves in a subsequent suit from asserting rights which they have waived deliberately. *Jinti v Kama-lathammal*, 7 M H C 263. A waiver is an intentional relinquishment of a known right or such conduct as warrants an inference of the relinquishment of it unless the person against whom the rights and of facts which could or the enforcement of such rights. No ignorant that it has been committed and confirm it. *Dhanul Dhar v Nathu*, 12 B & B 128. *Darby v Louden R Co*, 11 L C 223. *Austen v Chambers*, 6 Cl. & F 1. *La Banque v La Banque* 13 App Cas 11. *Imbala v. Whitehall*, 6 C. L J 111. *Nripati v Jalindri*, 91 Ind Cas 407. *Jahanlar v Rani Lal*, 37 C 440.

Order of Court. There can be no estoppel where a party acts under a mistaken impression as to the legal effect of an order. *Abdulla Sahib v Muhammad Husain*, 5 Mys L J 182. An involuntary act done by a person in pursuance of an order of Court cannot operate as an estoppel against him and prevent him from enforcing the remedy given to him by law. *Isha Dey v. Bala Lal*, 115 Ind Cas 67 = A I R 1929 Lah 42; see also *Mani Lal v Durga Prasad*, 5 Pat L T 425 = 3 Pat 930 = 60 Ind Cas 667 = 1924 P 673 = 1924 Pat 254; *Balagobind v Sheo Kumar*, 82 Ind Cas 181 = 2 A L J 791. Where a party has adopted an order of the Court, and acted under it he cannot after he has enjoyed a benefit under the order contend that it is void for one purpose and invalid for another. *Jogeniranath v Khola Buz* 72 Ind Cas 354.

Application of equitable estoppel in case of part performance. Where there the poss les ejec be C 1 pow the actings and conduct of the parties have carried the incompletely executed engagements into effect. The doctrine of part performance has not been applied in a case when a Hindu widow even though remains in possession thereof. *Raj Baha* Ind Cas 822 = 2 Pat 677 = 4 Pat L T 33 will not fail to support a transaction clothed imperfectly in those legal forces to which finality attaches after the bargain has been acted upon. The law of India is not inconsistent with the principles applied by equity in such cases but on the contrary follows them. *Mahomed Musa v Aghore Kumar*, 19 C W N 251. When in pursuance of an agreement to transfer property the intended trans- and not been ecuted subject uined between time as the

5. subsequent legal question falls to be determined *Gajendra Nath v Moulari*, 27 C W N 159, see also *Pitamber v. Ramcharn*, 28 C W. N 157

Estoppel and Adoption In a suit by reversioner for a declaration that an adoption, by a widow is invalid, no estoppel arises as against the plaintiff by reason of the mere fact that he concurred in the adoption which was supposed to be a valid *Gurlingasuamy v Ramalakshma* delivering the judgment on this point estoppel can arise from ignorance of law which law The adoption took place in 1858

considerations consequent on the growth of under an invalid adoption concurred in

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by marrying him to a girl of her own caste at the funeral ceremony of her husband estoppel by adoption *Kanabumal v Virasami* 15 M *Vinayak Rao v Lalshumlat* 11 B 381 A widow represented that she had authority to adopt, and the ceremony of adoption was carried out on the faith of the representation and the marriage of the adopted son was celebrated by the adoptive mother, the adoption was then challenged by a reversioner and the adopted son in order to defend his right incurred heavy responsibilities, held, that the adoptive mother was estopped from maintaining a suit for a declaration *Kunuar v Balwant Singh*, 5 *Dharma* 349, see also *Durga v Khushpalo*, A 397=5 M L J 66

The rule of estoppel by conduct does not apply to a case where no doubt was entered and all the belief in conduct contributed to the persistence of the adoption in that belief, and that in consequence of the inheritance. Where an adoption from her deceased the circumstance of an invalid adoption only when, by a course of conduct long continued on the part of the family which has purported to affiliate him, his situation in his original family has been so altered that it would be impossible to restore him to it *Parvathibogamma v Ram Krishna Rau* 18 M 145=5 M L J 41; *Kutaru v Babai* 19 B 374 Where a person is treated by another in such a way as leads him to believe that he is the adopted son of that other and on that footing and on account of such acquiescence and by reason of such encouragement he severs his connection with his natural family or undergoes a change of circumstances in such a way that when restored to his natural family his position would be very different from what it would have been if he had never left it the person through whom he will be established *Chand*, 85 Ind C 96 Ind C 97.

adoption is invalid, circumstances may arise in which the adoption on which hardships to be caused to the adopted boy in upsetting the adoption on which the person who sets up the estoppel to prove conclusively, that he was in fact adopted by the father resiling from the story of the adoption, but it is enough damaged if he

proves to the satisfaction of the Court that the likelihood of his being prejudiced by the alteration of position was so great that the Court will presume that the adopted boy must have been damaged. Also, estoppel being simply a principle of the law of evidence, it creates no substantive rights of an absolute character but commonly operates to close the mouths of certain people who have acted in a certain way from estoppel. It will operate only

Parasuramappa v

L. R. 1927 Mad 711

in the manner customary among the Agarwallas. The story of the regular Brahminical adoption of the same boy previous to the Agarwalla adoption was invented with the object of giving to latter adoption the rights of collateral succession. The acts and representations of the plaintiffs were set up as estopping them

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49 M. L. J. 173 (P. C.) Where a person executed a registered document declaring he had adopted another, and in mutation proceedings described himself as the

into a compromise wherein for
ion of repudiating such adoption,
no adoption *Kumbar Dutt v*
on a matter of law as to the

validity of an adoption creates no estoppel *Rajmal Anima v Shanmuga*, 70
Ind. Cas. 653 = 1923 Mad 11

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position as regards the validity of the adoption. It was estopped from questioning the validity of the same *Ichhnan v Banwar*, 114 Ind. Cas. 711 = A. I. R. 1929 Lah. 16. But where a person was at best a mere witness for the adoption of a boy by a Hindu widow and had no knowledge of the facts, he cannot operate in the matter to which validity of the adoption and *Amarendra v Banamali*, 10 F. I. R. 1930 Pat. 417.

Estoppel by acts of Government officer. A Government officer had no authority to waive the rights to which the escheat, and a decree founded thereon by a court, operate as estoppel. *The Collector of Maultipat*. 2 W. R. 61 P. C. = 8 M. I. A. 539.

Inconsistent pleas. It is an elementary rule that a party litigant cannot

1st L. 11-10-00 Ind. Cas. 610. A person who successfully sues another for rent cannot subsequently be heard to impugn that the defendant was a tenant. *Jitan Mahton v Lala Bhagwan*, 64 Ind. Cas. 262.

5. Neither he nor his representatives. Where a person by his own solemn and deliberate act wilfully induces another to believe the existence of a certain state of things, and to deal with him on the faith of it, he and as a general rule his heirs or those who claim under him are bound to make good the representation so made and will never be allowed to retract it. *Moonshee Syeed Ali v. The execution sale acquires and does not consequently judgment debtor does in the v. Jogendra Chandra* 23 Ind. Nandu v. Jogendra 70 Ind. In his legal representative *Syed Md Hasan v. Syed Ali*, 10 O & A 11 1229. It is not open to the representative of a lessor to prove that the state of the original lessee was other than what was described in the deed of lease. *Isicor Chandra v. Goursunder*, 193 Cal 603. Where the conduct of a grandfather has given rise to estoppel, the grandson claiming through him is bound by it. *Moman v. Dhannu* 1 Lah 31-5 Ind Cas 869. A subsequent mortgagee is bound by the representation made by the mortgagor to prior mortgagee and is estopped from challenging the validity of the prior mortgagee so far as it affects the share which was subsequently mortgaged. *Gurdayal v. Taid Husain* 51 Ind Cas 766. A mortgagee who purchases the property at a sale in execution of his decree on the mortgage is bound by an estoppel that would have bound his mortgagor. *Kalidas v. Prasanna* 15 Ind Cas 189. The doctrine of estoppel is applicable to persons claiming under those whose conduct had led to change of position. *Riyah of Deo v. Ablulla* 45 C 909-45 I A 97 (P C), *Badri Bhai v. Brij Nath* 5 O L J 458-47 Ind Cas 934. *Jigannath v. Syed Abdulla* 16 A L J 576-35 M L J 46-20 Bom L R 851-22 C W N 891-28 C L J 162-45 Ind Cas 770 (P C). The equitable doctrine of estoppel as laid down in 11 B L R 46 which applies to any person is equally binding on the purchaser of his right title and interest at a sale in execution of the decree. *Mohamed Moaffer v. Kishore Mohan Day* 27 C 909 (P C)-21 A 129-5 M L J 101. In *Debdendranath Sen v. Mirza Abdul Samad* 10 C L J 150 (165), *Moolji v. Jyoti* 13 C 153 said 'It was ruled by this Court in *Kishore Mohan v. Mohamed*, 13 C 153 (193) contrary to the principle deducible from *Richards v. Johnston*, 4 H & N 660 and *Herne v. Rogers* (1891) 1 Q B 230 that the estoppel that would bind A would also bind the execution purchasers of his interest. This view was subsequently affirmed by their Lordships of the Judicial Committee and they rested their conclusion on the ground that the principle of estoppel, founded in that case upon the decision in *Ram Doomar v. Moqueen* L R 11 A sup Vol 40 applied not only to A but also to the execution purchasers of the interest of A who were equally bound by it as they had purchased only his right title and interest. This is in accord with the statement of the rule by *Kay L J* in *Mad v. Thomas* 18 W R 21. No doubt, the statement sometimes has been made by text writers (*Hukum Chand on res judicata*, 204 and *Casper on estoppel* 2nd Ed 66) apparently on the basis of judicial dicta of the highest authority that as there is no privity between the purchaser at a sale in execution of a decree and the judgment debtor whose property is sold, the purchaser at the execution sale is not bound by the estoppel of the judgment debtor. Thus in *Anundo Mo* observed that the on the same footing as the title of the mortgagor or of a person claiming under him, a voluntary alienation from the mortgagor. Again in *Imrit Koer v. Debed Pershad* 18 W R 201 *Sir Richard Couch* remarked with reference to purchaser at an execution sale that they were not in direct from the party and were therefore not bound by the estoppel. In *the observations of Sir Barnes Peacock in Dinendra Nath v. Court* 7 C 107-8 I A 65 'There is a great distinction between a private sale in satisfaction of a decree and a sale in execution of a decree. Under the former the purchaser derives title through the vendor and cannot acquire a better title than that of the vendor. In the latter, the purchaser, notwithstanding he acquires merely the right, title and interest of the judgment debtor acquires that title by operation of law adverse to the judgment debtor and freed from all alienations or incumbrances effected by him subsequent to the attachment of the property.

sold in execution'. On the authority of these observations it was ruled by this Court in *Parlu Lal v. Mylu*, 11 C 101 that a purchaser at an execution sale was not the representative of the judgment debtor for the purpose of the rule of estoppel. Substantially to the same effect are the decisions in *Ringo Monee v. Raj Coomarsee* 6 W R 197, *Gour Sunter v. Hem Chander*, 16 C 375 and *Bishu Chander v. Fualet Ali*, 20 C 236. There can be no question, however, that the rule so widely formulated in these judicial dicta, is neither supported by authorities nor defensible on principle. It will suffice for our present purpose to refer to the judgment of the Full Bench of this Court in *Jehan Chunder v. Beni Midhab*, 24 C 62 in which it was pointed out that the view taken in these cases

the decisions of the Judicial
 " I I A 101 and *Dinendra v.*
 " See also *Ridha Kanta v.*
 " *It v. Lalramol*, 18 M 13;
 " *Iepin v. Jogeshwar*, 31 C.
 " *Nandatal v. Jogendra*, 38 C W N 105, *Sashubhusan v. Debnath* 60
 Ind Cas 705, *Prolyot v. Jori*, 16 Ind Cas 792. A person is not estopped from
 instituting a suit for a share of joint ancestral property by the circumstance
 that he claims under one who, when sued on a former occasion as trustee,
 never pleaded that he was a co-purchaser. *Surnomoyee v. Gunga* 2 W R 264.
 An admission by an adoptive mother, in a suit brought by her mother in law
 to set aside the adoption, that an alleged *unomuttaputti*, under which her
 mother in law had previously professed to adopt a son to her deceased husband
 was valid, would not estop her adoptive son from denying the validity of that
 instrument in a suit subsequently brought by him for the assertion of his rights
 under the adoption. *Anundomoyee v. Shreeb Chunder*, *Mateh* 155. Where a
 trustee does any act in relation to the trust of which he is a trustee
 by way of estoppel,
Kesharai, 15 B 625.
 on son, the real revere
 Ind Cas 50.

The doctrine of estoppel cannot bar the plaintiff's claim in a suit, when
 the person is a trustee of the property.

L J
 come
 by
 necessary implication the interest which he had in the property. *Dadabhai v.*
Cousin, A I R 1925 P C 306. A purchaser at an execution sale is bound
 by the same rule of estoppel as the judgment debtor and consequently he cannot
 dispute the validity of a mortgage which the mortgagor himself is estopped
 from questioning. *Nandatal v. Jogendra Chandra*, 36 C L J 421. Where a
 plea of estoppel is raised a person is bound by the previous knowledge of the
 former owner. *Sharpu v. Shri Radhika*, 15 R D 43. Acts in representative
 character do not create estoppel on personal claims. *Ram Horakh v. Hanwant*,
 A I R 1930 P C 249.

Constructive estoppel. The law knows no such thing as constructive
 estoppel. *Parsotam Gir v. Arboda*, 21 A 505 P C = 3 C W N 517 = 1 Bom
 L R 700 = 26 I A 175.

Fraud whether necessary to give rise to estoppel. This section embodies
 the rule of English law on the subject of estoppel. "The doctrine of estoppel
 is based on a fraudulent purpose and a fraudulent result. If, therefore, the
 element, or fraud is wanting, there is no estoppel. There must be deception and
 change of conduct in consequence." *Ganga Sahai v. Hira Singh*, 2 A 809 (F B).

Estoppel whether can arise when document is inadmissible. The rule of
 estoppel

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entry at settlement merely amounts to an admission and there was no change of position of the tenant to his detriment *Cohli v. Naul Mumtar*, 1 R 3 A 252 (Rev). A *chattal* -

brothers owned a house which was attached and sold in execution of a decree against D. L. obtained a preliminary decree for the partition of his share but before it was made final, the house had been sold. The defendant who was a tenant thereupon executed a *Sarkhat* in favour bought by the purchaser for ejectment, and executed a *Sarkhat* in favour of the plaintiff's right to get it vacated.

41 A 651-17 A L J 805-61 Ind. Case 518 Where a landlord with knowledge of an alienation accepts rents from the alienee, he is as much bound by the alienation as if he had expressly assented to it. *Pargul v. Singh v. Keltir Nath*, A W N 1892, 107; see also *Gunga v. Rim Guli*, 2 Agra 45, *Gala v. Rimji*, 73 P R 1900, *Puri v. Godar Khan*, 161 P R 1883. An owner of land omitting to sue for demolition of buildings, when the infringement of his right is first threatened or commenced is estopped from claiming demolition, but is only entitled to compensation. *Bhagh v. Nahir*, 77 P R 1871. A tenant cannot be permitted to object to the terms of a *patta* when he has accepted previously *mulir patta* for a series of years; for that constitutes a representation by conduct that the landlord's were proper ones, which, of course, would in so many words. See *Sankarachari*. The service of a notice for ejectment under

poses the existence of the relationship of landlord and tenant between the person who causes it to issue and the person to whom it is served. And the landlord cannot afterwards bring a suit for ejectment in a Civil Court to eject the same person from the same land, alleging that it is not tenant but only a purchaser. *Baldeo v. Indad*, 15 A 189-A. W. N 1893, 93.

The previous acceptance of a *pattah* from one who was neither a registered Yeomabdar nor lawfully entitled to the Yeomab; but who performed the service for some time, apparently under a deed of assignment executed in his favour by the previous Yeomabdar, is a good defence to a suit by lawful owner against the riyats to enforce acceptance of *pattas*, when the owner's conduct is such as to justify the belief of the riyats that the assignee was authorised to collect rent from them until the assignment was questioned by the owner and a notice of his title given to them. *Khador v. Subramanya* 11 M 12. The Rajah of Tipperah granted *Sanad chits* to certain tenants permitting the tenants to construct embankments to a silted up tank and to re excavate the tank, but no rent was reserved for the tank. The tenants acting upon that *sanad*, spent money - regard to the Rajah ing that the *ah Birenda*

ment from previous. A party cannot. *Backergu* money deposited by decree of rent is to a recognition of depositor not having principle of estoppel. 192-11 Pat 257. estop the landlord from denying the status of a person claiming rights on the basis of such misdescription. *Ganpat v. Baghubu*, 13 L R 326 (Rev). Where a person had been in long enjoyment as a co tenant to the knowledge of the Zemindar who also sued him as co tenant, held that the zemindar was estopped from disputing the status of the tenant. *Hishmit v. Wali*, 15 R D.

5 rule that an occupancy tenant who makes usufructuary mortgage of his holding to another man is estopped from alleging that the other man is his sub-tenant has no application where the mortgage is unregistered and so ineffective to pass the mortgagor's rights in the property *Ram Charan v Shiva Jagat*, L R 3 A 161 (Rev)

Landlord and tenant Where a landlord wrongly described a person as an exproprietary tenant in a rent suit, he is not estopped from denying the
Lachchi v Bhawanji B L R 8 (Rev)
 in ejectment and the tenant agreed to pay a
 not eject him and the landlord collected

the enhanced r

Nath v Bhaqua

Shabbir Ali, 8

as a rent decree

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decree and not a :

882 A misdescription of a person as occupancy tenant in rent receipts and suits for arrears of rent does not amount to grant of occupancy rights or have the effect of estoppel *Ashrofi v Kishori Ramani*, L R 6 All 64 (R v) A tenant by acquiescing in the payment of enhanced rent is not precluded from raising any objection under section 29 of the B T Act *W H Meyrick v Deepa Pandai*, 3 Pat 825 There is no peculiarity in the law of estoppel in India as distinguished from that of England; the law of India is comprehensively set forth in s 115 of the Evidence Act Taking of a rent each year under a mistaken belief may bar by estoppel the owner from any claim for mense profits during the particular year or years for which such rent was received *Mitra Sen Singh v Asst Janki Kuar*, 26 Bom L R 1134-40 C L J 468-70 L W 566 (P C)=46 A 728=51 I A 326=83 Ind Cas 946 A grove holder after cutting the trees in the grove was allowed to remain in possession on payment of rent He planted fresh trees and for 3 or 4 years, the zemindar did nothing to prevent it Held, he was estopped by his inaction from ejecting the grove holder *Ram Singh v Hannu*, L R 4 A 352-9 O & A L R 1057

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 an estoppel
 and that he
 'Jadannah' v
 Syed Ali v

Manick Chandra, 27 C W N 969 The granting of receipts in the ordinary course of business by a landlord to his tenant is not an admission of such a formal and deliberate character as to prevent the former from denying the relationship of tenant *Habib v Salamat*, L R 4 A 174 (Rev) A decree holder landlord who in execution of a rent decree purchases the holding subject to liability for a second rent is not estopped from proceeding against

v Bhatu Modi
 it be permitted to
 certainly cannot
 the tenant be
 originally deemed
 3-4 Pat L T
 is incorrectly

described in rent receipts issued by the zemindar does not estop him from denying that receipt
Bhatu Modi v Bhatu Modi, L R 4 A 8
 certainly for
 and kept quiet
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into the land
 ing that he had
 leave The first
Durga Varma
 and from denying
 a person's occupancy rights by reason of the fact that he allowed him to be recorded in the settlement as occupancy tenant, because the consent to

reversioner relinquished his rights to a portion of the inheritance in favour of the widow in consideration of receiving a relinquishment from the widow of all her interest in the remaining portion of the inheritance neither he nor any person claiming through him, could set up that her relinquishment was not binding on him and did not operate on the portion of the inheritance relinquished in favour of the widow *Jogendra v. Monindra* 17 Ind Cis 978. The attestation of a reversioner to a document implies only that there was necessity for the alienation and does not create estoppel *Amasiraj Pillai v. Kuthilingan*, 21 M. L. T. 30 = (1917) M. W. N. 78-79 Ind Cis 10, but see *Ganai Singh v. Sulab Singh* 19 P. L. R. 1911. But where the reversioner in fact the purchaser to believe the recitals of the document to be true and to act on them they are estopped by conduct *Bhubaneswari v. Hirathan* 21 C. W. N. 728. In *Hirsi Ashen Bhaqit v. Kashi Pershad* 42 C. 870, the Judicial Committee only laid down that a thoughtless reversioner should have a door of escape from an uncomfortable position rather than bind him down conclusively by the stringency of the equity brought about by his conduct *Piruramarelli v. Maharelli*, 6 L. W. 250 = 23 M. L. J. 260 4 Ind Cas 196. Where a Hindu widow in possession of her deceased husband's separate immovable property his concubine and his illegitimate daughter with the concurrence of the next reversioner effect a distribution of the property in pursuance of an instrument in writing to which they were parties, and a remote reversioner attests such instrument and consents to, and assists in the distribution of the property, such remote reversioner would be estopped by his conduct from questioning the legality and validity of the distribution or of assignments made by those who shared in such distribution. See *Dasi v. Gur Sahu* 3 L. 36. A reversioner by unknowingly accepting the mortgage of the land in the joint holding sold by a widow to another reversioner is not estopped from contesting the validity or its sale *Sheva v. Hyat* 32 P. W. R. 1914 = 103 P. L. R. 1914 = 23 Ind Cas 6. The interest of a Hindu reversioner is an interest expectant on the death of a qualified

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ped from claiming as a reversioner
R 1930 All 430. Where a reversioner
cla in to property when the success
nd by that agreement *Raghubir*
11 = A. I. R. 1936 All 498, but see

Polhar Singh v. Dutar A. I. R. 1930 All 683 = 1930 A. L. J. 688 = 125 Ind Cis 1

Estoppel by acts of agents
his agent to cheat a third party

The principal is estopped from
acting
of his a
A principal

clothed with a larger authority than that
e such persons have acted in that belief to

their detriment cannot rely upon any secret limitation of his agent's authority or upon any private understanding he may have with him of which the rest of the world must necessarily be ignorant. 'Strangers and Lord Ellenborough 'can only look to the acts of the parties and to the external indicia of property and not to the private communications which may pass between a principal and his broker, and if a person authorise another to assume the apparent right of disposing of property in the ordinary course of trade it must be assumed that the apparent authority is the real authority *Pickering v. Busi* 15 Earl 38 (43), *Casperz v. Entoppel* 177. Similarly in *Ramsden v. Dyson*, 1 E. & L. A. 126 (158) Lord Cranworth said. If indeed the principal knows that the person dealing with his agent have so dealt in consequence of their believing that all statements made by him had been warranted by the principal and knowing this allows the person so dealing to expend money in the belief that the agent had an authority, which in fact he had not it may be that in such a case, a Court of Equity could not allow the principal afterwards to set up want of authority in the agent. But this equity, where it exists, depends absolutely on the fact that the knowledge on which it rests can be brought home to the principal.'

Casperz Estoppel 178 But an agent cannot set up his own breach of trust
Harris v Truman, 51 L J Q B 338 Where a tenant without Zemindar's
 permission makes a grave on the *abadi*, the mere fact that the servants of the
 Zemindar stood by and did not object cannot amount to the agent's acquiescence
 so as to estop Zemindar from interfering with the grave *Khuda Balsh v*
Jasshankar, 115 Ind Cas 628 An endorsement by an agent of a decree-holder
 on a holder
 mad, 8

wife by a valid talak on 21 7 1919, and requested the *Lari* to communicate it to
 the plaintiff, his wife. She *La* informed her on 24 8-1919 but stated by mistake
 that the talak was dated 2 8 1919 instead of 21 7-1919 The plaintiff's suit for
 deferred dower was filed on 25-7 1922, more than three years from the real date
 of the talak Held that the defendant was estopped from showing that the date
 of the talak was earlier than 21 8 1919 *Kathirayamma v Urothel Marakhor*, 133
 Ind Cas 375 = A I R 1931 Mad 647

Difference between s 115, Evidence Act, and section 43 of the Transfer
 of Property Act The difference in language between s 43 of the Transfer of
 Property Act and the language of the illustration to s 115 of the Evidence Act
 seems to be that, under s 43 of the T P Act, mere erroneous representation
 will apparently where the ill
 tionally and fal
 of the transferee in the truth of the erroneous representation, where the
 illustration to s 115 implies that the transferee must have believed the inten
 tional and false representation and acted in the faith of such representation
Halkudhar Narain v Aadar Sayal, 28 M L J 41-27 Ind Cas 785, see also
Ram v Baldeo, A I R 1932 All 643

Family arrangements Where parties settled their disputes amicably and

families to construe acts done out of kindness and affection, to the dis tute
 of the doer of them Where two surviving brothers constituted a *Mitakshara*
 family, and the elder brother naturally and properly treated his younger brother,
 who had been born deaf and dumb, as a member of the family, and entitled to
 equal rights, until it became absolutely clear that his mildty was incurable,
 held that there was no ground for supposing that the elder brother intended to
 divest himself of his own property or to waive any rights, accruing to him by
 reason of his younger brother's incapacity and that there was no principle of
 law founded on the doctrine of estoppel or laches, or the law of limitation or
 otherwise, to hold, under the circumstances of the case, that the elder brother's
 acts and conduct had an effect and operation which he could not have intended
 or contemplated *Lala Muddun Gopal v Khukhundu Koer*, 18 C 341 (P C) = 13
 I A 9

One estoppel against another In a case of one estoppel against another
 the parties are set free and the Court has to see what their original rights are
Jucanlal v Behari Lal, 152 P W R 1918-45 Ind Cas 69

Benami Where a father, whether Hindu or Muhammadan purchases a
 property in the name of one of his sons the ordinary presumption is that it is a
 benami transaction and not that it is an advancement in favour of the son
 67 If part
 have character,

they cannot come in on his death under Order 22, rule, 3 *Dorcas v. S. 1*
Chittimoram, A I R 1930 Mad 221-53 M L J 48

Estoppel by election Where a man has an option to choose one or other of two inconsistent things, when once he has made his election, it is final and cannot

7 App Ca 360 *potest*
 Co Lit 146 a

Carpenter on Estoppel it both
 eat your cake, and return your cake *Per Crompton J in Crompton v. Dickinson*,
 11 B & L 152 To illustrate the doctrine of election, suppose by A Will or

deed, gives to B property belonging to C, and by the same instrument gives other property belonging to himself to C, a Court of equity will hold C to be entitled to the gift made to him by A only, upon the implied

he provisions of the instrument, by renoun-
 favour of B, he must, consequently make
 rned he is put to his election, to take

either under or against the instrument, if C elects to take under, and conse-
 quently to conform with all the provisions of, the instrument, no difficulty
 arises, as B will take C's property, and C will take the property given to him
 by A, but if C elects to take against the instrument, that is to say, retains his
 own property and at the same time sets up a claim to the property given to him
 by A an important question arises whether he thereupon incurs a forfeiture
 of the whole of the benefit conferred upon him by the instrument, or is merely
 bound to make compensation out of it to the person who is disappointed by
 his election *W & T Leading case* Vol I p 312 It is an obligation imposed
 upon a party to choose between two inconsistent alternative rights or claims,
 in cases where there is clear intention of the person, from whom he derives
 one, that he should not enjoy both Every case of election, therefore pre-
 supposes a plurality of gifts or rights with an intention, express or implied
 of the party, who has a right to control one or both, that one should be a
 substitute for the other The party who is to take has a choice, but he cannot
 enjoy benefits of both *Story Eq Jur* § 1077; see also section 35 of the
 Transfer of Property Act (IV of 1892) and, section 180 of the Succession Act
 (XXIX of 1925) "The doctrine" says *Fry L J in In Re Vardon's Trusts*,
 81 Ch D 275 (279) "rests, not on the particular provisions of the instrument
 which are on it"

and general intention But the election must be a voluntary act, not forced upon
 him by circumstances over which he had no control *Asia v Nurjan*, A I
 R 1933 Cal 39

Estoppel by negligence It is true that there can be no negligence unless
 776 Before
 onduct, there
 the general
 1906, 19 Q B D 68;
 nd essential condition
 he transaction itself,
 d that it is impossible

to treat them separately is that the negligence must not only be calculated to
 have the misleading effect attributed to it but must be proximate or real cause
 of that result *Bank of Ireland v Evans' Charities in Ireland*, 5 H L Cas
 389 per Parke B, *Suan v North British Australian Co*, 7 H & N 603, 633

Other cases After the right to get either rescission or reformation of the
 contract is barred, it is not competent to a party to a contract enjoying the benefit
 under it to say that he is not bound by one of its terms *Sashi Kant v Gopal*
Shel, 82 Ind Cas 970-A I R 1925 Cal 359 Admission in a different
 proceeding that one had sold the land does not act as estoppel so as to do away

with the necessity of registering the document *Maung Po Yin v Maung Tet Tu*, 86 Ind Cas 205=A I R 1925 Rang property made by a number of donors joint of the donors had no right to make the g 85 Ind Cas 516=A I R 1925 Mad 990 of certain shares from a widow during her life time he is estopped from denying the truth of the representation in suit between himself and the representatives of the lady *Mahamed Hasan v Ali Hardir*, 85 Ind Cas 509=A I R 1925 Oudh 337=12 O L J 1 Estoppel is purely personal and will not affect others in so far as they claim a title otherwise than through the person primarily *Umaram v Purul*, 85 Ind Cas 510=A I R 1925 Cal 993 A defendant cannot be allowed to set up his own fraud in defence Where a plaintiff claiming a title by purchase sues for declaration and possession, it is not open to the defendant to show that it was she who provided funds for the purchase by means of a fraud on the reversioner to which she and the plaintiff were parties *Pachayammal v Devanammal*, 22 L W 313=A I R 1925 Mad 1016 A man who has represented to an intending purchaser that he has not a security and induces him under that belief to buy, cannot, as against that purchaser, subsequently attempt to put his security in force *Jia Lal v Saera Bibi*, 99 Ind Cas 2=A I R 1927 Oudh 104 Although the house of an agriculturist is ordinarily unsaleable, still the conduct of the agriculturist judgment-debtor may estop him from pleading that the house is not saleable *Ganga Bishun v Jogmohan*, 6 P 251=102 Ind Cas 616=8 Pat L T 563=A I R 1927 Pat 233 Where the question arose whether a company was liable to be assessed to companies' tax by

the assessment by a suit in the civil Court *Bombay Co Ltd v Municipal Council of Dindigul*, 108 Ind Cas 26=27 L W 243 Even if the compromise is beneficial to a party's interest, but he has not taken any benefit out of or under it, that is not a bar to a suit for a compromise from challenging it *I R 1928 Cal 334* interest purported to be his right as a rival but the purchaser at an execution sale of that person's right and interest who got his name mutated in the *sherista* of the superior landlord on payment of an enhanced rent is not so estopped *Jaladhar Mandal v Amrita Lal Roy*, 105 Ind Cas 641=A I R 1928 Cal 87 A *muafidar* who has mortgaged his *muaf* had expressly enacted that the mortgagee cannot deny the mortgagee's title by a suit in the civil Court *I R 1928 Cal 87* A *muafidar* who has mortgaged his *muaf* had expressly enacted that the mortgagee cannot deny the mortgagee's title by a suit in the civil Court *I R 1928 Cal 87*

mistake but claiming to be a proper party to a legal proceeding, takes step for the purpose of establishing his title by a suit in the civil Court *I R 1928 Cal 87*

of certain property as a *mutawalli* and holds possession of it on that basis, he cannot afterwards turn round and say, that the *muaf* being void, he was in possession in his own right and claim the property as his own as against the beneficiaries *Rahya Banu v Najara Binu*, 55 C 449=32 C W N 219

commercial speculations cannot claim on another basis when he finds the first basis prejudicial to him He cannot both approbate and reprobate *Hurrim v*

Valan Gopal 33 C W N. 193-49 C L J 335-27 A L J 106-A I R 1929 P C 77 Where a person admits execution before the Registrar after the document has been . . . he was ignorant of . . . W N 407-29 I . . .

purchase the property of his other co-sharer, he is estopped from exercising his right of pre-emption *Rameswar v Ghisaran Prasad*, 27 A L J 665-A I R 1929 All 531 For purposes of estoppel an order by consent, not discharged by mutual agreement, and remaining undisturbed is as effective as an order of the Court made otherwise than by consent and not discharged on appeal. *Charles Hubert v Edward Keith*, 115 Ind Cas 7-A I R 1929 (P C) 289-57 M L J 429 (P C) A party who takes advantage under partition, is estopped from pleading impartiality *Narendra v Narendra*, 10 C L J 267-A I R 1929 Cal 577 Where a County Court Judge has tried an action which he had no jurisdiction to try, and the unsuccessful party appeals the respondent is entitled to raise the point of jurisdiction notwithstanding that it was not raised below, and the fact that no objection was taken to the jurisdiction in the county Court does not create any estoppel by conduct *Simpson v Crouie*, (1921) 3 K B 213-90 L J K B 578 Where in prior land acquisition proceedings there was a declaration that minerals beneath a particular land could be used by the Government for the purpose of construction of a bridge and the owner of the land received compensation on that footing and after the completion of the bridge he sued for a declaration that he was entitled to the remaining mineral in the land, *held*, that he was not estopped

cannot be heard later or after the sale to plead that the figure was unduly low and the sale should therefore be set aside *Ramanatham v Ramanathan*, 117 Ind Cas 705-30 L W. 995 A person creating a charge or a mortgage is estopped from saying that he is not entitled to create the charge or mortgage on the property *Shanlar v Ganpat*, 31 Bom L R 439-119 Ind Cas 186-1929 Bom 227

A usufructuary mortgagee cannot deny the title of the mortgagor and set up adverse possession unless he actually leaves the holding and enters under a different status *Jai Nandan v Lmrao* 119 Ind Cas 568-A I R 1929 All 305

Where a widow makes a gift of her husband's property in her possession

promise which amounts to a settlement of a doubtful claim, it is binding on him, even though at the time when he entered into it he was a mere reversioner. There is nothing to prevent him from so acting as to estop himself by his own conduct from subsequently claiming a property to which he may succeed *Moti Shah v Chandharp Singh*, 48 A 637-96 Ind Cas 590 Where an order directing the payment of the decree by instalment was passed at the request of the judgment debtor who subsequently acted upon it, he is precluded from contending that the order was not binding on him *Fielding v The Firm of Janaki Das*, 95 Ind Cas 243-A I R 1926 Lab 465

A Hindu widow executed a mortgage as guardian of her adopted son, subsequently she sold the properties to the plaintiff as her own. The plaintiff *held* that the plaintiff was not estopped from . . .

took a lease of the properties from the third person. In a suit for redemption of the mortgage, *held*, that the mortgagee was estopped from setting up the plea of tenancy *Gauri v Mangla*, 7 L R 171 (Rev)-A I R 1926 All 463 As between a mortgagor and his mortgagee, neither can deny the title of the other for the purposes of the mortgage, but the estoppel does not arise in a suit

neither based on nor connected with the mortgage *Deo Kali v Ranchoor Bux* 92 Ind Cns 19-13 O L J 208-A I R 1926 Oudh 253 Where in case of an alienation a person entitled to challenge it is present at the mutation proceedings and when there is every opportunity of objecting to it does not object he cannot challenge the alienation subsequently *Ram Sarup v Ram Saran* 96 Ind Cns 915-A I R 1926 Lah 650 Where a person purchases certain property in execution of a money decree expressly subject to a mortgage on it and admits the existence of the mortgage it is not subsequently open to him to challenge the mortgage in a suit on the mortgage by the mortgagee *Gouri Dorao v Huchand* 95 Ind Cns 563-A I R 1926 Nag 146 Where the owner of a property keeps quiet when his property is being sold as belonging to the judgment debtor in execution and sale, he is estopped

Singh, 27 P L R 260-A I R 1906 Cal 111 A person who has been successful in the Small Cause Court that the suit was one triable by the regular side he ought not to be allowed when the suit is filed on the regular side to turn round and plead that it ought to have been filed in the Small Cause Court *Kartar Singh v Nanda* 95 Ind Cns 816-A I R 1926 All 664 Where a lease is taken on the understanding that it would be for the benefit of the local public and this formed part of the consideration for the lease, the lessees cannot afterwards turn round and claim an absolute interest in the lands leased and deny rights to the public *Pearry Lal v Surendra Nath* 88 Ind Cas 505-A I R 1925 Cal 1233 A mere undertaking may operate as an estoppel, though it may not amount to a contract *Shanesh Chandra v Bechar Gope* 84 Ind Cas 124-A I R 1925 Cal 24 Where mortgagor

higher interest to get extension mortgages for execution of the mortgage could not be enforced in the mortgagee's hands *1925 Cal 723-48 M L J 121* There can be no estoppel in favour of a party who was not misled except by his own ignorance of the law *Anyad v Ashraf* 2 O W N 83-87 Ind Cas 445-A I R 1925 Oudh 568 A person is not precluded from setting up an inconsistent case in a subsequent litigation The contention put forward in the previous case itself becomes a foundation for any subsequent contention to arbitration through Court proceedings on the ground that the mortgagor has not complied with the conditions of the mortgage deed *Tuanj v Sona Hanji* 57 Ind Cas 633-A I R 1925 Cal 7

812 The person to whom a notice has been given to the effect that a property is going to be sold and who intimates his refusal to purchase can not be allowed after the sale has been made after his refusal to turn round and seek to enforce his right of pre-emption through the Court The doctrine of estoppel applies to all sorts of cases including pre-emption cases *Don Mahomed v Bunt Zahir* 87 Ind Cas 414

A person is not entitled to give an undertaking to a criminal Court to abstain from certain action to go and file a civil suit for declaration that the undertaking given by him was of no effect *Ramsaran v So Pratab* 91 Ind Cas 596-A I R 1925 All 605 Where the vendor under a contract for sale of immovable property stated to the vendor that his (the vendee's) money was ready and that the title deed was being engrossed and where those two matters alone were wanting to complete the sale and where the vendor gave five days' notice to the vendee to complete the sale the vendee was estopped from denying the truth of his statements *Mohitlal v Haji Moora* 41 C L J 331-83 Ind Cas 41-27 Bom L R 814

Where a prior vendee induced a subsequent vendee to believe that notwithstanding prior sale deed the vendor continued to be owner and to purchase property in that belief he is estopped from claiming priority under his sale deed *N 596-90 Ind Cns 875-A I R 1925 Cal 723-48 M L J 121* In the settlement record may amount to estoppel *Mallikarjun v Ramkrishna* 41 C L J 331-83 Ind Cas 41-27 Bom L R 814 A person who obtains possession of land claiming under a deed or Will he cannot afterwards set up another title to the land against the Will or deed though it did not operate to pass the land in question

and if he remains in possession till 12 years have elapsed and the title of his testator's heir is extinguished, he cannot claim by possession an interest in the property different from that which he could have taken if the property had passed by the Will or deed *Jagsewar v Pamluran*, 7 N L J 82-78 Ind Cas 810-A I R 1921 Nag 73 Where there is a contract for sale no decree for possession can be given unless the title is completed by a registered deed and an agreement between parties

to do away with the necessity expressly requires it *Munir*

68, *Dharam Chant v Muz* 8

20 C W N 307 But an undertaking may operate as an estoppel though in the absence of consideration it cannot amount to a contract Situations may arise in which a contract should be held to be an estoppel as in cases where only an adequate right of action would exist in favour of the injured party if estoppel were not allowed In such a case estoppel may sometimes be available to prevent fraud *Shantesh Chintari v Lechu tope* 10 C L J 67-1925 Cal 91

The donee of a property is not to

not belong to the donor but was

Moolchand, 76 Ind Cas 128-1923

sign the award and as a result

would otherwise have prosecuted the other party is estoppel from contesting the validity or the award *Moharshi v M Lina* 77 Ind Cas 41

It cannot be said that a Mahomedan tenant in common can be held to be represented by another Mahomedan tenant in common merely because their interests are identical *Karim Bikh v Mahaj Udlin* 40 A 311-L R 5 A 5 (Rev)-22 A L J 13-78 Ind Cas 1035 A mortgagor is estopped from pleading in a suit on the mortgage that he had no title to the property at the date of the document But if the mortgagee is proved to be well aware of the

erty, the plea of estoppel

924 Nag 363 Where the

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Haibullah, 1924 All 721.

Where a person gets another's name recorded as owner of a moiety of the property, and on the faith of that another purchases it at an auction sale the former can not later on claim ownership of the same *Mathura Prasad v Anandi*, 21 A L J 498 L R 4 A 501-74 Ind Cas 911 A dispute under s 145 Cr Pro Code relates only to possession of the properties and consequently a compromise of the proceedings does not estop a party from denying the title of the other *Gopi Das v Madho Lal*, 45 A 162-1923 All 77-23 A L J 932

In order to maintain a plea of estoppel in a pre-emption suit, it must be proved that the plaintiff believed the representation made and brought his suit on the basis of it *Banke Behari Lal v Nanna Lal*, 73 Ind Cas 372 Where the mortgage deed clearly purports to be executed by the mortgagor as the proprietor of the property in his own interest he is estopped from denying the interest which he represented as his own proprietary right in the deed *Bry Tarun v Raghunandan* 71 Ind Cas 941 (1933) Pat 49

Where a co sharer had been allowed by other shares to treat certain land as his exclusive holding and he grants a perpetual lease of a small portion of the land so as to confer occupancy right on the tenant and at a subsequent partition the land was allotted to another co sharer held that the co sharer was estopped from disputing the title of the occupancy tenant to the land *Iej Singh v Munshi*, L R 4 A 51-90 & A L R 430

Even where the mortgagors are trustees acting in a public capacity and not for their own benefit they are estopped from denying their title and cannot set up as a defence against the mortgagee that the property so mortgaged is trust

Bry Ratan v Ragh

non of certain plots

as upon title after-

Held that there was

Chandra, 4 Pat L 1,

730 A statement in the Court of an Assistant Collector during the mutation proceedings to the effect that the plaintiff and two others were in possession of the property in equal shares and that mutation of names may be made accordingly, does not prevent the plaintiff from asserting his right to the entire property in Civil Court subsequently *Ramratan v Bindu*, 9 O & A L R 20=72 Ind Cas 832 Where in execution of a money decree the decree holder under a *bonafide* mistake brought to sale certain of his own properties as those of his judgment debtor and the sale was confirmed and delivery of possession was made to the purchaser, held that the decree holder was estopped from setting up his own title to the properties as against the auction purchaser.

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Ind Cas 797
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Zemindar is not estopped from asserting that the sale was
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mortgage from a person in possession and obtains possession it is
not permitted to question the mortgagor's title *Surendranath v Ahluwalia*
Mohan, 29 C L J 434=52 Ind Cas 59 A mortgagee brought a suit for
possession of the mortgaged property against a person whom he treated as the

mortgagee for redemption of
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Cas 356
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mortgages land which is afterwards sold in Court auction at the instance of the

mortgagee, can sue on behalf of the temple to recover the landlord's interest, which claim against the mortgagee. *Sahib v El* Ind

Cas 197 Where a person by his conduct in a redemption suit had elected to affirm the sale and to act upon it, he is estopped from suing for the cancellation of the sale of equity of redemption on the ground of fraud. *Chanham v Behari Lal*

Ind Cas 997 It is not open to the lessee to question the validity of the mortgagee's ejectment by the auction purchaser. *Ind Cas 997*

Cas 705 Where a person after his tolls in a Municipality has been accepted, represents to the Municipality that he bid on behalf of himself and another person and asks that such other person should be regarded as co contractor and the latter joins in this petition of representation and pays money on which the chairman officially accepts the amount tendered by both the person who did not join in the original bid is disputing his liability under the contract. *Municipal Council v Kannu-*

Ind Cas 705 The admission of liability under a decree obtained against the ward does not create an estoppel and debar the Court of wards from challenging the validity under the Court of Wards Act not having been complied with the decree was not validly obtained. *Punjab Court of Wards v Lala Hanwar Bhan*, 126 Ind Cas 796-31 P L R 710-A I R 1930 L

Nanda v referred by the lower court the right to

acquired in the decree, and therefore is not estopped from prosecuting the appeal. *Kailashbad v Khanhalla* 124 Ind Cas 239-31 P L R 668-A I R 1930 Lab 26 Where a lease granted by one co sharer confers no right upon the lessee there is nothing to prevent the grantor from joining the other co sharers to eject the lessee who is found to possess no right in respect of the land in dispute. *Panchanan v Anant*, A I R 1932 All 457. If the grantors

so that any person were the absolute

real transaction conveyance *Ts*

Where par certain rights, which they allege they have in connection with certain proceedings in Court being brought to an end, they cannot thereafter allege the continuing existence of those rights. *Muhammed Ibrahim v Chandan Singh*, 63 Ind

plaintiff was estopped from denying the right of the defendants under s 115 of the Evidence Act. *Ananta Murarrad v Gunn Nitha*, 22 Bom L R 415-57 Ind Cas 143 A dispute was settled by arbitration. Subsequently two of the arbitrators purchased the interest of one of the parties to the dispute and sought to upset the arrangement arrived at as a result of the arbitration. In the circumstances they were estopped from doing so. *Dudhai Singh v Karan Singh*, 55 Ind Cas 506 When a person appeared at the time of the mutation in respect of the sale in dispute and expressed his consent to it he cannot subsequently come forward to impugn it. *Muhammad v Wali*, 2 Lab L J 306 Where some of the mortgagees led a subsequent purchaser of a portion of the mortgaged property and a puisne mortgagee of the remainder to believe

that the whole property was unencumbered, they were precluded by the doctrine of estoppel from setting up their rights under the prior mortgage against the mortgagee *Sahbudhin* account, a party is estopped from suing for ar

the decretal debt as well as interest of time in the Court to enable him to pay the amount he (the judgment debtor) cannot at a later stage of the proceedings dispute the item of interest, and is bound to pay interest from the date on which he admitted his liability to pay interest *Narayan v Raoji*, 6 Bom L R 417-23 B 393. A party cannot take benefit of a transaction and at the same time repudiate it when the transaction is one and indivisible. Where the property of a judgment-debtor is sold in execution of a decree and the sale-proceeds go in satisfaction of the decree, and the judgment-debtor accepts the payment of the decree, he cannot impeach a part of the sale *Annapurnabai v. Ramchandra*, 43 Ind Cas 178. Where two persons embark upon a joint adventure for the purpose of extinguishing a prior mortgage and taking a first charge on the property it is the legal duty of each to inform his co mortgagee within a reasonable time that he had still an outstanding claim under the prior mortgage and the omission to give the information amounts to such an omission as is contemplated by s 11 of the Evidence Act and operates as estoppel *Pandurang v Narayan*, 44 Ind Cas 547. A judgment-debtor got an execution sale postponed on undertaking that he would not raise any objection on the ground of regularity or irregularity of the sale. He failed to set it aside on the ground that he had not given the time he had still an outstanding claim under the prior mortgage and the omission to give the information amounts to such an omission as is contemplated by s 11 of the Evidence Act and operates as estoppel.

Zemundary, 27 C L J. with that brought 533 A transfer 132 without not, by dnapur and in prior suit brought against him by the defendant agreed to give up possession of the decree of

in pursuance of that arrangement but its validity was sought to be questioned after the death of the mother by the executants themselves *Held* that they were estopped *I R 1930 All 687*. A Will cannot be altered by interest to another of the Contract *Jacob v The* of nearly five years prior to the suit for rescission of contract on the ground of defect in title of plaintiff's vendors and onerous covenants is highly prejudicial to the defendant's vendors, especially when the plaintiff was previously seeking to enforce the contract against his vendees notwithstanding the defects. Plaintiff's conduct in enforcing the contract against his vendee and laches of five years work out an estoppel against him and equally debar him from enforcing his claim *Soralji v Tarachand*, A I R. 1930 Sind 66. A purchaser at a Court sale of a judgment debtor's property is not bound to inquire into the title of the vendor at all. He is not estopped from claiming the property if he is buying it in good faith.

but it does not mean that the encumbrance charge or any other claim against the property has been established. In connection, therefore, with the sale of immovable property subject to an encumbrance the auction purchaser is entitled to contest the factum and the validity of the encumbrance. There is no rule of estoppel which can prevent him from impeaching the charge on the property. *M. Vin Kuar v. Ishar Das* A I R 1930 Lah 40, see also *I. Atumma v. Partab Singh*, 31 A 553-36 Ind Cas 203 (P C), *Ala Sultan v. Mohallat Khan*, A I R 1921 All 79-43 A 489, *Gimesh Moheshwar v. Purushottam* 33 B 311-11 Bom L R 26, *Narayan v. Umbar* 35 B 276-13 Bom L R 307-10 Ind Cas 913. The fact that after the death of the successful pre-emptor the vendor himself has become the legal representative is not enough to estop the latter from taking the benefit of the decree. *Bramaban v. Durag Singh*, A I R 1920 All 220. The mere fact, that a corporation has granted license under certain chapter of a Municipal Act does not preclude it from refusing to grant a different license under some other provisions of the Act. *Corporation of Calcutta v. Siemens Bena* 35 C W N 831.

116 No tenant of immovable property, or person claiming through such tenant shall during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had at the beginning of the tenancy, a title to such immovable property and no person who came upon any immovable property by the license of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such license was given.

Principle *Where a man having no title obtains possession of land under a devise by a man in possession who assumes to give him a title as tenant he

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plaintiff, and then refused to pay his rent under an idea that he might contest the plaintiff's right, but the plaintiff could not be supposed to come to trial prepared to meet such a defence and to make out his title, such an action as the present does not involve the question of title. In the same case *Grose J* said 'It has been said that the rule of not giving in evidence *nil habuit in tenements* in an action for use and occupation is a technical rule, but in my opinion no rule is better founded in justice and policy than this. The general rule is admitted that in such an action as this the tenant cannot dispute the landlord's title, se' 'The principle is the contrary, it is his out of possession 41

Scope of the section : The estoppel of a tenant is one of the most notice-

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pp 515-517 But this section does not debar one, who has once been a tenant, from contending that the title of his landlord has been lost or his tenancy has been determined. I from contending this tenancy *Amnu v* over after the expiry that his landlord the zemindar and *Gooroo Pershad*.

recover possession of a house from the defendants alleging that they were his tenants under a lease which he had granted to them, and that though the term of the lease had expired they refused to vacate, the defendants having passed the *Kabuliyat* to plaintiff could not be heard to deny the latter's title as ground for refusing to give up possession. *Patel v Hargovan*, 19 B 133 Plaintiff alleging a purchase of land from A and B and that he afterwards granted them a *patta* and retained them in possession, sued to recover possession on the ground of the tenancy having expired. He tendered in evidence a consent decree obtained against B for arrears of rent. *Held* that the decree worked no estoppel against B by virtue of s 116 of the Evidence Act and did not relieve the plaintiff of the necessity of proving his case completely. *Soltir Moulai v Nisomal*, 1 C L R 528 Two persons mortgaged certain property and five years later joined with another mortg party

him five years after, estopped from showing that the mortgagors were not, at the date of the lease, entitled to the whole of the property comprised in the mortgage. *Prosunno Kumar Sen v Mahaborat*, 7 C W N 575 A person who obtained possession of property from another is estoppel from denying the title of that other to the property at the time he was so let into possession. But where the defendant obtained possession of certain property under a rental agreement from one who was the manager of certain charity to which the said property was attached *held* that the defendant he was entitled to manage the pro that therefore the Will and

43 Ind Cas 47 A tenant, deny his land possession to him *Ma* (35 Ind Cas 7, 24 C L foll), see also *Ekoba Go* *Alah Bahsh v Lai Khan*, 67 Ind Cas 269, see also *Mahomed v Uberoi* 89 Ind Cas 590=12 O L J 501, *Mahomed v Zahiruddin*, 101 Ind Cas 771 *Pundlik v Urkuda*, 97 Ind Cas 992, *Dajalal v Ko Lon*, 6 Rang 657, *Sidik v Mahomed*, 21 S L R 185, *Vertannes v Robinson*, A I R 1928 Rang 162, *Currumbhoy v L T Creet*, A I R 1933 P C 29 A person who executes a lease in favour of another, is estopped from denying that other's title to grant the lease. It is immaterial whether he was the tenant of some other person before the execution of the lease. *Chandoo v Purbhoo*, 59 Ind Cas 707 A person entering into a covenant in his *Kabuliyat* is bound to recognise rights so recorded even if such rights were incorrectly recorded and had no real existence. *Mudnapore Zemindari Co Ltd v Nares Narain*, 38 C L J 317=63 Ind Cas 161; *Samsuddin v Aga Syed* 11 O & A L R 1041

expiration of the only surrendering 50 Ind Cas 591 97, 37 All 557 =55 Ind Cas 953,

a landlord from the *talquzar Seth Surjun* Entries in revenue correctness which has under s 42 of the *F Jai Kuar v Lathu*, it not under circum-

stances which would establish a relationship as between the parties of landlo

and tenant, the tenant is not estopped from showing that the person to whom he paid the rent is not the landlord *Abdul Rappak v Promadi Sundari*, 80 Ind Cas 22 Tenant in possession prior to lease also is estopped *Meal Ram v M Bholi*, A I R 1925 Lah 60 Where a property is leased by a person without title to it and the lessee is ejected by the true owner it is not open to the lessee in a suit by his lessor against him to deny the plaintiffs' title *Moti Lal v Jai Vahomed* 47 A 63=85 Ind Cas 756—A I R 1925 All 275

Though the tenant and show that his Such a plea does confession and aver on the ground that the lessor's title has been defeated by a title paramount in the case of complete eviction a question of continuance of paramount terminating the in the case of a partial eviction demand the distinction is quite apparent but "attornment" in the sense in which a mere agreement in favour of a third party to pay rent but has been defined as the act of the tenant putting one person in the place of another as his landlord *Jogendra Lal v Mahesh Chandra*, 55 C 1013=32 C W N 559=112 Ind Cas 172=47 C L J 387 Where the rights of the vendors of the plaintiff become extinguished by adverse possession of a plot of land by defendant for more than 12 years, the defendant will not be estopped from pleading acquisition of title by adverse possession and denying plaintiff's title to plot even though the defendant, after purchase of the plot by the plaintiff had obtained his permission to occupy the plot *Maung Ba Than v Maung Sein Win*, A I R 1929 Rang 170 Where the mortgagees in possession allow the mortgagees to remain in occupation of the mortgaged properties as tenants and the mortgagees duly execute and register the mortgage, the mortgagor cannot claim the subsists between them and plead that the lessor *v Krishna Chandra Woods*, L R 3 Q

The mere fact that a person has taken a lease from the Municipal Board cannot estop him from setting up another party to that lease If any one pleads that the lessor and the lessee are the same person, the Municipal Board cannot set up the fact that the lessor and the lessee are the same person between them.

may have been the nature of a person's possession prior to a lease, once he takes a lease deed in respect of the land from another he is thereafter estopped from denying the title of the lessor *Maung Kyue v* 907=L R 3 A 623 only.

No tenant. "The true ground of estoppel is" according to the statement of Vice-Chancellor Sir P H Page Wood, in *Longford v Selmes*, J K & J 220, 229, "that a tenant may not dispute the right of his landlord by saying that he had nothing in the property. It is equally clear" he observes, "that he may, nevertheless, show that the landlord had an interest at the date of the lease, which has since determined." The ground of the doctrine, as stated in *Lush J*, in *Vorton v Woods*, (1863) L R 3 Q B 658 at p 671, is that as much as the parties have agreed that they should stand in the relation of landlord and tenant, and the one accordingly receives possession, from the other and enters premises, so long as he continues in possession, he cannot be heard to deny the state of facts which he has agreed shall be taken as the basis of the arrangement; in other words, he cannot set up that the landlord has no title." The principle is exactly expressed by *Patty C B* in *Wagon v P* (1883) 12 L R 1r 69, 72,—"The defendant is estopped from alleging that his lessor had not at the time of letting, any estate in the premises. He may, however, on proper pleading show, that the estate which the lessor had at the time of letting had expired before the commencement of the action."

may dispute the title of one from whom he did not get possession, and to whom he has not attained, in the strict sense of the word, at the request or with the privity of the person from whom he did get possession. *Gregory v Doulie*, 3 Bing 174. *Cornish v Scatchell*, 4 B & C 171, *Lell Mahomed v Kallmes*, 11 C. 519. A tenant who has repeatedly acknowledged that a person in possession of the proprietary right is entitled to receive rent and who has in fact attorned to him cannot afterwards be allowed to question the validity of the title of such person for the reason that the instrument by virtue of which possession of the proprietary right had been obtained was unregistered. *Shums Ahmed v Ghoolam Moher*, 3 N W P 113. A tenant who was not let into possession by the person seeking to eject him is not estopped from denying the plaintiff's title, he may show that the title is in some third person or in himself. *Venkata v Aiyanna*, 31 M L J 712-20 M L J 157-26 Ind Cas 817 (F B). A grantee of lands so long as he holds a religious office in a temple is estopped from setting up a title inconsistent with that of the grantor, and an alienee from such grantee is similarly estopped and the alienation itself is invalid as against the trustee of the temple. Section 116 of the Evidence Act is not exhaustive of the law of estoppel. *Thayellajam v Venkatarama Krishnayam*, (1919) M W N 10-33 Ind Cas 888. This section applies not only to tenants let into possession at the beginning of the lease but also to tenants who are already in possession and continue in it. *Harat v Dindi*, 25 Ind Cas 615. An adverse action taken by a third party, whether that third party be the Government or some other rival claimant cannot have the effect of terminating the relationship of landlord and tenant and the tenant will be estopped by this section from denying the landlord's title. *Kudhumi v in Kanna Thara*, (1918) M W N 376-8 L W 41-45 Ind Cas 655. Under this section a tenant is precluded from denying the title of the landlord, but it is open to him to question the status of his landlord. *Lokoram v. Bulya Rao*, 53 Ind Cas 43. A tenant who has executed a lease but has not been let into possession by the lessor, is estopped from denying his lessor's title in the absence of proof that he executed the lease in ignorance of the defect in his lessor's title or that his execution of the lease was procured by fraud, misrepresentation or coercion. *Malham v Bursakhi*, 123 P R, 1919-50 Ind Cas 591. A tenant inducted of land by one person cannot alter by the character of his possession and make a difference to the landlord going over to another person and paying rent to him. *Abdul Halim v Pana Mia*, 61 Ind Cas 494. A tenant cannot deny the right of the person from whom he took the tenancy. *Janki v Ram Sahai*, L R 4 A 398, *Sital Prasad v Badai*, 69 Ind Cas 647. A tenant can prove cessor of landlord's title by ouster by the latter on ouster. *Ramaswami v* see also *Alagapillai v Ramaswami*, 49 Ind Cas 892, *Hopcroft v Keys*, 9

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Where in a suit by
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landlord's title. *Rutter*

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of English law which enacts that a tenant who was so let into possession could not deny his landlord's title. The plea of estoppel is of no avail where tenants

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as a tenant from disputing in a Court of law the title of his landlord, is a rule tending to general convenience. I am aware that there is a qualification of this rule, if qualification it can be called, and that there are cases in which the tenant has been permitted to show that a landlord could not justify a distress in all of these, however, the right of the landlord to demand his rent is admitted, and the plea has been either that his title has since expired, or that the tenant has been compelled to pay sums which he was entitled to deduct from the rent, these cases therefore rather confirm than impeach the general rule, but the tenant here brazenly disputes the landlord's right to demand."

Or person claiming through such tenant When the relation of landlord and tenant is once established, it attaches to all who may succeed the tenant immediately or remotely, and the succeeding tenant is as much affected by the acts and acknowledgments of his predecessor as though they were his own (*Crease v Larrat* 1 Group M & R 919. The assignor of a lease is estopped equally with his assignor *Sayor v Nerdham*, 2 Funt 270; *John v Blair*, 1 L. P. 89, *See d Bullen v Will*, 2 Ad. & El. 17, *See d Mansel v Palmer*, 3 Bing 41. But a third person not claiming possession of the land who has brought goods on to the land by the licence of the tenant, is not estopped from disputing the lessor's title. *Tilman v Henman*, (1893) 2 Q. B. 169. So persons not claiming possession of land through the tenant are not estopped from denying the title of the lessor. *Maharaja of Jaipur v Suraj Singh* 41 A 671-20 A L J 615-(1922) A 333. Where the lessors accept and act upon the *talukdary*, the lessors as well as the persons claiming under them are equally estopped from denying the validity of the lease. *Hari Mond v Durgathan*, 91 Ind. Cas 661-A I R 1926 Cal. 682. The estoppel operates against persons claiming through the tenants, as for instance *sub-leasees* (*Cajera on Estoppel* 105, *Dar d Knight v Smythe*, 1 M & S 347, *London and N. W. Rail Co v West*, L. R. 2 C P 533; *Barwick v Thompson*, T. R. 453. An under tenant is bound by estoppel as against his lessor under s 116 and is estopped from denying the title of the original landlord. Where the lessor obtains a decree for ejectment against the lessee he can execute the decree against the sub-lessee also. *Sheikh Yusuf v Jyotish Chandra*, 33 C. W. N. 1132-A I R 1932 Cal. 241. This section which enacts the rule of estoppel of a tenant is not exhaustive of all principles of estoppel as between landlord and tenant. The basis of the principle is the fact of the letting of the tenant into possession which creates the estoppel. If a tenant consents to give up possession to a party claiming title adverse to the landlord's title that party is estopped as the tenant would have been from disputing the landlord's title. *Ayubulla v Bilal*, 35 C. W. N. 652-54 C. L. J. 151.

During the continuance of the tenancy A tenant cannot, in the absence of fraud or mistake, question the title of a person to whom he has attorned (*Oravenor v Woodhouse*, 1 Bing 38, *Hall v Butler*, 10 Ad. & El. 204; *Doe d Blarlow v Higgins*, 4 Q. B. 367), or paid rent (*Carlton v Doxcoek*, (1835) 51 L. J. 659), or at whose hands he has submitted to a distress, (*Panton v Jones*, 11 Q. B. 270. *Conner v Blandu* 1 Bing N. C. 45). A tenant is as has already

been said, estopped from disputing his title as against his landlord, and as against all persons claiming through the landlord, during the continuance of the tenancy. The words of the section are "during the continuance of the tenancy". The words "during the continuance of the tenancy" are to be construed as meaning "during the continuance of the tenancy" and not "during the continuance of the tenancy" as the words "during the continuance of the tenancy" are to be construed as meaning "during the continuance of the tenancy".

the subject of the tenancy. The words of the section are "during the continuance of the tenancy". The words "during the continuance of the tenancy" are to be construed as meaning "during the continuance of the tenancy" and not "during the continuance of the tenancy" as the words "during the continuance of the tenancy" are to be construed as meaning "during the continuance of the tenancy".

of the plaintiff is estopped from disputing the title of the landlord at the beginning of the tenancy.

to deny relation *Devulraj* *Duklumalla*, 25 Ind Cas 721 : A tenant who has been let into possession cannot deny his landlord's title however defective it may be, so long as he has not openly restored possession by surrender to his landlord *Mussamat Bilas Kunicar v Desing*, 19 C W N 1207 P C -29 M L J 735; *Mahomed Humtar v Aurang*, 60 Ind Cas 502-3 Lah L J 227 In a suit brought by the plaintiff in ejectment on the expiry of the lease, it is not open to the defendant under s 116 of the Evidence Act to say that the plaintiff is not the sole landlord, when the defendant had been inducted on the land by the plaintiff and when the lease in favour of the defendant had been executed by the plaintiff alone *Alimuddin v Alanaddin*, 38 Ind Cas 531 This section only operates as an estoppel during the continuance of a tenancy and not after it has come to an end. A tenant is liable to pay rent to the person who has the real title *Mahadeo v Janarayan*, 62 Ind Cas 850 But it is open to the tenant to prove a subsequent cessor of the landlord's title, and one way in which the tenant can show that the title had determined such an one who has a term of years cannot set up during the continuance of such relation any title adverse to the landlord inconsistent with the legal relation between them and however notoriously and to the knowledge of the other party, acquires by the operation of the law of limitation title as owner of any other title inconsistent with the title of the landlord *Iarug*, d) The against him in ejectment during the continuance of the tenancy and is decreed against him *Verlaunes v Robinson* A I R 1928 Rang 162 A tenant is not estopped even before or after the expiration of the term from showing that his lessor's title has determined *Downs v Cooper*, 2 Q B 256, *Langford v. Selmes*, 3 K & J, 220, 229, *Gippins v Buckland*, 1 H & C 236; *Wogan v Doyle*, 12 L R Ir. 39; *Sergeant v Nash Field & Co* (1903) 2 K R 304, 313 C A But if the tenant came into possession of the land as a tenant, he would seem to be that *Do v. Smythe*, p 401; see also 513, *Ayululla v. Oudh* 174-8 s 116 which next action was temporary only and ceased to operate when he gave up possession of the land and when his tenancy according be decided as the case could *Agabeg v James Golder*, 57 I A

At the beginning of the tenancy. The words "at the beginning of the tenancy" in this section only apply to cases in which the tenants are put into possession of the tenancy by the person to whom they have attorned, and not to cases in which the tenants have previously been in possession *Lal Mahomed v Kallanus*, 11 C. 519 (explained in *Keludas v. Surendra* 7 C W. N 596); *Swanell* 2 R & C 471 R.

that relationship ceases A 226-33 Ind Cas 97. dlord had no title at a that since its commencement it has expired or has been defeated because the bar operates only during the continuance of the tenancy *Rama Suami v Alanga Pillai*, 79 Ind Ca 881-1925 Mad 143 Where under s 116 of the Evidence Act a tenant duri

the continuance of the tenancy is not estopped from denying that at the beginning of the tenancy his landlord had any title to the demised premises. It is open to a tenant in a suit for recovery of rent to show that the title of his landlord has expired or have legally determined. *Rim Raha v Munna Lal*, 32 P L R 338-A I R 1931 Lah 243. This section only provides that a tenant cannot be permitted to deny that the landlord at the beginning of the tenancy had a title to the property. He is not estopped from saying that on the death of the lessor or the property did not devolve on the plaintiff but devolved on some body else. *Madan Lal v Mt Gour Das*, 26 A L J 1255-110 Ind Cas 376-A I R 1928 All 650. A tenant attorning to the mortgagee and paying rent to him will be estopped from questioning the mortgagee's title in a suit for ejectment by the mortgagee. *Nagindas v Bahalal*, A I R 1930 Bom 391-32 Bom L R 692.

How a relationship of landlord and tenant is created. A relationship of landlord and tenant can be created either by written contract or by verbal contract, when the landlord has put the tenant in possession of the land. It may also be inferred from the

Casperz on Estoppel, 102. 1 established between the parties the landlord's title. There must be put into possession by the landlord in order to estop the tenant from disputing the landlord's title. The question in each case is whether a new tenancy has arisen. Of course in support of the contention that there was no relation of landlord and tenant between the parties the tenant may assert that the contract of tenancy is void or voidable on account of misrepresentation or fraud. *Shanker v Jagannath*, 30 Bom L R 741-111 Ind Cas 911-A I R 1928 Bom 165. Payment of rent is evidence of permissive occupation, and in all cases furnishes a strong presumption against the tenant. It furnishes the landlord with a *prima facie* case, but the circumstance is always open to explanation, and where rent has been paid under a mistake or upon misrepresentation, it is open to the tenant to rebut the presumption. *Gratenor v Woodhouse* 1 Bing 38, *Bogers v Pitcher*, 6 Taunt 202, *Casperz on Estoppel* 113, *Williams v Bartholomeo*, 1 B & P 326, *Doe v Clarke Perke Ad Cas* 239, *Fenner v Duplock*, 2 Bing 10, *Doe v Barton*, 11 Ad & El 307; *Doe v Francis* 2 M & R 57, *Doe v Brown*, 7 Ad & El 447, *Hall v Butler*, 10 Ad & El 204, *Carlton v Boucock*, 51 L T 659, *Serjent v Nash*, (1903) 2 K B 304 C A, *Knight v Cox*, 18 C

title in per on ock, 51 strong

Landlord as a benamidar. In cases where the doctrine of estoppel does not come into play, it is open to the tenant-defendant to urge that the plaintiff, as benamidar for the beneficial owner, is not entitled to claim rent from him. *Rahimannessa v Mahadeb* 12 C L J 428. In that case at page 431, Mr Justice Aookherjee said: "The District Judge, as we have already stated, has held

that the plaintiff was a mere benamidar and consequently claim rent from him. This is a judicial decision, but in fact, a series of decisions of this Court in cases of *Don-elle v Kedarnath*, *Cherbutty v Don-elle* 20 W R 17 R 44 and *Kailash Mondal* also, reliance may be placed to

some extent upon the case of *Jaynarain Boss v Kadambini Das* 7 B L R 723. In some of these cases, there are expressions to be found in the judgments to the effect that the doctrine of estoppel recognised in English law should not be adopted in this country. It is not necessary for us to consider, whether this view is not too widely expressed, and whether such a position could be maintained in view of the provisions of section 116 of the Indian Evidence Act. It is sufficient for us to hold that in cases where the doctrine of estoppel does not come into play, it is open to the tenant-defendant to urge that the plaintiff, as benamidar for beneficial owner is not entitled to claim rent from him. We may

... that in the long history of the ... As already ... S.

143 and *Gregory v Deridge*, 3 Bing 471. But in a suit for rent, instituted by the person, in a 116 from rent, somebody else nature *Dogar* 1907; see also *Charan*, 9 Ind Cas 89. But it is executed by

general law, has no
 tant can deny his right
 also *Kuthaperumal v.*
 *I L J 597.

7. A party obtaining possession of those premises, title against the has collected rent *in v Narayan*, 13

M 395

Acceptance of lease under coercion, etc. A person who, under coercion, takes a lease, is not bound by his acceptance, nor is he estopped, by paying rent to the person granting the lease, unless the payee let him into possession. Estoppel would be confined to the case where the lease was given by a Collector or Suraj Bakshi. A lease made to a Collector for a tenure liable to pay revenue on account of an estate, is not a lease, and cannot create an estoppel.

can deny his landlord's title existing at the commencement of the lease, the rule only applies where the tenant has been let into possession. If through ignorance or mistake a tenant has executed a rent note and has been put in possession by the lessor it seems that he can dispute the lessor's title. *All Luxembourg v Dev* 72 Ind Cas 855. A tenant who has executed a lease but

attornment was made by payment of rent. But the onus of proving want of title is on them. *Chengtu Sookor v. Jaheruddin Mondal*, 91 Ind. Cas. 669 = A. I. R. 1926 Cal. 720. Where a tenant being already in possession has made an attornment or acknowledgment of the tenancy, he may show that he did so

5. through ignorance, mistake or the like *Bishen v Fule Huram*, 112 Ind Cas 382

Assignee of landlord : A tenant is not prevented from questioning the title of the alleged assignee of his admitted landlord. *Ranee Tillasurree v Ranee Ashmedh*, 21 W R 101. *Cornish v Scarell*, 8 B & C. 471; *Coleridge v MacKenzie*, 4 M & G 143. The defendant mortgaged in 1895 an unrecognised sub-division of a Narwa but remained in possession of it under a rent note executed in favour of the mortgagee. The mortgagee assigned his rights to the plaintiff. Plaintiff sued defendant in ejectment and the latter pleaded that the mortgage, the lease and the assignment were void. *Held* that the defendant having attorned to plaintiff it was not open to him to contend in the ejectment suit that plaintiff had no right to let out the property on rent. *Darilas v Shamal*, 22 Bom L B 149-58 Ind Cas 595. But in the case of an assignee of the lessor, though he is to all intents and purposes in the same situation as the lessor, and takes the benefit of and is bound by a lease by estoppel, the law is different. *See* *Ind Cas 595* and *Ind Cas 596* that the lessor had no such title as he

7 L. J. O. S. 18, *Juc v Wood*, Cr
M & W 337, 343; *Doe v Wiggins*, 4 Q. B. 367, 375; *Sturgeon v Wingfield* 15
M & W 224; *Cuthbertson v Irving*, 4 H. & N. 742; *Halsbury Vol 13 p 405*

Disclaimer of right to evict. The authorities show that a tenant in India is not precluded by an admission of tenancy from showing that the nature of the tenancy asserted by him to the knowledge of the landlord has been for the

the right to evict
by the tenant to the
of a right in con
is a tenant at will or
e *Fitzan v. Moad*,
the right

16 Ch D 780 A landlord merely be receiving rent cannot preserve his right to other claims continuously derided by the tenant The fact that such assertion adverse character when *disugri v Banaji*, 27 Ployd, 15 W R 233, *Durga Prosad*, 12 B Ngapa, 7 B. 96, 99, *Mamunura v Narayana*, 3 M 44, *Narayana v Mamunabai*, P J. 136; *Santharan v. Periasami*, 13 M 467

Whether sections 116 and 117 are exhaustive Sections 116 and 117 of
part of the analogy of the tenants' estoppel It has however been correctly
doctrines of estoppel by
97) 1 Ch D 440 on appeal
which is not provided for
747 = 3 C L J 629 = 33 C

747-3 C L J 629-53
The principle of the rule in such cases is that where property is taken under an instrument and the taking possession is in accordance with a right which could not have been granted except upon the understanding that the possessor should not

1, there is an
1 20 Ind Cas
1 a dictum in
erty to dispute
Evidence Act
y Statute, Act
her v Small,
116 and 117
applies The
e Act are not

exhaustive in force in British India *Mhaiganta v Himmatt*, 20 C. W. N. 1335-21 S. C. L. J. 103 In decided by this Court that sections 115 to

of the late Chief Justice Sir Richard Garth to which I wish to draw attention is at p 678 There he is reported to have said 'It has been further contended by the Appellants, that ss 115 to 117 contained in Chap VIII of the Evidence Act lay down only rules of estoppel which are now intended to be in force in British India, and that those rules are treated by the Act as rules of evidence; and that which th would in

ing any of sectic administration of the law' I desire to point out that the principle of law which was laid down by Chief Justice Zundal (vide notes under principle, supra) to which I have referred

it is refe- has who den mad poe the defe Dar ..

claiming by him can controvert the landlord's title He cannot put another person in possession

This I believe, down by Bu 768n) This e v Gonne, 2 (1893) 2 Q B v Bradley, 5 (of the arguments

an estoppel except during the term? *Serjt, Byles* answered A tenant is at all times estopped from disputing the title of his landlord and referred to a long line of cases, including *Doe v Smythe* 4 M & B 347 At a later stage of the argument, *Mr Justice Vaughan Williams* repeated the question, 'whether the estoppel does not end with term' *Serjt Byles* answered the estoppel is limited in point of extent; but there is no authority for saying that it is limited in point of time *Wilde C J* then intervened with the following observation "In *Co Litt* 47(6), it is said that 'if a man take a lease for years of his own land by deed indentured, the estoppel doth not continue after the term indeed, for, by the making of the lease, the estoppel doth grow, and consequently, by the end of the lease the estoppel determines. The only qualification I am aware of that has been engrafted upon that rule, is, that if the tenant comes into possession before he dispossessed the landlord pointed out in *Accident* when the tenant had permission in the foundation dispute the title of his existence of the estoppel conditions are present, such notices as

long line of decisions
v *Guru Prosad*, 11
simplified recognised
ugurnath, 7 W R 25,

723 n We have further the weighty opinion of *Sir Subramanya Ayyar C J* expressed in the case of *Muthamayan v Sinna Sama Vayan*, 23 M 526 that

16. the law has not in this respect been altered by the Indian Evidence Act, and that now, denying (see also *Ram Chandra*)

that this view is erroneous and that the law as Indian Evidence Act is an intentional der subject In my opinion, there is no foundation for the contention that the

the continuance of the tenancy, a tenant of an immoveable property or persons claiming through such tenant, cannot be permitted to deny that the landlord of such tenant, at the beginning of such tenancy, had no title to the immoveable property This does not imply that after the expiration of the tenancy the

by a rule of substantive of evidence, not being are not excluded by action does not contain the whole law of estoppel Thus the tenant's estoppel operates even after the termination of the tenancy *Majibar v Isab Surati* 32 C W N 867-A I R 1928 Cal 548.

Licensee of a person in possession There is no distinction, so far as concerns the law of estoppel, between a licensee and a tenant, and a licensee who has obtained possession by aid of the licensee, before he can show that his

Vol 13 p 404 In obtained possession in the garden, and title In delivering case of a person who *Doe d Knight v Lady* up possession to the party coming through him, has a was held in that case, not

that the party claiming as landlady to the tenant was altogether estopped from trying the right, but that the tenant must first restore possession If the defendant here has any right, she might, in the first instance, have brought ejectment, or have entered on Mrs Johnson and dispossessed her But she takes neither course She fraudulently obtains permission to go upon the land, and

holding the land extends also as a servant" even the case of permission, Vol 106 107 had

en to isting aran mere cense under sbury es of

Vol 13, 424 The respondent came upon the land in dispute by the appellant, who caused M T to redeem it from mortgage, after which it was held jointly by the families of M T and the respondent About 15 years

subsequently according to the respondent, the appellant made over the land altogether to him and M. T. The respondent also raised the question of the appellant's title. The burden of proof being entirely on the respondent and no limitation being establish

ndant is proved to be permissive, he is estopped from denying plaintiffs' title under this section *Mah Ill v. Maung*

1. Consequently the licensee is not prevented from asserting that he must not be turned out *Uthadesa v. Ma San Me*, 7 R 617—A. I R 1930 Rang 29

Estoppel between mortgagor and mortgagee Where a mortgagee is put into possession by the mortgagor in pursuance of the contract of mortgage, he is estopped from denying the title of his mortgagor during the continuance of the mortgage. The principle of estoppel between the mortgagor and the mortgagee works in favour of and against both of them. The mortgagor is estopped from denying his own authority to mortgage the property. On the other hand the mortgagee is estopped from denying the authority of the mortgagor to mortgage his property. *Rad As' v. Ma San Me*, 7 R 617—A. I R 1930 Rang 29. 11 O L J 722, see also *Lakshmi Surendra v. Khutundra*, 29 C L J 434, *Kadalan v. Oothinan*, 10 Ind Cas 2. *Jadunandan*, A I R 1925 All 753, *Deb med v. Hanyu*, 35 B 507, *Gulab v. Duran*, 48 C 591 (P C), *Jogini v. Bhutnath*, 31 C 146, *Shamsharan v. Mokkoda*, 15 C W N 703, *Ranjana Saha v. Dhiku Singh*, 10 C L J 264—16 Ind Cas 246; *Kanara Venkata v. Ramaswami*, 10 M 75, *Maha*

is estopped from denying his title as long as he has possession. *Rajnarayan*, I. R. 1925 All 108. the date of the mortgage. death of the mortgagor persons who are his heirs under the Hindu Law did not succeed to his occupancy rights in accordance with the special rules laid down in Act 12 of 1881. *Mahadeo v. Ram Raj*, A I R 1930 All 108

Estoppel by landlord A landlord is estopped from alleging his want of title to the premises (*Trevinn v. Lawrence* 2 Smiths L C (13th Ed) 605), against tenant, though not, it has been held, the invalidity of a lease granted by him in good faith, but without necessary consent. *Canterbury Co v. Cooper*, 73 J P 225, *Phup Ev* 659

117. No acceptor of a bill of exchange shall be permitted to deny that the drawer had authority to draw such bill or to endorse it, nor shall any bailee or licensee be permitted to deny that his bailor or licensor had, at the time when the bailment or license commenced, authority to make such bailment or grant such license.

Explanation. (1).—The acceptor of a bill of exchange may deny that the bill was really drawn by the person by whom it purports to have been drawn

Explanation (2).—If a bailee delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them as against the bailor.

7. *Estoppel*—In cases mentioned in this section an estoppel by agreement. As has been well based on a conventional state of facts that, for that very reason, the parties never in practice come to any express agreement about them at all and the estoppel is nothing but the carrying out of what the parties as honest men must have intended if they thought about the matter at all at the time they made the bargain (*Crabbe's Estoppel*, 12, 21). The parties are deemed to have dealt with one another on the basis of their rights being regulated by a conventional state of facts. The tenant and licensor, the terms that the bill amounts to an undertaking to pay to the order of the drawer and all are instances of estoppel therefore of the estoppel in a transaction in each case." *I Chunder*, 3 C L J 629.

Negotiable Instruments—In the case of the acceptance admits the genuineness of the signature of the drawers to assume that re. *Philips v Im Thurn* L R 1 C P 163. "The object of the law merchant" says *Byles J* in *Suan v North British Australian Co*, 2 H & C 175, "as to bills and notes made or become payable to bearer, is to secure their circulation as money; therefore honest acquisition confers title." So whenever one of the who has enabled such *Ashurst J* in *Lachbarre* is thus led to question that it is incumbent upon the handwriting of his drawer's name into the acceptance of the Bank, 46 the same case it nature of the signature has been used case of a bill paid upon presentment, as to one accepted and afterwards paid." The rule is thus stated by *Stephen* "No acceptor of a bill of exchange is permitted to deny the signature of the drawer, or his capacity to draw, or, if the bill is payable to the order of the drawer, his capacity to endorse the bill though he may deny the fact of authority of the agent principal, though the bill is accepted in bank, the acceptor may not deny the fact that the drawer, endorsed other bills without drawers. If they must be who actually But in India section 1. In really drawn at liberty to d by sections 41 runs s not relieved knew or had the bill."

reason to believe the endorsement to be forged when he accepted the bill."

Section 42 says: "An acceptor of a bill of exchange drawn in a fictitious name S.
 that such name is fictitious,
 an indorse-
 to be made
 lay down
 imptions as
 regards consideration, date, time of acceptance, time of transfer, order of
 endorsement and stamp. This section further authorizes the presumption that
 the holder is a holder in due course. Section 119 provides that the Court shall,
 on proof of the protest presume the fact of dishonour. Section 120 makes
 provision for estoppel against denying original validity of instrument by the
 maker of the promissory note, drawer of a bill of exchange or cheque, and
 acceptor of a bill of exchange. Section 121 makes provision for estoppel against
 denying capacity of payee to endorse. Under section 122, no endorser of a
 negotiable instrument shall, in a suit thereon by a subsequent holder, be
 permitted to deny the signature or capacity to contract of any prior party to the
 instrument. In an action on a promissory note or a bill of exchange against a person
 whose name properly appears
 defendant to show that the sign
 principal, whether the defend
Co v Deuan Chand, 117 Ind 4

Bailor and
 to claim that
Wilson v Ande
 246, *Hunderson*,
 and those with whom pro
 bears a close resemblance
 vide section 116 supra
 the bailment is determ
 paramount *Biddle v*

goods is estopped
Burr Jones § 285,
v Griffin, 10 Bing
 estoppel non la

do not question the general
 rule in *Cheesman v Enall*,
 a connection with wharfs
 possession of property were

there has been no special
 to that of a tenant who,
 estopped from denying
 he is evicted by title
 the same, whether the

acts
Rog
So
 this
 him
 delivered the property to the true owner, who had the right to possession upon
 demand by the latter, even before legal proceedings have been commenced
 Such demand by the true owner is equivalent to eviction by title paramount
Burr Jones § 285. *Stephen* thus states somewhat differently, the general rule
 "No bailee, agent or licensee is permitted to deny that the bailor, principal, or
 licensor, by whom any goods were entrusted to any of them respectively was

THE INDIAN EVIDENCE ACT.

Biddle v Bond, supra by Lord Blackburn, in a considered
 a Judge who knew
 laid down there
 ordinary contract of
 non-delivery of
 goods delivered them
 for an interpreter
 I defend the action
 goods

on behalf of the
 If he takes the latter
 but he must prove it;
 says Lord Blackburn,

that person
 laid down, and it seems to me rightly
 Therefore, I am of opinion that
 on the right and title and by the
 have not named any such person or
 that any person has such a right
 terms that they are not defendants
 for themselves only As between
 no defence Therefore, if we
 plaintiffs and the defendants,
 succeed in the action." *Rogers*
 318 (325) In the same case
 rival claimants to the copper
 proceedings against the rival
 Kathrine
 Robinson v
 of bailment
 this case
 "A bailee
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 So
 what
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 and there has been
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 (at p 233),
 Blackburn J delivering the judgment of the Queen's Bench, said (at p 233),
 "We think that the true ground on which a bailee may set up the *jus tertii* is
 founded is determined by what is equivalent
 It is not enough that the bailee has become
 person We agree in what is said in *Bettley v*
 aware of the nature of
 Read, 4 O R 511 517 that to allow a depository of goods or money, who has
 acknowledge
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 may be entitled to relief under an interpretation
Thorne v Tilbury 3 H & N 531, 537, that a bailee can set up
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See also *Civil & Criminal*
 may, however, equally with a tenant, shew that the time of a
 goods has expired since the bailment *Thorne v Tilbury*, 3 H & N 531 So
 the facts shew that there has been what
Shelbury v Scotsford, Yelv
 and there has been
 the *jus tertii*, if
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 title and by the
 is supported
 to produce
 the goods and
 rections of the
 such delivery"
 Thackerseydas,
 other than the
 delivery of the

17 C W N. 300-310
 bailor, claims goods bailed, he may apply to the Court to stop
 the title to the goods *Contract Act*, § 167
 ed with knowledge that another than the bailor
 the bailee cannot set up the claim of such third

person cannot take the law *Ex parte Davies*, 19 Ch D 86, S. which goods have been taken by title paramount, and, if

good excuse to him against his bailor of *Shelbury v Scotsford*, Yelv 23 in thief and had been forcibly taken away from the bailee by the rightful owner, and it was held that the thief could not maintain an action of trover for the ground that the eviction of the horse of his promise to return it to his by be able to avail himself of such a default. If the bailee knowing of the

adverse claim, has said to his me have a commission, and I have afterwards set up against his bailor the title of the adverse claimant, because he would have acted with his eyes open," and *Lush J* added, "I am of opinion that when a person in such a position, knowing of two adverse claims to goods elects to take part of one of the claimants and to sell the goods as his, he is taken this in the trustee

Licenses of patentee, etc : One who manufactured goods by consent of and of th to it with the c pater

293 The United States Supreme Court in an oft-quoted case said : "Having actually received profits from the sales of the patented machine, which profits

ion of the defendants y an agent or a joint joint owner cannot setting up the illegality s § 285 The analogy *lackburn* 'So long as the lease remains in force, and the tenant has not been evicted from the land, he is estopped from denying the lessor's title to that land, but he is entitled to show that a particular parcel was never comprised in the lease. So a licensee

stranger can show *Le v Adie*, 3 App this rule does not ot acting under it 284, 289), or a iage (*A W*) Ltd) by the licensee of & II 930, *Taylor Crossly v Dixon*, mth, 26 Ch D.

7.

A licensee of a trademark also is estopped, as against his licensor, from questioning the latter's title to the trade mark. *Jagannath v Cresswell*, 40 C 814. In delivering the judgment *Inam J* said: "The first question that I have to consider is whether the defendant can be allowed to deny the plaintiff's title. The contract between the owner of a trade mark and his licensee is like a contract between a landlord and his tenant, and as between landlord and tenant so between licensor and licensee the former's right cannot be questioned by the latter. In *Clarke v Adie*, L R 2 A C 423, which was a case of a patent Lord Blackburn said 'Although a stranger might show that the patent is as bad as any one could wish it the licensee must not show that,' and in the same case Lord Cairns said 'In an earlier case' . . . N S 713. *Hood*

Grover and . . . V C held that the fact of a patent having been found invalid at law in an action between the patentee and a third party, could not be set up against the patentee by his licensee in a suit upon the same patent. The position as the licensee of a patent . . . 19 (154); *Ebrahim v Essa* Abbr 24 M . . . C 214, "In India there is no system of

registration nor is there any provision for a statutory title to a trademark so that the rights of the parties must be determined in accordance with the principles of the English common law." Per *Jenkins C J*, in *British American Tobacco Co Ltd v Mahboob Buksh*, 38 C 110 at p 117, see also *G S H v Messrs Jagannath*, 42 C 262 = 19 C W N 1. When the plaintiffs, the traders of the trade marks and business of a jute burlor, gave a licensee to the defendants, the right to use and authorize others to use exclusively the trade marks and to hold the good will of the business of original jute-burlor and the marks without any interference by the proprietors for a particular period on . . . to repudiate

licensee of a trade mark cannot put an end to the relation of licensee and licensee by repudiation of the other party is a . . . concurrence . . . al o . . . opted . . . will . . . have . . . 503 =

Johustone v Milling, . . . by a person who is not acquire the property been imported by him . . . 39 A 123

Warehouse man A warehouse man who, on receiving an order from the seller of malt to hold on account that he so holds it, cannot set up purchaser that by the usage of trade till it is measured and that before seller became bankrupt. *Stonord* man in possession of goods attorns to the buyer of them, acknowledging that . . . the price or . . . represents . . . and and say . . . d, 6 B & S . . . Watson 2 B & C . . . 1895) 1 Q B 521, . . . stoppel in pairs is . . . ears, 6 A & E . . . H & N 549, and . . . on this principle . . . defendant have

found the-
up = title
v. Demick
7 Bing 339, in which *Tindal G J* stated "the defendant is estopped by his own admissions; for unless they amount to an estoppel, the word 'estoppel' will be blotted from law" The admission in the present case namely, the statement by the defendant that he held the sugar at the plaintiff's order and disposal, is certainly no less strong than in *Gosling v Birnie*; and lastly, in the case of *Knight v Wiffen*, L R 5 Q B 660, in which the principle upon which an estoppel *in pais* arises is again enunciated, and it is again pointed out how it applies" The general rule is that a bailee of goods who has acknowledged that they belong to a
the title of that person *Hanes v*
Bing 337 Where a wharfinger
for certain persons, and transferred
it was held that he could not resist an action
on the ground that they had not been separate
property passed to the person who lodged it
possession, sold a quantity of them to

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CHAPTER IX.

OF WITNESSES

118. All persons shall be competent to testify, unless the

Who may testify Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind

Explanation—A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

Witness must be competent. Incompetency, denotes the legal incapacity to give evidence. In many cases, the testimony of a witness is excluded, not on the ground of incompetency, but on the ground of interest, and (2) incompetency from mental capacity. On the former ground, not only were parties themselves and their husbands and wives excluded, but also all persons who were in *part jure* with either party, or otherwise substantially interested in the proceedings. Successive statutes have abolished this kind of incompetency, leaving the fact of interest in the proceedings to affect credibility.

8. merely. *Coale Gas Lt* 213. The early common law rules of exclusion prevented persons who by reason of their relationship to the parties were not supposed to be competent to the suit. (c) The trend of these exclusions was absent in the same direction as the present rules excluding persons from acting as jurors, thus giving another illustration of the influence of the old jury system. The substantial disappearance of these rules of exclusion may be traced between the years of 1823 and 1853. *McIntosh Ex* § 212.

Infidels and Atheists In England formerly all persons not Christians were excluded from testifying, but at the present time there is no exclusion upon the ground of religious belief, or the lack of it. The theory of the oath has always been that it gave a peculiar sanctity to testimony and that without the oath there was no guarantee of truthfulness. Under these circumstances (and the law recognized no substitute for the oath) it was quite natural that persons who, by reason of their religious belief, felt no force in the oath should have been excluded from testifying. In fact, without a change in the theory it would have been inconsistent and absurd to have allowed a person who refused to take an oath or if taking it, took it only as a matter of form to give his testimony. The broadening of the form of the oath, with the recognition that other religious beliefs besides the belief of the established church might exercise the same influence over the mind, and furnish the same guarantee of truthfulness resulted in the final disappearance of this rule of exclusion. The English Courts have now held that it was held for the English Courts to the effect that a person who refused to take an oath or if taking it, took it only as a matter of form to give his testimony.

testimony of three witnesses whose depositions had been taken under oath administered in accordance with the *Gentoo* religion should be received. There is nothing in the argument of *Lord Chief Justice Willes* at p 40 313. There is nothing in the argument that, as Christianity is the law of England, no other oath is consistent with it and, for the reasons already given, this argument carries no weight with it. Though I have shown that an infidel cannot be excluded from being a witness and though I am of opinion that infidels who believe in a God and future rewards and punishments in his other world may be witnesses yet I am as clearly of opinion that if they do not believe in God or future rewards and punishments they ought not to be admitted as witnesses. The principle of this case was subsequently approved by *Lord Mansfield* in *Atcheson v Eves* 11 1 Cowp 382, and thereafter re-affirmed in other cases *Re v Gilliam* 1 Esp 285, *Edmonds v Rouse*, *Ryan & Moody* 77. It is evident from this that at that time the Courts had found no way to admit the testimony of atheists. In the case of the suit of Quakers so obnoxious to the early English Churchmen whose members refused to take oath, no little difficulty was experienced in bringing them within the rule of competency, so much, in fact that a special statute was required to extend this privilege Stat 7 & 8 William III C 31 allowed Quakers to affirm where other persons were required to take the oath. Later however

statute was required to extend this privilege. But in 1853, the
allowed Quakers to affirm where other persons were required to take the oath.
 Later however or any per on
 Vict C 68)
 1889 (51 & 5)
 ing to being
 sworn, and stating as the ground of such objection that he has no religious belief
 an oath
 he expressly
Reg v Moore

61 L J N C 80, *Nagh v Ali Khan*, 8 T R 411 As regards the question how far it is necessary to follow a statutory form of oath or affirmation, reference may be made to *Salomons v Miller*, 3 Ex 778, *Lancaster v Heaton*, 8 El & Bl 952, *Wolsel v Worthington* 13 Ir Ch R 311, *Camp* *Rul Cas Vol. XI* p 111

Parties to the suit The old rule as to the incompetency of parties to the suit to be witnesses was founded upon the prejudice supposed to exist on account of personal interest in the result At the present day it has been entirely abolished, except in the one case of an accused person upon trial for the crime charged against him

Husband and wife of party. The husband and wife of a party may testify in all cases, but is not compellable to disclose private or confidential conversations and communications (*File s 120 infra*)

Pecuniary interest of a witness Originally persons pecuniarily interested in the suit were not permitted to testify In *Dent v Biser*, 3 T R 27, 36, *Buller J* defined the rule of exclusion on the ground of interest to be whether the witness is to gain or lose by the event of the cause This however, has entirely changed except with respect to a witness to a Will who is also a beneficiary under the Will This has been said to be the sole survivor of the numerous exclusionary rules making witnesses incompetent by reason of relationship or pecuniary interest *Best Ev (Chamberlain sur El)* p 178, note To day a person interested in the outcome of a suit is allowed to testify the same as a disinterested person, but the adverse party may show by cross examination the nature and extent of that interest as affecting the credibility of the witness *Melchey v R* § 216

Sex In spite of the example of the surrounding peoples notably of Scotland there seems never to have been in the law of England any general testimonial disability based on sex *Wigmore* § 517

Scope of the section Under this section all persons are competent to testify unless the Court considers that they are incapable of giving evidence
 its extreme
 same kind
 to him and
 if a person

to testify as a witness is a condition precedent to the administration to him of an oath or affirmation and is a question distinct from that of his credibility when he has been sworn or has affirmed In determining the question of competency the Court under this section has not to enter into enquiries as to witness's religious belief or as to the knowledge of the consequences of falsehood in this world or the next It has to ascertain in the best way it can whether, from the extent of his intellectual capacity and understanding he is able to give a rational account, of what he has seen or heard or done on a particular occasion If a person of tender years or of very advanced age can satisfy these requirements his competency as a witness is established *Queen Empress v Lal Sahai* 11 A 183 According to English law every sane person is a competent witness in both civil and criminal cases except a child who does not understand the nature of an oath *Powell Ev* 197 But in India, where a person is competent to testify according to the provisions of this section but is unable to administer an oath or affirmation, the Court may administer an oath or affirmation to him in such manner as it may think fit and the evidence so given shall be recorded in the proceedings and shall be admissible in evidence

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 even though under the age of seven years may be sworn in a criminal prosecution provided such infant appears on strict examination by the Court to possess sufficient knowledge of the nature and consequences of an oath, in

proceeding so that the appellate Court may feel satisfied as to the capacity of the child to give evidence. *Tulsi v. Emperor*, 110 Ind. Cas. 799-29 Cr. L. J. 767-A I. R. 1928 Lah. 903, see also *Hanuman Sarma v. Emperor*, A. I. R. 1932 Cal. 723-36 C. W. N. 691.

Duty of Court in cases of witnesses of tender years In *Nafar Sheikh v King Emperor*, 18 C W N 147 at p 150 Mr Justice Mookerjee said 'It has further been argued that under section 118 of the Evidence Act, he was bound to ascertain, before those children of tender years were examined as witnesses, whether they had capacity to understand and to give rational answers. Reliance has been placed upon the decision in *Fakir v Emperor*, 11 C W N 51, which, it has been urged, is an authority for the proposition that it is obligatory upon a Judge to test the capacity of a witness of tender years by appropriate questions and to form his opinion as to the competency of such a witness before the actual examination commences. It may be conceded that there are expressions in the judgment in the case mentioned which tend to support this broad statement, but in my opinion the proposition thus widely formulated is not justified by the terms of section 118 of the Indian Evidence Act. That section lays down that all persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions by tender years. The Legislature has not prescribed an inflexible rule of universal application to the effect that before a child of tender years is questioned, the Court must by a preliminary examination test his capacity to understand and to give rational answers and must form an opinion as to the competency of the witness before the actual examination commences. In fact the case of *Queen v Whitehead L R 1 C C R 33* shows that the incompetency of the witness may very well appear in the course of his examination in chief and that the evidence of a witness so found to be incompetent may at any stage be withdrawn from the jury. The true rule on the subject is concisely stated by *Brewer J* in *Heeler v United States*, 159 U S 523 in these terms. The decision of this question (whether the child witness has sufficient intelligence) primarily rests with the trial Judge who sees the proposed witness notices his manner his apparent

trial The question of the capacity of the witness to testify is a question for the Judge himself to decide and not for the jury although after he has decided in favour of the competency of a witness it is for the jury to determine the amount of credit to be given to the statements made by such witness. *Queen v Hossein* 8 W R Cr 60 A Judge can act on the evidence of a child of tender years if he is impressed by its intelligence and demeanour and the

been in fact made. It may turn out in the course of the examination at the trial that the evidence falls so short that the evidence which the judge gives. On his capacity, he suggests capacity of -3 Pat 91-3

Pat L T 649=66 Ind Cas 73=23 Cr L J 233 In the case of a child of tender years produced as a witness the Court should examine it after being satisfied that the child is intellectually sufficiently developed to enable it to understand what it has seen and to afterwards inform the Court thereof *Dhan Ram v Emperor*, 13 A L J 1072, *Ghulam v Emperor*, A I R 1930 Lah 337; *contra*, *Nafar v Emperor*, 41 C 406 The Judge must form his opinion as to the competency of a witness before his actual examination commences *Fahlu v Emperor* 11 C W N 51

Child witness Children of six or even five years of age have been allowed to testify upon the Court being satisfied as to their capacity to give rational testimony *R v Holmes* 2 F & F 788, *R v Perkins* Moody C C 175, *Sheuring v Sheuring*, (1892) Times, Nov 11, P & Baster 1 East P C 413 Where not satisfied, the testimony of a child of seven (*R v Forsyth*, 93 L T 217) or even eight (*P v Williams* 7 C & P 320) has been rejected Where in a murder case a small boy, who was an eye witness to the murder, was not examined in the Sessions Court on the ground of his youth, held that the Sessions Judge especially considering the importance of the witness, ought not to have refrained from examining him unless, under the words of section 118 of the Evidence Act, he considered that the boy was prevented from understanding the question put to him, or from giving rational answers to those questions, by reason of tender years *Queen Empress v Ram Seval* 23 A 90=A W N 1900 211 A child of tender years if a competent witness when such child is intellectually sufficiently developed to understand what it has seen and afterwards to inform the Court about it, this sufficiency may be tested even in examination in chief, understanding is thus the sole test of competency *S Rasul v Emperor*, A I R 1930 Sin 1 129=130 Ind Cas 514, *Nafar Sheikh v Emperor* 41 C 406=18 C W N 147 *Dhan Ram v Emperor*, 38 A 49=13 A L J 1072 Evidence by child should be accepted with caution *Mann v Emperor* A I R 1930 Oudh 400 Where the Court is of opinion that the child upon whom an offence under s 376 I P Co is committed is unable to give relevant information in the matter by reason of tender years and consequent immaturity of judgment, it should not examine the child at all *Ghulam v Emperor*, 31 P L R 612=A I R 1930 Lah 337

Oath A witness who has taken oath in the usual form may be asked whether he thinks such oath binding on his conscience, but not whether he considers any other form more binding *The Queen's Case*, 2 Br & Bing 284 A person who does not believe in the sanctions of religion will not be bound by an oath Thus, where a witness who had been sworn on the *voir dire* stated in answer to the opposing counsel that she did not believe in a future state of rewards and punishments and regarded the obligation of an oath as no higher than that of her word it was held that the Judge had acted properly in rejecting her evidence *Maden v Catanack* 7 H & N 360 It is not enough that a person has a religious belief unless he is able to say what form of oath is binding on his conscience *Nagh v Ali Khan* S T L R 444 Where in a trial for murder the Sessions Judge deliberately abstained from administering an oath or affirmation to the only eye witness to the murder on the ground that she was only 6 or 7

In every case where a witness is applied with the provisions of the Evidence Act, the provisions of which are cases in which it clearly appears that the witness does not understand the moral obligation attaching to an oath or affirmation or the consequence which may arise from giving false evidence of such a person, 6 Pat L J 147= The evidence of a boy v is admissible prescribed form though it should be required before proceeding to ask the witness the question put thereafter the requirement by the

Oath-Act. If the witness of such an oath a witness, these facts may the statement of a witness the witness was not that the omission

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"omission" in section 13, Oaths Act, includes any omission and is not limited to accidental negligent omissions *Empress v Sambhu*, 11 C P L R Cr 16 Whether a child understands the nature of an oath or not, he should when examined as a witness be examined on oath or affirmation *Queen Empress v Sheoratan*, 5 C 242 Oudh, *Queen v Amrita*, 22 W R Cr 1; *Pua v A E*, 2 L B R 322, see also *Queen Empress v Marsu*, 10 A 207 = A W N 1888, 86, contra, *Golla Chinna v Emperor*, 15 Cr L J 161 = 22 Ind Cas 737, *Queen v Scua*, 23 W R Cr 12 = 14 B L R (T. B) 294, *Queen v Ilary*, 22 W R Cr 14 = 14 B L R 51, *Queen v Perumal*, 7 Weir, 827, *Nandalal v Nistaram* 27 C 440

Insanity There was a person lunatic and idiot, in the superstitious is an infliction sent from heaven, at all *Co Litt* 6 (b), *Comyns*, 2 Leach Cr C, 3rd ed 482, *Wig* upon Littleton said "Non compos mentis is of four sorts (1) An idiot, which from birth is by a natural defect of the mind, (2) A man that

(3)

idiot

he

hath not under (4) To be a lunatic, he must be such as he depriveth himself *Cole on Little*, down in 1842 standing may have arisen, nor whether it be temporary and curable, or

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longer
254 = 5 C

as a witness, it no
Till, 2 Den & P C C
then argued that any

always prompting him In the same case it is said that it is disastrous if mere delusions were held to exclude a witness Some of the greatest and wisest of mankind have had a particular delusion This broad and rational to disqualify must be such the specific subject of the In three particular respects intent, in two of them the

the subject to be testified about. If on this subject no aberration appears the person is acceptable, however untrustworthy on other subjects. Thirdly, the mere fact of soundness at the time of trial is no longer sufficient; for derangement or defect at the time of the event to be testified to, may make the person untrustworthy. The other elements, the cry in *Durham v Durham*, of persons of unsound mind, their own knowledge, and their statements have been acted on. But it is evident that statements they must be in question "with caution, and evidence of the facts"

Idiocy. A person incapacitated to such an extent that he is unable to understand the subject in reference to which he is called as a witness is incompetent. Naturally incapacitated persons are not permitted to testify. This rule has always existed and exists to day. The question of whether a person has sufficient capacity to testify is a question of fact for the Judge to decide and he may hear testimony on the point, as well as examine the person himself. *McKelvey's Ev* § 217

Drunkenness. It follows from modern theory of mental derangement that intoxication even habitual, does not in itself incapacitate a person offered as a witness. The question is, in each instance, whether the witness was so bereft of his powers of observation, recollection, or narration, that he is thoroughly untrustworthy as a witness on the subject in hand. First, then, the capacity of observation at the time, of the events to be testified to, may be such as would exclude the witness as unfit for this requisite, and to declare alone to be considered

be so affected that the intelligent and truthful narration may appear to be destroyed temporarily. *Wigmore* § 400. But that a witness was drunk on the occasion to which he is called upon to testify goes to his credibility and the weight of his evidence, and not to his competency to testify. Drunkenness at the time of testifying is not sufficient to disqualify the witness from testifying. It is for the Court to determine from the present conduct and appearance of the witness, whether he is in such a state as to comprehend the obligation of oath, and to testify intelligibly, or whether he should be excluded. *Burr Jones* § 724. To render the witness incompetent it must be shown that, at the time of his examination he was *non compos mentis*, deranged in mind, from some cause the effect of liquor, or any other cause. No drunken man should be permitted to give evidence, but this never can apply to drinking men, even, though incapable of managing their estates. The point of enquiry is the moment of examination; is the witness then offered so besotted in his understanding as to be

unimpaired, to recollect and to state the facts, where they do recollect with clearness and intelligence." So a drunkard is a competent witness, when free from the influence of liquor. *Banks v Goodfellow*, L R 5 Q B 519, R v Hill, 2 Den 254, *Spittle v Walton*, L R 11 Eq 420

Accused whether competent witness. Section 312 (4) of the Criminal Procedure Code provides that no oath shall be administered to the accused. See also sections 5 and 6 of the Indian Oaths Act. As no oath can be administered to an accused person so he can not be examined as a witness. In the Full Bench case of *Emperor v Nga Po Min*, A I R 1932 Rang 190-10 Rang 511 (F B) Page C J said "At common law an accused person cannot be either examined or cross examined (*R v Payne*, 1 C Cr 317) and the reason is that there can be no sanction that such a person will speak the truth. In India an accused person is 'competent to testify' within s 118 Evidence Act (1 of 1872), but such a person is incompetent to be a witness, for an oath cannot be

administered to him, and all witness affirmation before they can lawfully any Court. *In jure non creditor nisi* and 6 Criminal P C (5 of 1898), 406=20 Ind Crs 741. Thus where several accused are tried jointly one accused cannot be sworn and therefore cannot be examined as a witness against other co accused. *Reg v Hanmantha* 1 Bom 610; *Empress v As* 720 *Queen Empress v* Cr L J 342. But an application for transfer of the case under section 526 *Ghulam v Emperor*, 3 Ind 46=23 Cr L J 399, see also *Gallagher v Emperor*, 54 C 52. So in India an accused person is not entitled to give evidence on his own behalf. In England the disqualification of the accused in criminal cases to testify for himself seems not to have been questioned in policy until Bentham's time. But his arguments in this respect took longer for their fruition in legislation than any other of his proposals for abolishing witnesses' incapacities. By the Criminal Evidence Act 1898 (61 & 62 Vict C 36) the disability of the accused to appear as a defence witness has been removed. Before that time, it had become customary in England to allow the accused to make a statement to the jury to tell his story not on oath and not as a witness but in the guise of an address or argument on the testimony and the whole case. *R v Malins* 8 C & P 242 *P v Walling* 8 C & P 243 *R v Dyer* 1 Cox Cr 113 *R v Williams* 1 Cox Cr 363 *A v Shumnum* 15 Cox Cr 122, *R v Millhouse* 15 Cox Cr 622. That the formal grant of competency then was so long withheld was due rather to a hesitation founded on the supposed interest of the accused himself. His failure to use the right of testifying would (it was believed) damage his cause more seriously than if he were able to claim that his silence was enforced by law. But chiefly, his exercise of the right to testify would (it was believed), in subjecting him innoc his or Engl should

Criminal Law Vol I p 412 said. I am convinced by much experience that questioning the accused or the power of giving evidence is a positive assistance and a highly important one to innocent men and I do not see why in the case of the guilty there need be any hardship about it. Similar remarks also occurred in *Lord Alton's* Recollections of Bar and Bench where at p 176 he said. It will be convenient here to refer to the effect of the passing of the Act which enables prisoners to give evidence. I had long been impressed with the absolute necessity of such a measure in the interests of justice for the protection of the

the prosecution may comment upon any evidence given under the Act by a person charged [*R v Gardner* (1899) 1 Q B 150] but he must not comment upon the failure of any such person or of the wife or husband of such person to give evidence. Stat 61 & 62 Vict C 36 s 1(b). But it has been held that the Judge may comment upon such failure. *R v Rholes* (1899) 1 Q B 77, *R v Smith* 84 L J K B 213 31 T L R 617. There are, however many cases in which it would not be expedient or calculated to further the ends of justice so to do. *Kops v The Queen* (1894) A C 653. A person discharged by the police and not brought before the Magistrate is not an accused person. In India the evidence of such a person is admissible although he has been illegally discharged by the police. *Queen Empress v Mona Puna*, 16 B 661.

Counsel engaged in a case. A police officer or advocate conducting a prosecution should never be sworn, unless he is called as a witness, and if so

called, he should be allowed to depose only to those facts which he knows and of which he is, in accordance with the
witness Empress v. Kenlu, 6 P. L. 1
v. Peary, 40 C. 893 Ladd Goudary
182, Chandreshwar v. Bishneswar, 5 P. 777

Miscellaneous Where a witness gives a satisfactory explanation of his presence on the scene the mere fact that a person is a tailor or weaver by itself is hardly any ground for discrediting his evidence. *Emperer v. Ramjan, 1 P. 1932 Lab 12-32 Cr. L. 1130*

119 A witness who is unable to speak may give his evidence

Dumb witness in any other manner in which he can make it intelligible, as by writing or by signs, but such writing must be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence.

Scope At the time when unscientific ideas prevailed concerning mental derangement and defect, the deaf and dumb were so far treated as idiots that they were presumed to be incapable of testifying until the contrary was shown. *Hale, Pl. Cr. L. 34, R. v. Ruston, 1 Leach 3 C. & P. 127, Morrison v. Leonard 3 C. & P. 127* To day this presumption has disappeared. *Wignore § 498* In *People v. McGee 1 Den 21 Jenett J.* said "The woman was of sense sufficient to have interpreted the signs and made them intelligible to her by the signs." See also *Harrod v. Harrod, 1 Key & J. 9* Persons affected with such calamities have been found by the light of modern science, to be much more intelligent in general, and to be susceptible of far higher culture, than was once supposed. Still, when a deaf mute is addressed as a witness, the Court in the exercise of due caution will take care to ascertain before he is examined, that he possesses the capacity of understanding the nature of an oath, and of giving evidence in a satisfactory manner by the use of signs or by writing. *1 Leach 403; R. v. M. v. Hill, 14 M. & W. 100* In a case where a deaf and dumb witness in Court cannot give competent evidence, the Court may appoint a competent witness to write down the answers of the witness. *5 O. C. 246*

witness who is so deaf and dumb that it is impossible to make him understand the questions put in cross examination, is not a competent witness and his evidence, if taken ought to be struck out, and a conviction based solely on his evidence must be quashed. *Tenkattan v. Emperor, 14 Ind. Cas. 655 (1911) 7 A. 395 (F. B.)*

which

are then read to the witness to understand and that he is to be asked where a deaf and dumb witness is unable to happen of the details of certain events, and cannot understand questions or communicate the events that he is attempting to tell about, his testimony cannot be taken. When the witness, by reason of physical injuries to the throat, was unable to speak, the Court was justified in permitting her to nod for yes, and shake her head for no, and to write answers for which the simple affirmative and negative signs were inappropriate. *Burr Jones § 719*

120. In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. In criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness. S.

Parties to civil suit, and their wives or husbands. Husband or wife of person under criminal trial

husband or wife of any party to the suit, shall

be competent witnesses. In criminal proceed-

ings against any person, the husband or wife

of such person, respectively, shall be a com-

petent witness.

Reason of the rule It was a favourite doctrine of common law that husband and wife were one person in the law. Since parties were incompetent to testify in their own behalf it followed that, if the legal identity of husband and wife was conceded they are not competent witnesses for or against each other. *Burr Jones* § 733 Blackstone thus stated this ground of exclusion 'But in trials of any sort, they are not allowed to give evidence for or against each other, partly because it is impossible their testimony should be indifferent, but principally because of the union of the persons, and, therefore if they were admitted to be witnesses for each other they would contradict one maxim of the law *nemo tenetur seipsum accusare*' Black Com 443 see also section 3 of Act XV of 1852 and s 14 of Act II of 1875. But even in England by statutes this incompetency of husband and wife has been gradually removed both in civil cases (see 21 Jac 1 C 10 s 6, the County Courts Act 1846, s 8; the Evidence Amendment Act 1853, s 1 and the Evidence Further Amendment Act, 1869, s 31 and to a large extent in criminal trials by a series of Acts culminating in and superseded by the Criminal Ev Act 1898. *Phip* 7th Ed 437, see also *R v Lord Mayor of London* 16 Q B D 772, *Director of P P v Blady*, (1912) 2 K B 89, 92, *Leach v R* (1912) A C 305. This section does away with this rule of the common law. In India that bar has been removed by this section. (Place of rule as in England) rule of positive law, and

natural justice. *Per Sir*
(25) Cr. *Mr Livingstone*
nce, prepared by him for

the state of Louisiana says "The exclusion of interested testimony having been examined and found to be injurious to the investigation of truth, and its admission to be attended with not be reduced to one of a quantity that has no finds no place in the proposed code, and fruitful sources of uncertainty, expense, delay, and inconvenience in the law. If the search after truth requires that interested witnesses, and even the parties themselves, should be interrogated to discover it, are there any relations in which the offered witness may stand to the parties that exclude his testimony." (1) The code now offered does not contain the exclusion of husband or wife, as with sufficient reason this person tries of course

Civil cases Even before the passing of the Indian Evidence Act, it was held in *Queen v Khyroollah* 6 W R 21 Cr (K B) by the majority of Courts that in India, upon trials in the Mofussil, a wife was competent to give evidence for or against her husband, or for or against any person tried jointly with her husband. This rule has been incorporated in this section. Bastardy proceedings under section 488 Criminal Procedure Code, and civil proceedings within the meaning of section 120 of the Evidence Act, and the defendant thereto may give evidence on his own behalf. *Nur Mahomed v Bismulla Jan*, 16 C 781, see also *In re Tokee v Abdool*, 5 C 500 under section 488 of the

61 provided that on wife's petition for divorce founded on adultery, coupled with cruelty or desertion, both husband and wife are competent and compellable as to cruelty or desertion. Section 2 of Stat 32 & 33 Vict C 63 enacts that parties to an Stat 40 & 41 a civil right or competent and was made

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as the case may be, of the person so charged, to give evidence shall not be made the subject of any comment by the prosecution, (c) The wife or husband of the

the position of an accused), the husband or wife of such person, respectively, shall be competent witness. But the accused is not a competent witness in a criminal case. The complainant or the husband or wife of such complainant is a competent witness in a criminal proceeding, although this section makes no provision for it, because in all criminal cases the crown is always the nominal prosecutor.

Pross 2 new under Divorce Act R section 52 of the Indian Divorce Act and shall be other witness, Bretton, 4 A.

49 (51) Section 52 of the same Act enacts. "On any petition presented by a wife, praying that her marriage may be dissolved by reason of her husband

61 s 6

121. No Judge or Magistrate shall, except upon the special order of some Court to which he is subordinate, be compelled to answer any questions as to his own conduct in Court as such Judge or Magistrate, or as to anything which came to his knowledge in Court as such Judge or Magistrate but he may be examined as to other matters which occurred in his presence whilst he was so acting.

Illustrations.

(a) A, on his trial before the Court of Session, says that a deposition was improperly taken by B, the Magistrate. He cannot be compelled to answer questions as to this, except upon the special order of a superior Court.

(b) A is accused before the Court of Session of having given false evidence before B, a Magistrate. B cannot be asked what A said except upon the special order of the superior Court.

(c) A is accused before the Court of Session of attempting to murder a police-officer whilst on his trial before B, a Sessions Judge. B may be examined as to what occurred.

Principle. A Judge is not bound to leave the bench and testify as to anything. Public policy would authorize his refusal. If the Judges are made

competent witnesses, it would have a tendency
to lower the standard attempt. *Burr Jones* §
764 In *Duke of Buccle* 5 E & I App 429
433, *Cleasby B* said "With respect to those who fill the office of Judge it has
been felt that there are grave of made subject of
cross examination and comme put) in
relation to proceedings before it properly
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Scope of the section. Calling the Judge as a witness is an exceedingly
rare event. Nevertheless, it has sometimes happened that a presiding Judge
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would be passing judicially upon his own case. The last would disorganise the
Other like results may be conceived as
proceedings *Reg v*
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Richell v Justice, K
iving evidence upon
matters which they saw, when sitting as Judges, unless they arrive at such know
ledge by virtue of investigation which they were making as Judges. A Munsiff
should not be called upon to depose to what took place before him in the course
of a trial which he was conducting as a Munsiff. *High Court Proceedings*, 27th
Nov. 1871, 2 Weir 777-6 M H C App 12. The privilege given by this section
is the privilege of the witness & of the Judge of whom the question is asked.
If he waives such privilege, it does not lie in the mouth of any other person to
assert it. A committing Magistrate, who is cited as a witness in a Session
Court cannot be compelled to answer questions as to his own conduct in Court,
except under the special orders of the Court to which he is subordinate. If he
does not object to answer such questions, there is no prohibition to his doing so.
Empress v Chidan, 3 A 573-A W N 1831, 37

Judge, whether competent witness. In arguing a question as to the duty
of the Court not to have rendered a certain judgment, counsel put this case
"Sir, let us put the case that one man kills another in your presence, you
observing it, and another who is not guilty is indicted before you and is found
guilty so as to incur the penalty of death, you ought to reprieve the judgment
against him, for you are knowing to the contrary, and should make further
report to the king, to give him pardon. No more should you give judgment in
this case, before causing those to appear by whose hands the king was paid."
Gorcoigne C J said "Once the king himself asked of me the very case that

him just to you say it,
7 H IV, 41, pl 5
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aving, cited the above
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"A Judge" says Mr Taylor "before whom the cause is tried must conceal any fact within his own knowledge, unless he be first sworn (*R v Anderson*, 7 How St Tr 874, *Hurpurshad v Sheo Dayal*, 3 I A, 259, 286); and consequently witness (*Ross v Bul* .. . may then be sworn [181]. In this

last case, the proper witness, should I because he can hardly misibility of his c
Ross v. Buhler, 2 M

exercise judicial functions may give evidence in a case pending before him when such evidence can and must be submitted to the independent evidence judgment of other persons exercising similar judicial functions sitting with him at the same time. So also a Sessions Judge is a competent witness, and the giving of evidence by him does not preclude him from dealing judicially with the evidence of which his own forms a part. *Queen v Mookla Singh*, 13 W R 60 Cr. In a case in which a Deputy Magistrate took an active part in the capture of parties charged with having been members of an unlawful assembly and where he tried them on that charge, *Phear J* said, "It has been held, which govern the co person is not necessa

an inquiry into or investigation of facts, because he may have been himself a witness of some of the facts which are the subject of the inquiry or investigation, if he does do so he, so far from being under any such obligation as that which the Deputy Magistrate seems to have referred to, is bound to state to the prisoner or other person concerned, or to make known to him so far as he can, what are the facts which he himself observed, to which he himself can bear testimony And, moreover, the prisoner who is being tried by a Judge in this the Judge who, owed as a witness, in our opinion,

Court It is always dangerous for any man in whose right conduct others are concerned to set up and endeavour to carry out a fiction such as this. It is most specially dangerous for a Judge, who is under the grave responsibility which attaches to the office of a Criminal Judge, to attempt anything of the kind. The Deputy Magistrate if he thought it right, as he did, to take upon himself the duty of trying the prisoners in this case, ought to have made no pretence whatever of any sort, he ought to have frankly avowed and openly stated in his Court all the part which he had taken, and the facts which he had observed, and made his own evidence part of the record in the case. The awkwardness of a Criminal Judge being the principal witness in the case which he has to try is no doubt, most apparent, this however, is reason for his declining to try the case, not for his endeavouring to assume an unreal character." *Hutro Chandra Paul and ors, 20 W R 76 Cr*

In *Empress v Donnelly*, 11 C 405 the question arose whether a Magistrate can himself be a witness in which he is the sole Judge of law and fact. In answering the question in the negative *Martini* J said: "As to the second point, whether the conviction is illegal because the Magistrate himself gave evidence, that question seems to me to resolve itself into this: Is a sole Judge of law and fact competent to decide a case in which he has himself given evidence? It has been strongly contended on the part of the Crown that he is so, and that there is no impediment in law to a Judge giving evidence, and then disposing himself of the case by his sole opinion. No instance of this kind has, however, been

found and no authority of any Judge or text writer has been cited in support of such a proposition. The English cases (they are very bad and very old) do not go farther than to establish that a person having to exercise judicial functions may give evidence in a case pending before him when such evidence can and may be given by other persons, exercising similar functions. In *Queens v. Norman* (C 1) a case in England is cited in which even under the circumstances a Judge has been called as a witness in a trial on which he was sitting later than the trial of Lord Stafford. Two cases are cited—*one the case of Queen v. Taragial* and *the other the case of Queen v. Taragial*.

occasion very fully, to the conclusion that he lays down as the result of the English cases. In the absence, therefore, of any authority for the position that a sole Judge of law and fact may give evidence, and then decide a case in which he has been a witness.

If he gives his evidence upon any matter of importance, the party against whom his evidence tells could not venture to test his credibility either by cross

B L R A Cr 15 are conclusive that one who is sitting as a sole Judge is not competent also to be a witness." See also *Queen v. Manikam*, 19 M 263.

Although a Magistrate is not disqualified from dealing with a case judicially merely because in his private capacity he has been a witness in a case, he should not initiate the proceedings, there is no necessity for him to do so. offence and initiated the prosecution, and where he is one of the principal witnesses for the prosecution. *Queen v. Bholanath*, 2 C 23; see also *Sudhama v. Queen*, 22 C 222; *Arish v. Queen Empress*, 20 C 857. In the case of *Mudh* 21 C 167; *Saidar Khan v. Emperor* 21 C 167; *Alimuddin v. Emperor*, 29 C 392=6 C W.

N 300. It is one of the oldest and

to him out of *Balusa*, 22 M 100; *Arish* and *belief* *v. Sheo Dyal*, *Khodes Naram* *v. Emperor* 21 C 167; *Alimuddin v. Emperor*, 29 C 392=6 C W.

50 Ind Cas 301, *Arishore v. Ganesu*, 3 W R 200, *Arishore v. Ganesu* 3 W R 121.

Where a Magistrate, trying a case of riot, made a local inspection of the scene of the alleged offence and was influenced by such inspection in arriving at his verdict, the conviction was set aside. *Arishore v. Ganesu*, 3 W R 200, 725= *Arishore v. Ganesu*, 3 W R 121.

v. Abdul, 21 C 300.

Husband and wife—Old rule of excluding their evidence The principle with the old disability of husband
The record of judicial ratio and
ounds and policy of this privilege

forms one of the most curious and interesting chapters of the law of evidence. It is curious because the variety of ingenuity displayed, in the invention of reasons *ex post facto* for a rule so simple and so long accepted, could hardly have been believed but for the recorded utterances" Wigmore § 2278. The reason of the privilege is thus given by *Buller J* in his trials at *Assizes*, 286. Husband and wife cannot be admitted to be a witness for each other, because contrary to the legal policy of marriage. In *Burley v. Dixie*, *Lee* Cas. to *Harlowe*, 261. *Lord Hardwicke L C J* said: "The reason why the law will not suffer a wife to be a witness for or against her husband is to preserve the peace of families." The following reasons are stated by *Sir William Blackstone* in his commentaries: "If they are admitted to be witnesses for each other they would contradict one maxim of law *nam scilicet promissa causa testis esse debet*, and if against each other, they would contradict

here he said: "The reason is ascribed by *Lord* that they are not to be permitted to testify for or against each other. Most of these reasons" says *Prof. Wigmore* "do not call for particular dissection: their very statement is void of force. "Hard", "hardship", "policy", "peace of families", "absolute necessity", some such words as these are the vehicles says *Mr. Jeremy Bentham* by which the faint spark of reason that exhibits itself is conveyed. These are the leading terms, and these are all you are furnished with, and out of these you are to make an applicable decision and intelligible proposition as you can. [As to the 'policy' of the situation]

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own nature) so many privileges (such as the privilege of the husband and wife) which gave birth to this immoral rule, is to convert that sacred condition into a nursery of crime. The reason now given was not I suspect the original one. Drawn from the principle of utility, though for late and polished times it has been the original of the two persons thus connected. On questions relative to the fountain of all reasoning" IV, C V, Wigmore § 22-8. But this cannot be. The Commissioners on Common Law Procedure, in their second report of 1833 said: "The question how far communications of married persons inter se should be a matter of testimony in Courts of Justice stands on a different ground (from that of compelling one to testify to facts against other) So much

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of such testimony would have a powerful tendency to disturb the peace of families, to promote domestic broils, and to weaken, if not to destroy, that feeling of mutual confidence, which is the most endearing solace of married life Taylor § 909

Scope of the section 17 Vict C 83, which disclose any communication made to her by her husband during the marriage" The protection afforded by this section is greater than that conferred by the English Statute. There only the husband and wife are protected from disclosing any communication made to him to her by his or her marriage partner. But in India, he or she is not permitted to disclose that communication. *Steph Dig Ev* art 110, *Markby Ev* p 93. As according to the rule of interpretation, words importing the masculine gender includes feminine, the word 'he' includes the word 'she' and the word 'him' includes the word 'her'. So this section confers the same privilege on the wife that it confers on the husband. *Markby Ev* p 93, *General Clauses Act* (X of 1897) s 13. The words "compelled to disclose" or 'permitted to disclose' clearly imply that the party concerned is not made or allowed to say or do something by

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to such a case. A document even though it contains a communication from a husband to a wife or *vice versa* in the hands of third persons, is admissible in evidence, for in producing it, there is no compulsion on or permission to the wife or husband to disclose any communication. The section protects the individuals, and not the communication if it can be proved without putting into the box for that purpose the husband or the wife to whom the communication was made. For these reasons we think the exhibit V was rightly received in evidence. A third person who has overheard a conversation between husband and wife while it was going on may testify to it. *Greenl Ev* 15th Ed Vol I p 347, but see *R v Pamerter*, 12 Cox Cr 177. The principle applies quite irrespective of whether either spouse is a party to the cause. Moreover the death or divorce of the other member does not affect the policy of prohibition. Again, the other member may always waive the privilege. *Greenleaf* § 333 (C). A c

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proved by him. *R v Sn*

R v Balrett, 7 C & P

communications or communications, and the question may thus arise whether certain conduct by one spouse in the presence of the other—such as the payment of money or the signing of a note—is to be treated as a communication. *Greenl* Ev § 254

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limited to such matters as have been communicated during marriage. Taylor § 909 A. This section is limited to such matters as have been communicated

"during the marriage"; and, consequently, if a man were to make the most confidential statement to a woman before he married her, and it were afterwards to become of importance in a civil suit to know what that statement was the wife, on being called as a witness, and interrogated with respect to the communication, would as it seems be bound to disclose what she knew of the matter. *Taylor* § 91.

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Parliament, and had married another person, was offered as evidence against her former husband, Lord Altonley held he has created

energy "It never can while the parties remained in the most intimate of relations, shall be broken, whenever, by the misconduct of one party, the relation has been dissolved" *Monroe v Turstleton*, Pea Add Cas 221 explained and confirmed by Lord Ellenborough in *Aregon v Ld Hinnaid*, 6 East, 192, 193. Where there is no 'representative in interest' who can consent, under this section, to the

husband to his wife during even if willing, to disclose such and is not his "representative" The prohibition enacted by in interest for the purpose of the section rests on no technicality that can be waived at will, but is founded on a principle of public policy which no Court is entitled to relax.

91 No statement of an incriminating nature guilt under section 302 I P Code to her husband *Ishanan v Emperor*, 1923 Lah 40 In *Muhamad* 914 Cr = 261 P L R 1914-15 Cr L J 613-25 convicted of murdering her step son on the charge by her to

and the strength of a confession

him alone of the body

is not admissible, as

husband within the meaning of s 122, Evidence Act. The effect of the confession is not admissible under this section. *105 Cr = 14 Cr* stated to injure his and does not

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of the accused as to certain communications between *In re Gopal* at v Crown, 34 P R 1914 Cr = 27 communication made by an arbitrator to whom he had accepted bribe from a Khambatta, A I R 1930 Lah 280

the object of the confession is not admissible under this section. *105 Cr = 14 Cr* stated to injure his and does not

desk drawer," in effect communicates to her not only the words but also the act of placing the package. While his domestic acts are ordinarily not to be treated as communications, nevertheless it is always conceivable that they may by special circumstances be made part of a communication. To formulate a precise test would perhaps be impracticable. It is clear however, that the mere doing of an act by the husband in the wife's presence is not a communication of it by him, for it is done for the sake of the doing not for the sake of the disclosure. There must be something in the way of an invitation of the wife's presence or attention with the object of bringing the act directly to her knowledge. Except in such cases, the privilege cannot cover anything but an utterance of words, spoken or written. *Wigmore* § 2337.

123. No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the Officer at the head of the department concerned, who shall give, or withhold such permission as he thinks fit

Principle On the principle of public policy, the official transactions between the heads of the departments of state and their subordinate officers are in general treated as privileged communications. *Greenleaf* Et § 251. In *Beatson v Shene*, 5 H & N 838, 853, *Pollock*, C B said: "We are of opinion that it cannot be laid down that all public documents, including treaties with foreign powers and all the correspondence that may precede or accompany them,

foreign Affairs in this country, containing matters injurious to the reputation of a foreigner or a British subject, can it be contended that the person referred to would have a right to compel the production of the letter in order to take the opinion of a jury whether the injurious matter was written maliciously or not? We are of opinion that, if the production of a state paper would be injurious to the public service the general public interest must be considered paramount to individual interest of a suitor in a Court of Justice."

Scope of the section This section follows the English law as laid down by the majority of the Court in *Beatson v Shene* 5 H & N 838 instead of the view of *Martin B* in that case and of *Field J* in *Hennessey v Wright*, 21 Q B D 509 and makes the public officer the Judge of whether a communication made to him in official character should or should not be disclosed. So under this section the Judge is bound to accept, without question, the decision of the public officer referred to. This view is confirmed by s 169 which forbids the Judge even to inspect the documents. *Beatson* p 94

service—an enquiry in public, may do

appears to us therefore that the question whether the production of the document would be injurious to the public service, must be determined, not by the Judge, but by the head of the department having the custody of the paper; and if he is in attendance and states that, in his opinion, the production of the document

public interests and not that the documents are confidential or official which alone is no reason for their non production; nor that their production might prejudice the crown's own case or assist the other party which is rather a fiction unless overborne by some plain over-
Henry Greer Robinson v The State of New
 = 1931 A C 701-61 M L J 943 P C; see
 & G 183 In *Poulett v Ati Gen*
 The party in this case ought to
 ing is the fountain and head of justice
 and equity and it can not be presumed that he will be defective in either, and
 it would derogate from the King's honour to imagine that what is equity
 against a common person should not be equity against him" See also *Esquimaux*
v Wilson, (1920) A C 358, 366 But privilege in matters under s 123 should
 not be claimed unnecessarily *Mehtah v Secretary of State*, A I R 1933
 Lah 157

Affairs of state would, no doubt, be held to include any matters of a
 public nature with which the Government is concerned *Gun* Ev. 354. So
 no person will be required to testify with regard to state secrets or as to
 correspondence between Government officials on matters of public business,
 if in the opinion of the head of the department, such disclosure would injuri-
 ously affect the public interest *Best* Ev 537 But any officer having the
 custody of records, not being records of which the production may, on special
 grounds be refused, is bound to produce them on receiving summons to that
 effect 2 Weir 781 Statements made by witnesses in the course of depart-
 mental enquiry into the conduct of
 upon their trial on charges of taking
 under s 123, 124 or 125 of the Evidence
 Act 431-16 Ind Cas 77 Statements made before the Income Tax Collector
 governed by section 123 of the
 Income Tax Act 1917 = 82 M 62 =
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Official records relating to affairs of state The protection of documents

official, which alone is no reason for their non production *Asiatic Petroleum v*
Anglo Persian Oil Co (1916) 1 K B 822-85 L J K B 1075 A libel case by
 a lieutenant colonel, who was engaged in the service of the Government
 Court of enquiry appointed by the
 plaintiff's conduct in the mining
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 v May, 2,
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Home v Bentinck
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 Where the docu-
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 cannot be disclosed
 v *Cobbett* 5 L J P
 international affairs

... Mr. Justice Williams J said "I agree although not perhaps exactly on the same grounds" "State papers, despatches, minutes, or documents of any such description which relate to the carry-

of a public nature and in the possession character as Secretary of State were held in *India Company*, 11 L J Ch 71, corresponde

... A report of an accident made by a railway company to the Ministry of Transport was held protected *Aikin v L & N E Ry Co* (1930) 1 K B 527, so also reports by an Inspector to the Local

... (*All Gen v Nottingham*, 20 Inland Revenue to his superiors by Government Analyst to the

Home office as to post-mortem examination of corpse (*Williams v Star Co*, 72 J P Jo 65); police report under the Irish Crimes Act (*R v McCornack*, Crimes Act Cas 244, *Ashton v Waterford* 42 Ir L T Jo 77) as well as communications between the Director of Public Prosecution and his Assistant (*R v Benson*, 151 C C C Sers Pap 705) are held protected *Phip Ev* 190 Where letters addi-

would not see, those letters s 123, Evidence Act, and nd decide under s 162 r late, A I H 1933

Loh 157 In a prosecution for per- part of these for the pro- cation was that the *Kabulyats* in question on which they were written do not the date of the *Kabulyats* of Stationery, Calcutta depo on his own experience but on in respect of which privi- prepared to let the Court or of the witness was not admissible *Emperor v Joffrel Hossain*, 59 C 1046=36 C W N 514=A I R 1932 Cal 468

Who determines the necessity of secrecy Although the party who relies upon a public document may be prepared to lay before the Court the original or such secondary evidence of it as has been raised by statute to the rank of an original of any public department

of stat urality *Commissioners v Aberde* account to the Court that his opi should be produced in open document shall not be put in department is alone competent to judge whether the disclosure of a document will be injurious to the public interest, he alone is competent to take this objection

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3 depends will furnish to the designing officials too ample opportunities for abusing the privilege. The lawful limits for the privilege are, extensible beyond

law makes the public officer in his official consideration that the public interest to disclose the communication. *Secretary of State v. Saminatha Nadar*, 119 Ind C 718. Where certain statements were made to a station master of a State Railway but there was nothing to show that they were made to him in official confidence, the communications are not protected. *Emperor v. Bhagnath*, A I R 1929 O 115 513-6 O W N 937. In a recent Madras case the Court observed "The question for decision is whether the evidence referred to shall be given or withheld. If the objection is taken by the proper person, the Court will not go behind it." *Secretary of State v. Saminath Nadar*, A I R 1930 Mad 312, see also *Garudachar v. Abbas Khan*, 8 Mys L J 474. But in *Henny Greer Robinson v. The State of South Australia*, 35 C W N 1121 (P C) at p 1126, Lord Blanesburgh after reviewing all the previous cases said "The power of the Court to call for the production of documents for which this privilege is claimed and to determine the validity of the claim for itself was much discussed in argument. The result of the discussion has been, as their Lordships think, to confirm the view of *Griffiths C J* in *Macones Wireless Telegraph Company v. The Commonwealth*, 16 C L R 178, where in effect he concludes that the Court has in these cases always had in reserve the power to refuse the production is sought to the State which in no way out of exercise be carefully guarded so as not to occasion to the State any mischief which the privilege, as *v. Stone*, currently have publicity is the Minister's statement is, *v. Aberdeen*, nevertheless, each case of *Henderson* by judicial pronouncement, by reason of the thing, *Lindley M R* for example, in *Joseph Hargreaves, Ltd* [(1900) 1 Ch 347] was not prepared to set any limit to the power of the Court to call for production of a document for which this privilege is claimed. The propriety of *Field J's* own practice in the matter as described by him in *Hennessy v. Wright*, (21 Q B D 509), has, *pace* the observations upon it of *Isaacs J* in *Griffen's Case* (not been challenged, and hitherto, it has usually been in cases where the state was not itself a party litigant that the difficulty has been suggested whereas in the present case the authority is if any, should a document is found to exist. But to of this judgment of the authorities is, their entitled to prescribe in any particular case the manner in which the claim of privilege shall be made if the claim is to be allowed. It may, in one case, if thus advised accept the unsworn

ments, provided of course, that such power be exercised so as not to destroy this found to exist. But to of this judgment of the authorities is, their entitled to prescribe in any particular case the manner in which the claim of privilege shall be made if the claim is to be allowed. It may, in one case, if thus advised accept the unsworn

statement of a person. It is not a matter of course that a person should be required to make a statement. S.

it ought to appear that the mind of a responsible Minister had been brought to bear on the question of the expediency in the public interest of giving or refusing the information asked for, and Lord Coleridge insisted on an affidavit being produced from the President of the Board of Trade himself. In the present case their Lordships are not required to make upon this subject any

one that has not been expressed inadvisedly or lightly or as a matter of mere departmental routine, but is one put forward with the solemnity necessarily attaching to a sworn statement. Lastly, the privilege the reason for it being what it is, can hardly be asserted in relation to documents the contents of which have already been published."

124. No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure

Principle In *Hennessy v Wright*, L R 21 Q B D 509, 512, *Field J* said "There are two aspects of this question. First, the publication of a state document may involve danger to the nation. If the confidential communications made by servants of the Government or by inferiors to superiors in the Government are liable to be made public in a Court of law, it is thought proper to say 'fiat justitia' and the country in a war be injurious to servants of the Crown. It is of all freedom in their official that."

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stances had made of no matter how since " (1) The official should be de in the course it signifies nothing malicious or criminal conceded is a rally in favour n exoneration, by hypothesis of testimonial n hardship to

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conceded. There ought to be a protection for 'secrets of State' in this narrow sense. But this done, what remains? In only three or four of the precedents has there been even a pretence that the matters actually preserved from disclosure are of such a nature that they should be kept secret. If they are not then that (3) in

the necessity of public disclosure when matters are of public interest. Ordinarily they are not in any community under a system of representative Government and removable with that solidly with the veil of common routine of every intelligent man and every eye can seldom be legitimately closed. It is of partisan politics or personal interest. If the responsibility of officials to explain and to justify their acts is the chief safeguard against oppression and corruption. To concede to them the power to suppress the truth is to concede to them the power to suppress the truth.

to obstruct investigation into facts which might fix him with a libelous
 If ignore § 2378

Scope of the section There is a marked difference between this section and section 123. This section is confined to public officers, though who are such is not defined. Section 123 embraces every one. This section makes the officer himself the judge of the propriety of waiving the privilege. In no case has the Court any authority, if the objection is raised by proper authority. Section 123 is confined to public officers, though it is not so stated. Section 123 is confined to public officers, though it is not so stated. Section 123 is confined to public officers, though it is not so stated.

the Government
 North Et 310 Statements whether oral or written, made by an officer
 summoned to attend before a Military Court of Inquiry are not part of the
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section import no special degree of secrecy and no pledge or direction for maintenance, but include generally, all matters communicated by one officer to another : *Agaraya Pillai v Secretary of State*, 26 Ind Cas 101 (P), the privilege as to the production extends even to those which are confidential.

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When he considers that the public interest would suffer by the disclosure of the document, he may refuse to disclose it. This section follows the English law and makes the officer the judge as to whether or not the disclosure should not be made. *Harmath*

246. An officer's refusal to disclose a document on grounds of public policy is final. It is not competent to the Court to call for and examine the secret archives of the state in order to satisfy itself of their confidential nature. *Lala Tribhuban v Deputy Commr*, 47 Ind Cas 225-5 O L J 2341 but see *Collector of Jaunpur v Jamina* 44 A 360 where the Court observed that it is for the Court to decide whether or not a particular document for which

404 A 246 An officer's refusal to disclose a document on grounds of public policy is final. It is not competent to the Court to call for and examine the secret archives of the state in order to satisfy itself of their confidential nature. *Lala Tribhuban v Deputy Commr*, 47 Ind Cas 225 = 5 O L J 234; but see *Collector of Jaunpur v Jamna* 44 A 360 where the Court observed that it is for the Court to decide whether or not a particular document for which

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dependent upon a party, who knows or must know, the contending parties,
and may have the most serious reasons for a decision in the case.
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In the case of the Judge, you have sacred guarantees; in that of a politician
you have none. External pressure will curb down the politician, whilst you
will behold the Judge more e ung and
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the Judge on the Bench, in instead
of allowing a secretary, or any member of the Government, to silence him, to
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On grounds of public policy, the official
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communications between a
provincial governor and his attorney general on the state of the colony, or the
conduct of its officers (Wyatt v Gore, Holts N P Cas 299), or between
v Maxwell,
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10), and the
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state will

5. 5 P W R Cr 1913=5 Ind Cas 711 The customs superintendent could not claim privilege as to what took place between him and the Emperor, 2 Ruku where the secondary evidence of certain documents had been admitted in the Court.

section can be also not ad- section in correspondence between President to the Government Padmanbhuah v Town 53 It is doubtful whether a Railway station master is a public officer within the meaning of this section Emperor v Bhagwati, Ind Rul (1930) Oudh 174 During a police investigation under s 61 of the Bombay District Police Act K, an Excise Inspector, in reply to enquiries by the police wrote a letter containing what he knew of an alleged offence under s 296 Penal Code Held, that K for the purpose of the case must be considered to be a private person, that he was not a person to whom the communication was made, he was the person by whom it was made and the letter did not fall under s 124 of the Evidence Act Barjora Frameje In re, A I R 1932 Bom 196=34 Bom L R 258

125.* No Magistrate or police-officer† shall be compelled to say whence he got any information as to the commission of any offence, and no Revenue-officer shall be compelled to say whence he got any information as to the commission of any offence against the public revenues.

Explanation.—"Revenue-officer" in this section means any officer employed in or about the business of any branch of the public revenue.

Principle A genuine privilege for communications, on the fundamental principle of privilege, must be recognized for communications made by informers to the Government encouragement can be created only by informant's identity of the Earl C J said 1r 90, ten to discuss the truth a rule which has universally obtained on account of its importance to the public for the detection of crimes that those persons who are the channel by means of which information is given to the Government will be

very unwilling to stop it, but it does not appear to me that there is any necessity for it in this particular case" So it is absolutely essential to the welfare of the state that the names of parties who interfere in situation of this kind should not be divulged; for otherwise, be it from fear, or shame, or the dislike of being publicly mixed up in inquiries of this nature,—few men would choose to assume

* This section was substituted for the original s 125 by the Indian Evidence Act (1872) Amendment Act, 1887 (3 of 1887)

has under s 125 of this Act have 1 in command of military police in of 1887, s 13] and in Bengal (vide

the disagreeable part of giving or receiving -
the consequence would be that many -
Dallas C J, in *Home v. Bentuck*, 2 B
Trial, 32 How. St Tr 102; *R v. O'B*
Briant, 15 L. J. N S Exch 265 These matters are either those which con-
cern the administration of penal justice, or those which concern the administra-
tion of the same, but subject

Scope of the section The law recognizes the duty of every citizen to communicate to the government and to its officers such information as he may have concerning the commission of offences against the laws, and for the purpose of encouraging the performance of that duty without fear of consequences, the Courts have long held that when the Government is immediately concerned, as was the case in the names of persons is when and to whom it is made.

In *Rex v Alers*, 6 Q.B. 780, the Court said that the informant must be a person who has been applied in cases of crime or misdemeanour by the Crown or some other authority, and not a private individual.

In *Gray v Pentland*, 2 Serg & R 23, Home May, 2 Smith J., Burr Jones § 763

he related it to a friend,
another quarter, a majority
to be asked the name of that friend, and they all were of opinion that all those
questions which tend to the discovery of the channels by which the disclosure
was made to the officers of justice were, upon the general principle of the
convenience of public justice, to be suppressed, that all persons in that situation
were protected from the discovery, and that if it was objected to, it was no more
competent for the defendant to ask the witness who the person was that advised
him to make a disclosure, than to ask who the person was to whom he made
the disclosure in consequence of that advice, or to ask any other question
respecting the channel of communication, or all that was done under it. *R v.*
Hardy, 24 How St Tr 808, *Green* Et § 250. It may now be taken as settled
rule that witnesses for the crown in criminal prosecution undertaken by the
Government are privileged from disclosing the channel through which they have
received or communicated information (*R v Watson* 32 St Tr 1, *R v*
Richardson, 3 F & F 693, *A G v Briant*, 15 M & W 169, *Mirles v Beyfus*,
25 Q B D 491) but it has been ruled that a detective cannot refuse on grounds
of public policy to answer a question as to where he was secreted. *Webb v*
Catchlove, 31 L R 159. In *R v Berrard* 1 F & F 210, when objection was
taken to a question put to a witness, whether he had gone to a certain place as
a spy, Lord Campbell, allowed the objection to prevail, on the ground that the
question was not relevant. But if the witness was really called upon to draw
with O'Brien,
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Amrita v King I " " " " " "
 In *Weston* " " " " " "
 will only add a " " " " " "
 does not in exp^{re} " " " " " "
 whence he got " " " " " "
 rule is taken on " " " " " " of the foundation of the rule show that the

Q B D 309) A fortiori if objection is taken, it cannot since the law allows ss" but *Coelburn C J* ordered him to answer the question, which in the particular instance turned out to be material, the information having been supplied by two girls not called; "they could have stated," said the Judge "how it was they had come to know that the bottle was where it was found, and perhaps could have given some clue to the person who put it there" *R v Richardson*, 3 F & F 693 So in England the line between public and private prosecutions not being clearly drawn for this purpose, it is for the Judge to decide whether the information is protected or not *Roscoe Cr T* 181 The English rule was followed in an Indian case before the passing of the Indian Evidence Act *In re Mahesh Chandra*, 13 W R Cr 1 (10) But under this section the rule is applicable both in cases of public and private prosecutions A mere suggestion that the complainant should show that the house raided was not the one referred to the rule embodied in the production Cr L J 47=29

Ind Crs 70

The words "information as to the commission of any offence" in this section, only enacted the rule which, as said by *Eyre C J* in *Hardy's case*, 24 How St Tr 808, has universally obtained, on account of its importance to the public for the detection of crimes, that those persons, who are the channel by means of which the information is necessarily disclosed, should be protected. But having regard to the distinction between a police officer and an officer of the salt department, the latter cannot be considered a Police officer within the meaning of s 123 Evidence Act, and may therefore be compelled to say whence he obtained the information as to the commission of an offence *Reg v Gowla*, Rat Un Cr C 183 So also a superintendent of a police station *Queen Empress v Rana v Emperor*, 16 C W N 431=15 between questions which a witness is not permitted to answer, and questions which he cannot be permitted to answer. The latter class of questions of the former class are in no way refused to answer such questions from his refusal *Mahomed Ali* 277

126. No barrister, attorney, pleader or vakil shall at any time be permitted, unless with his client's Professional communication express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment.

Provided that nothing in this section shall protect from disclosure—

(1) any such communication made in furtherance of any * [illegal] purpose.

* This word in s 126 was substituted for the original word "criminal" by the Indian Evidence Act Amendment Act (18 of 1872), s 10

- (2) any fact observed by any barrister, pleader, attorney S. or vakil, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.

It is immaterial whether the attention of such barrister, * [pleader], attorney or vakil was or was not directed to such fact by or on behalf of his client.

Explanation.—The obligation stated in this section continues after the employment has ceased

Illustrations

(a) A, a client, says to B, an attorney "I have committed forgery and I wish you to defend me"

As the defence of a man known to be guilty is not a criminal purpose, this communication is protected from disclosure

(b) A, a client, says to B, an attorney—"I wish to obtain possession of property by the use of a forged deed on which I request you to sue"

The communication, being made in furtherance of a criminal purpose, is

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Principle . . .
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tion of legal advisers by clients, the apprehension of compulsion or disclosure by
the legal advisers must be removed; and hence the law must prohibit such
disclosure except on the client's consent. *Wigmore § 2291, Philip Ev 170, Per
Mountainey B in Jonesley*
Great Central Railway, (1910)
Anderson v Bank L R 2
meaning of the rule is this
of our law, litigation can only be properly conducted by professional men it is
absolutely necessary that a man in order to prosecute his rights or to defend
himself from an improper claim, should have recourse to the assistance of
professional lawyers, and it being so absolutely necessary, it is equally necessary
to use a vulgar phrase, that he should be able to make a clean breast of it to the
gentleman whom he consults with a view to the prosecution of his claim, or the
substantive . . . he able to
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* This word in s 126 was inserted by the Indian Evidence Act Amendment Act (18 of 1872), s 10.

5. aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting rights and obligations, which form the subject of all judicial proceedings. If such communications were not protected no man in the same learned Judge remarked in another case would dare to consult a professional adviser, with a view to his defence, or to the enforcement of his rights, and no man can safely come into a Court either to obtain redress, or to defend himself. *Bolton v Corporation of Liverpool* 1 My & K 94 95. No privilege can be thus required for any communication which is made for the purpose of committing a criminal or fraudulent act or of aiding no part of the client's interests nor within a legal adviser, were the rule otherwise.

the purpose of illustrating his criminal purpose. *Harris v. The State* 111 Cal. 277. *Russell v Jackson* 9 Hare 392, *Follett v Jefferyes*, 1 Sim N S 317, *R v Cox* 14 Q B D 153, *Williams v Quebrada* (1895) 2 Ch 751, *Bullivant v A G for Victoria* (1901) A C 196, *Ramsbotham v Senior*, (1869) 8 Eq 575n, *In re Postlethwaite*, (1897) 35 Ch D 723.

Scope of the section
reason of public policy

or attorney of the party cannot be compelled to disclose communications made to him or letters or entries. *Greenough v Gaskell* 1 My & K 101. In this case the plaintiff was assisted by consultation, with Lord Lyndhurst Tindal C J and Parke J, 4 B & Ad 876, and it is mentioned in one in which all the authorities have been reviewed in 2 M & W 100 per Lord Abinger and is cited in *Russell v Jackson*, 15 Jur 1117. In settling the law on the subject *Green v Green* 1 Ex 237, see also *Berd v Lovelace* 19 Eliz in Chancery Cary's R 88 *Austen v Vesey* Cary's R 89, *Kelway v Kelway* Cary's R 127 *Dennis v Codrington*, Cary's R 143 *Wilson v Russell* 4 T R 753, *R v Withers* 2 Camp 578, *Wilson v Troup*, 7 Johns Ch 20, *Mills v Odd*, 6 C & P 728 *R v Shaw* 6 C & P 372. 'This protection,' says Lord Chancellor Brougham 'is not qualified by any reference to proceedings pending or in contemplation. If, touching matters that come within the ordinary scope of professional employment, they receive a communication in their professional capacity either from a client or on his account and for his benefit in the transaction of his business or which amounts to the same thing if he is his behalf matters, the client they are to hold them and

it is not to be confined to disclose the information, or produce the papers in any Court of law or equity, either as a party or as a witness. *Greenough v Gaskell*, 1 My & K 101. In *Pearce v Pearce*, 1 Deg & Sm 25. *Knight Bruce v Knight* 1 My & K 101.

it is nevertheless an obstacle to the investigation of truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principles. *Wigmore* § 291, *Broad v Pitt* 1 M & M 283-3 C & P 518, *Foster v Hall* 12 Pick. Mass 89 97. Communications made by a client to his pleader expressly for the purpose of incorporation in the pleadings are not confidential and are not privileged. *Bibi Sona v Mir Abdul*, 6 S L R 1. Under this section a pleader cannot disclose the contents of a document

reat price to pay for the privilege remains an its obstruction in plain e of a general policy, but it is nonetheless an obstacle to the investigation of truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principles. *Wigmore* § 291, *Broad v Pitt* 1 M & M 283-3 C & P 518, *Foster v Hall* 12 Pick. Mass 89 97. Communications made by a client to his pleader expressly for the purpose of incorporation in the pleadings are not confidential and are not privileged. *Bibi Sona v Mir Abdul*, 6 S L R 1. Under this section a pleader cannot disclose the contents of a document

necessary *Barkanta v Bhailal*, 1930 Ind Rul. Bom 89 An executor of a client cannot be presumed to give his consent to the pleader stating the contents of it from the mere fact that the executor, had deposited to its contents as a witness *Ibid* S.

Privilege is irrespective of litigation being original theory of privilege the confidences when given for the purpose of securing aid in action in which they were given It is obvious that the privilege would be wholly inoperative if a suit, gains. Williams for the so; on it made are not incident) with was in death,

the present law proceed Greeno Ald E B 4, L attorney 1 Deg & 12m 12 Knight Bruce V C said "I suppose *Cromack v Henthcote* to be now universally acceded to, as far as any discovery by the solicitor or counsel is concerned, or dispute is immaterial" Cas 333-26 Bom L R 887, M v Corrie, 8 Q B D 356

Advice sought for miscellaneous non legal purpose A lawyer is sometimes employed without reference to his knowledge and discretion in the law—as where he is charged with finding a profitable investment for trust funds In such cases, where he is charged with finding a profitable investment for trust funds, he is not to be held responsible for the result. *Madd* 47; *Brown* W 98, *Doe v W* it is not easy to find advice

Where the general purpose concerns legal rights and obligations a particular incidental transaction would receive protection though in itself it were merely commercial in nature—as where the financial condition of a shareholder is discussed, in the course of a proceeding to enforce a claim against a corporation. But apart from such cases, the most that can be said by way of generalization, is that a matter committed to a professional legal adviser is *prima facie* so committed for the sake of the legal advice which may be more or less desirable for some aspect of the matter, and is therefore within the privilege, unless it clearly appears to be lacking in aspects requiring legal advice *Vigmore* § 2296

Barrister, Attorney, pleader 21 of Act II of 1855, where the word "pleader" has been added. Under that Act it was held *Chandra Kant*, 9 W R Cr Lell Now the question is whether the word "pleader" includes Mooktears. In construing this section the Court in *Abbas Peela v Queen Empress*, 2 C W N 484 (488)—25 G 766, observed "The pleader for the Appellants contended that the statements made by the accused to the Mukteer *Kedar Nath* were privileged, and that without the consent of the accused, *Kedarnath* could not be called as a witness. The Court held that the barrister is placed in Act I

6. not, without the consent of his client, disclose any communication made by the client to him in the course of his professional employment or any advice given by him professionally to his client, the knowledge of which he shall have

'express' before the word 'consent' which makes it specially stringent in favor of the privilege. Now, there is no suggestion in this case that the accused expressly consented to Kedar disclosing in Court the statement or statements made to him by the accused inasmuch as he was a Muktear and that consequently the statement and we have been referred to a case of the *Queen v Chandia Kant Chakrabarti*

1 B L R A C 8, which proceeded upon Act II of 1855. As we have already pointed out, section 24 of the old Act is different from the section in the present Act. The Procedure Codes, Act XXV of 1861 and Act X of 1872 did not contain any definition of the term "pleader." Act X of 1882 for the first time defines the word as follows—"Pleader", used with reference to any proceedings in any Court, means a pleader authorized under any law for the time being in force to practice in such Court, and includes (1) an advocate, a vakil and an

any muktear or other person in such proceeding. The result who appear in a Court in any a purpose of pleading in any particular case, come within the category of pleaders; and section 126, if we take it, be construed as applying to all persons who come within the category of pleaders as defined in the Criminal Procedure Code. It would indeed be a strange anomaly if muktears who act in certain Courts as pleaders were the Indian Evidence Act and were not regarded as privileged cognized position as barristers.

We may say that the provision which was contained in Act II of 1855 and which was subsequently amplified by section 126 of the present Evidence Act embodies one of the wise principles of the English law, and that although in England there is no distinction as to the conditions of all persons who plead. Now by the amendment

of section 24 (1) by Act XXV of 1861, "pleader" used with reference to any proceeding in any Court, means a pleader, or a muktear authorized under any law for the time being in force to practice in such Court, and includes (1) an advocate, a vakil and an attorney of a High Court so authorized, and (2) any person appointed with the permission of the Court to act in such proceeding. Now the word "pleader" includes not only muktear, but also an advocate, with the permission of the Court.

In interpreting the Indian Evidence Act which was placed in the Statute Book as early as in the year 1872. The question is whether the communication between the accused and the muktear is privileged. If we are to accept the interpretation of the Empress in *Empress v. Hume*, the reason given by the Privy Council, in holding that the communication is not privileged, is that the word "attorney" in the Act is meant, and not "advocate," and that the word "attorney" follows in their proper order after vakils. There is, therefore, by law no privilege as to communications between muktears and their principals, and the witness testimony ought to have been received and laid before the jury. "The reasons given for this decision seem equally to apply to the language of the present section." Woodroffe

proper order after vakils. There is, therefore, by law no privilege as to communications between muktears and their principals, and the witness testimony ought to have been received and laid before the jury. "The reasons given for this decision seem equally to apply to the language of the present section." Woodroffe

Evidence Act, 8th Ed p 901 But on principle such communications should be excluded and it is anomalous that provisions of this section apply to inter-

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are recognized by the Courts and, though not mentioned in the section, they would probably obtain the same protection as the persons mentioned " *Mark*
Ev p 96

According to English law, the privilege attaching to confidential profes-

sional disclosures is strictly confined to the

protect those made

Wheler v Le M

but see *R v Giff*

Duchess of King

agents (*Mosely v*

Webb v Smith, 1 C & P 337) and friends (*Wheler v Le Marchant*, 17 Ch D

675), *Phil* Et 170 There is no ground for encouraging the relation of client

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Hecker v Le Marchant, 17 Ch D

675), *Phil* Et 170 There is no ground for encouraging the relation of client

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Wigmore § 2302.

Shall at any time be permitted, etc In every case the privilege is the

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15 Q B D 114 The legal adviser is not competent to waive the privilege

R v Leveson, 11 Cox 152, *Wilson v Rastall*, 4 T R 758, *Lyell v Kennedy*,

27 Ch D 1, *Kay v Poorun Chand*, 4 B 631 But it is as client and not as

party to a cause, that he is entitled, for the reason of the privilege applies to

all clients as such, whether or not they are parties when the disclosure is sought

from them Hence, the privilege equally forbids disclosure by the attorney

of a client not in any way concerned in the cause *Wilson v Rastall* 4 T R

759, *R v Withers*, 2 Camp 578 Conversely, when the client is not a party

then on general principles the party cannot invoke the privilege *Merile v*

Moore, 2 C & P 275, *Wigmore* § 2321 The client may claim the benefit of the

rule, although no fee has been paid, or although there has been no formal

retainer The privilege has been recognized even in cases where the attorney did

not consider that he was

to show that the relation

§ 749 But a waiver

debars him from insisting

And subject to such waiver, when once communications or statements are

privileged they always remain so (*Pearce v Foster*, 15 Q B D 114, *Bullock v*

Carry, 3 Q B D 356, *Haslam Foundry etc v Hall*, (1857) 3 T L R 776), as

the privilege is not destroyed by death but may be claimed by the personal

representatives of the client who was entitled to it *Bullivant v G for Victoria*

(1901) A C 196, *Wills* Ev 2nd Ed p 285 But although the rule "once

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obtained a copy of the privileged document or has perused its

contents, he is at liberty to give secondary evidence of them, if due notice to

ails to this extent that a document

waiver, this does not affect the

matters to which the privileged

quering production has at some

26. produce the original has been given. *Will: Ev 2nd Ed 285*; see also *Mint v Morgan*, 8 Ch 361, *Lloyd v Mostyn*, 10 M & W. 478, 481, 482, *Calcraft v Guest*, (1898) 1 Q B 759.

Anytime The word "anytime" in this section is significant. When a communication is once privileged it is "always privileged." Per *Cockburn C J* in *Bullock v Carry*, 3 Q B D 356, Per *Landley L J* in *Calcraft v Guest*, (1898) 1 Q B 761. The privilege continues for the purpose of future litigation change of solicitors, or that the
 . . . *Clinton*, 19 Ves 268), or the
 . . . *v. Broun*, 7 Hare, 79), or the
 . . . *C 196, Pouell Ev 233*. The purpose of the privilege to secure, it, when the relation ended, or it could be compelled to disclose the which the disclosure might not

be used to the detriment of the client or his estate. *Wigmore § 2323, Pearce v Foster*, L R 15 Q B D 114, 118, *An Attorney, In re* 84 Ind Cas 353-A, 1 R 1925 Bom 1 (F B), *Wilson v Rostall*, (1792) 4 T R 759, *Parker v Yates*, 12 Moo P C 520, *Explanation to the section*

Express consent The privilege is designed to secure the client's confidence in the secrecy of his communication; hence, the privilege is not violated by his own will permits to be made is always been recognized that a waiver
 . . . *al*, 21 How St Tr 1, 341, *Merle v Moore*, to the client and not to the attorney

But such waiver can be express or by implication. As regards waiver by implication there is some conflict of decisions. *Woldram v Ward*, Style 449, *Mackenzie v Yeo*, 2 Curt Eccl 866, 876. In India the matter is set at rest by use of the words "client's express conduct." The question in this connection may well arise whether there can be a waiver by a deceased client's representatives. That an executor or administrator may exercise authority over all the interests of the estate left by the client, and yet may not incidentally have the right, in interest of that estate to waive the privilege concerning confidential communications affecting it, would seem too inconsistent to be maintained under any system of law. It is generally agreed that in testamentary testis the privilege is divisible, and may be waived by the executor the legatee. *Wigmore § 2329, Doe*, 9 Hare 387, 392, *Greenlaw v King*, in this section includes "representatives" whether the executor of a client can

waive this privilege in respect of a will where there are various beneficiaries having conflicting interests under the Will. *Barkanta v. Bharial*, 1930 Ind Rul Bom 88

The consent required by this section should be given on each occasion when a communication of the kind described is sought to be made admissible in evidence. A consent given to the disclosure of some privileged matters in a civil suit is not sufficient authority for the disclosure of the same matters in a criminal case arising out of the suit. *Queen Empress v Gulshan, A W N* 1890, 172. A failure on the part of a client to claim privilege where he is under "consent" given by him to his otherwise privileged holder. Sind 47. The statement person without the consent ery improper on the part thout his client's consent.

purpose of his on law that an or on behalf s professional nications were t 1 Myle & ary 69; Burr

Jones 748 This privilege protects from disclosure two classes of communications (i) confidential communications which have passed at any time between the party or witness and his legal adviser in his professional capacity for the purpose of the former obtaining legal advice for the protection of his interests, information procured in pursuance of such communications for the same purpose and notes and other records of such communications and information made for the same object, (ii) similar communications, information, notes and records, whether commenced or only to counsel or solicitor, cases to be tried on the client's behalf *Halls*

Ev 2nd Ed 276, *Greenough v Gaskell* 1 My & K 98, *Minet v Morgan*, 8 Ch 361 *Anderson v Bank of British Columbia*, 2 Ch D 644 *Wheeler v Le Marchant*, 17 Ch D 675, *Sontpuort etc Co v Quicl* 3 Q B D 315 'If the protection was confined to proceedings begun' says Lord Chancellor Brougham in *Greenough v Gaskell*, 1 Myl & K 98, 102, 'or in contemplation then every communication would be unprotected which a party makes with a view to his although at the time not allowed to extend over such client if it only included communications more or less connected with judicial proceedings, for a person often times requires the aid of professional advice upon the subject of his rights and liabilities with no reference to any particular litigation and without any other reference to litigation generally than all human affairs have in so far as every transaction may by possibility become the subject of judicial inquiry. The communications may be either oral or written *Pearce v Foster*, 15 Q B D 114 A communication with a solicitor for the purpose of obtaining legal advice is protected though it relates to a dealing which is not the subject of litigation, provided it be a communication made to the solicitor in that character and for that purpose' *See Jessel M R in Wheeler v Le Marchant*, 17 Ch D 682, *Minet v Morgan*, L R 8 Ch 361 Absence of litigation or prospect thereof at the time the confidential communications are made is no excuse for disclosure *An Attorney, In re* 84 Ind Cas 353 = A 1 R 1925 Bom 1 (F B) It is misconduct from consulting in his case as the opposite party

the fact that there was no definite agreement by the first party makes no difference *Maung Maya v Sun Singh* U B R 1897—1901 Vol II 368 On general before a party nature draft prepared by a muktear of some statements made by the complainant which with some alterations were meant to be incorporated in a petition of complaint to be presented to the Court is a privileged document *Mayan v Emperor* 37 C W N 68

By or on behalf of his client Neither client nor solicitor need act personally each other in order that the privilege

may or of D 61 M R said He may employ a third person to write the letter, or he may send the letter through a messenger or he may give a verbal message to a messenger In the second case the same learned Judge also observed The actual communication to the solicitor by the client is of course protected and it is equally protected whether it is made by the client in person or is made to the solicitor in person or to a clerk or subordinate of the solicitor who acts in his place the solicitor or his protectee, with a view to *re v Lucette* *re v Hoffman*, Mc N & G

627, 639, *Glyn v Gaulfield*, 3 Mac N. & G 463, 473, *Carpmael v Poole* 9 Beav 16, *Ford v Tennant*, 32 Beav 162, 168, *Goodall v Little*, 1 Sim N S 155, 163, *Steel v Stuart*, 1 Phil Ch 471, 475

Contents or condition of any document with which he has become

of a pre existing document of the matters voluntary, in the language 33, 35), to perceive a fact to counsel and a deed or other written communication of this sort is not

instrument

confidential it is within the privilege, and the testimony of the attorney on the stand cannot be required *Wigmore* § 2308; see also *Bulstrode v Felchmere* 1 Freem Ch 5, *Anon*, 5kin 404; *Bottomly v Osborne*, Perke Add Ch 99, 101 *R v Upper Boddington* 8 Dowl & R 726; *Bale v Kinsey*, 1 Cr M & R 35 *Masston v Dounes* 6 C & P 331, *Heathley v Williams*, 1 M & W 523, *Doe v Watkins*, 3 Bing N C 421; *Herring v Clobery*, 1 Phil Ch 91, *Hibbert v Knight*, 9 Exch 11 *Davies v Waters*, 9 M & W 608, 612 A solicitor is not bound to disclose the nature or contents of the mere statement

of, a of the solicitor that he receives a communication enough to protect it *Volant v Soyer*, not be such as passed directly between

of such a nature as the purpose of being legal advisers, then

Lishnu v New York, a Will in the course and cannot be examined in a subsequent case *Basil*, 31 Bom L R 1046—

the nature or contents of the mere statement of a professionally qualified person may be submitted to a document produced with employment be *Bukantz*

Relevancy or necessity of the communication The Courts have not always used consistent language in answering the question whether the privilege is limited in some way to communications necessary or material or relevant to some purpose of the consultation In *Gillard v Bates*, 6 M & W 547 the Court observed "The test is, whether the communication is necessary for the purpose of carrying on the proceedings in which the attorney was employed" The test laid down in *Cobden v Kennel*, 4 T R 431, is that the Court should see "whether the communications were made by the client to his attorney in

7 How St Tr 1229 *Boules L C B* 111

in protecting secrets disclosed by the client to his attorney to be, as has been said, in favour of the client, and principally for his service, and that the attorney is in loco of the client, and therefore his trustee, does it not follow from thence, that everything said by a client to his attorney falls under the same reason? I own I think not, because there is not the same necessity upon the client to trust him in one case as in the other, and of this the Court

I see any im-

an attorney or the client talks to him at large as a friend,

think the Court is not under the same obligations to guard such secrets, though in the breast of an attorney" In the same case *Monteney B* added If this original principle be kept constantly in view, I think it cannot be difficult to see any other which may arise upon this

either is, or by the party concerned can the attorney

the attorney

not, nor can

shall invariably keep secrets possibly by any man living be supposed to be necessary for that purpose, that the attorney is at liberty, and in many cases—as particularly, I think, in the present case—the attorney ought to disclose It is thus further elucidated by *Douson B* "Nothing that came properly to the knowledge of the attorney in defence of his client's cause ought to be revealed I will suppose an unknowing

man to have twenty deeds by him, and he delivers them all to his attorney to see which were relative to suit he looks them over finds not half of them applicable to close the matter necessary, and I what came to this man's and in the next place that the client could not think it necessary. It is therefore, not whether the fact or the statement is actually necessary or material or relevant to the subject of the consultation, but whether the statement is material as a fact for the purpose of the client to obtain advice on that subject. *Ignore* § 2310

Communication must be confidential. The moment confidence ceases, as Lord Eldon in *Privilege cases* *Jarkhurst v Jouten* 194 216 *Greenough v Gaskell* 1 Myl & K 98 104 letters in order to be privileged must be professional communications of a confidential character for the purpose of getting legal advice. *Gardner v Innes*, L R Exch D 49 53, *Oshes v Wood*, (1891) P 237 246. The privilege assumes of course, that the communications are made with the intention of confidentiality. *Ignore* § 2311. The law in India on this point is practically the same as in England, and that in interpreting section 126 of the Evidence Act a Court may rightly refer to English cases, as shown by *Hestrop C J* and *Sargent J* in the case of *Munon Haji Harun v Maute Abdul Kasim* 3 H 91 in which Chief Justice Sir M Hestrop said 'Communications to be protected by that section (126) of the Evidence Act must we think be confidential. The word 'disclose' shows that common sense seems to require that communications must be confidential or private. Section 126 of the Evidence Act must be of a confidential nature. Judges in the course of their duties exactly the principle follows. L R 5 Ch 703, *Daniell v Tanner* 16 Q L 9 App Cas 81 R v *Roberts* 12 C 265. In *Dwyer v*

The privilege does not extend to matters of craft which the attorney knows by any other means than confidential communications with his client, though if he had not been employed as attorney he probably would not have known them. The case is *Tanner*, 16 Q B D 1. The name of the client is *Mohan Singh* under

§ 126 is of a very limited character. It protects only such communications as are made to the legal adviser in confidence in the course and for the purpose of his employment. And if the communication is not made in confidence then the communication is in no sense privileged. *Bhagwan v Deoram* A I R 1933 Sind 47. Communications made to legal advisers in order to be protected by this section must be confidential. A communication made to a pleader in order that it might be communicated to the Court as one of the statements in a plaint and in order that a decree might be obtained is not such a communication but on the contrary is one made expressly for the purpose of disclosure and express consent to the disclosure was therefore actually given by client. *Abdul Hussein v Dibi Sona Dera* 4 S L H 50.

Communication distinguished from acts clients conduct. Appearance Abode etc. The question is does the privilege cover only that knowledge of the client's utterances or also that which is given rise to a communication. It is sometimes discussed as if the word communications was synonymous with utterances of words, that is, who favour it. The largest answer repudiates the limits of the word communications as if it included no more than utterances voluntarily disclosed and without any utterance of the point of view of the alleged knowledge of the attorney.

attorney is restricted to that which he obtains by the sense of hearing only, or includes also that which he learns by seeing; and this mode of statement corresponds more closely to the distinction between utterances and acts of the client *Wigmore* § 2306 In *Robson v Kemp*, 11 Esp 32, 55 Lord Ellenborough L C J said "The act (of destroying a power of confidence and communication as an attorney character One sense is as privileged as privileged as to what he hears, but not to what he sees, where the knowledge

But in *gham* said corrector s t, something o a certain y other man y *v. Foster*, 1 11 & 12 100, *Donoghue v Stevenson*, A legal adviser may give evidence of a fact respect to matter which "Buller J in his over a fact of his own without being counsel or produced in the case, he shall be examined to the true time of execution, so, if the question were about an erasure in a deed or a Will, he might be examined as to the question whether he had ever seen such deed or Will in other plight for that is a fact of or to be permitted to discover any confession such heard" "There is marked contrast the statement of Lord Ellenborough in *Martin*, in *Brown v Foster*, can they be them consistent with Mr Justice Bronson's distinction between a communication and an act? The truth is that each is right, under some circumstances, and all are harmonious, when the proper allowance is made Looking back at the reason of the privilege it is seen to secure the client's freedom of mind in committing his affairs to the attorney's knowledge It is designed to influence him when he might be hesitating between the positive action of disclosure and the inaction of secrecy There is, therefore, by hypothesis, always some voluntary act of dis

otherwise have existed in hand, then, those data event, but mere observation as the colour of his hat known by such acts without any purpose of as his adviser—such as in the roll of bills from the communications of *gham* and Mr Justice would have been equally cognizant On the other hand almost any act, done by the client in the sight of the attorney and, during the consultation, may conceivably be done by the

whether, h The torney's t token cy, and e comes, that n that is, atent—, en case, s to be s, which entially committed to the attorney, and thus be not privileged Obviously no fixed form of rule can be stated for the present application of the principle In the

ordinary case, it is only the expressed communications of the client that will be privileged. *Higmore* § 2306 For the purposes of section 126 of the Evidence Act, it is immaterial whether the communication which is sought to be protected was verbal that is to say, by word of mouth or by demonstration. In a suit for the revocation of a patent in which the question for decision was the formation and process of working of a stove owned and used by the defendant the plaintiff tendered in evidence a vakil who had been employed by the defendant in some previous proceedings and had in the course and for the purpose of his employment, visited the defendant's premises at the latter's invitation, in order to make himself acquainted with the working of the stove. Held that the knowledge acquired by the vakil as to the formation and process of working of the stove amounted to a communication made to him by his client in the course and for the purpose of his employment and that therefore, his evidence was inadmissible under section 126 of the Evidence Act. *Gopi Lal v Lakhpat Lal*, 48 Ind Cas 603=16 A L J 987

No adverse reference from claims of Privilege If a client party claims the privilege no inference should be drawn against him as to the unfavourable facts. *Per Lord Chelmsford in Wentworth v Lloyd*, 11 *Higmore* § 2322, *Weston v Leary Mohan*, 20 C W N 17 P C Whatever the drawing of such it is this very dis

Judge to determine the privilege The claim of privilege being made the trial Judge is to determine. This follows from the usual of no give to the party's oath in answering a bill of discovery. *Higmore* § 2306 Ordinarily an attorney's statement that a document is privileged is sufficient. *Volant v Soyer*, 13 C B 281 But in *Lyell v Kennedy* L R 27 Ch D 1 21, *Colton L J* said The Court must be satisfied clearly satisfied, either from admissions or from other documents that the oath of the defendant by which he claims his protection cannot be really available for the purpose for which it is put forward. *Higmore* § 2323

Third person over hearing The law provides subjective freedom from client by assuring him of exception from its process of disclosure against himself or the attorney or their agents of communication. This much but not a whit more is necessary for the maintenance of secrecy of communication. Since the privilege is a derogation from the public interest it would be improper to extend its prohibition to third persons who obtain knowledge of the communication. One who overhears the communication whether with or without the client's knowledge is not within the protection of the privilege. The same rule ought to apply to one who surreptitiously reads or obtains possession of a document in original or copy. *Higmore* § 2326

Presence of third person If a third person is present and occupies more than a passive position in the communication, the privilege is lost. *Bhagwati v Deviam* A I R 1933 Sind 47

Joint interest The privilege attaches to communications between persons having a joint interest with the communication. *See* *q* as between partners. *Wilson* 59 L J 813 directors and shareholders. *Woodhouse v H* 30 T L R 59, *Per Mayon* *trustee and cestus qui trust* (*Falbot v Marshfield* 2 Dr & S 549 *Per Mayon* 22 Ch D 609, *Re Portlethwaite* 3 Ch D 722), even though the party receiving the communication has paid for the communication (*Bacon v Bacon* 31 L T 349), lessor and lessee as to production of the lease (*Doe v Thomas*, 9 B & C 289), reverser and tenant for life as to common title (*Doe v Dale* 3 Q B 609), two persons stating a case for their joint benefit (*G v Litch*, 2 J & W

291), or a husband and wife who are only collusively in contest (*Ford v Pontes* 5 Jur N S 993 *alibi* if the contest is genuine) Nor does a privilege attach as between joint claimants under the same client—e.g., between claimants under a testator as to communications between the latter and his solicitor (*Russell v Jackson* 9 Hare 387) But where communications relate to matters outside the joint interest they are privileged even as against a party bearing the expense of the communications—e.g. communications between plaintiff corporation and its solicitors as against a defendant ratepayer as to matters not connected with the rates (*M of Bristol v Cox* 26 Ch D 675) or between a trustee and his solicitor as against the cestui que trust where the communication is not made but to enable him to resist litigation by cases of joint interest it

Where the consultation was had by several joint for joint statements and neither could be able to

obstruct the other in the
§ 2328 *In re an Attorney*

Joint Attorney There may be a relation, not of an absolute confidence The chief instance occurs a common interest, and each communications are clearly privileged

Yet they are not privileged in a controversy between two original parties in as much as the common interest and employment forbids concealment by either from the other *Higmore* § 2312, *Daugh v Crook* 1 M & R 10 *Perry v Smith* 9 M & W 681, *In re an Attorney*, 84 Ind Cas 353 (F B) 10 Bom L R 887 But if a solicitor be employed for two parties as for mortgagee and mortgagee and peruse on behalf of the former his abstracts of the title, he cannot as against him disclose their contents (*Doe v Walling* 3 Bing N C 421), and where a professional man was engaged by vendor and purchaser to prepare the deeds, and the draft conveyance was confidentially deposited with him by both parties it was held that he could not produce it at the trial against the interest of the purchaser's devisees though with the consent of the vendor *Doe v Seaton* 2 A & E 171 Where two persons having a dispute about a claim made by one of them upon the other went together to a solicitor, one of them made a statement and instructed the solicitor to write a letter to a third party on the subject of the claim—it was held that in a subsequent action between these two persons both the statement and the letter were admissible in evidence *Shore v Bedford* 5 M & Gr 271, *Griffith v Davies* 5 H & Ad 502 In all these cases the question would seem to be was the communications made by the party to the witnesses in the character of his exclusive solicitor? If it was the bond of secrecy is imposed upon the witness, if it was not the communication will not be privileged *Perry v Smith* 9 M & W 687, *Pagall v Sprye* 10 Beav 51 *Taylor* § 936 A communication to the opposing party's attorney, as such, is clearly without privilege nor if reposed could be accepted *Karim* 3 B 91, *Varston v Downes* 310, *Ainsworth v Harding* (1900) 2 C 110

Time of consultation The privilege exists not for the sake of the legal profession in general but for the sake of clients needing legal advice It therefore assumes that the relation of client and adviser has been formed (or is forming) for a particular person as client and communications are protected not merely when the person consulted is a professional legal adviser, but when the relation was a confidential one *Gaskell* 1 common law seems plain not certainly predict the attorney's acceptance of the employment, the former must be protected in his preliminary statements when making the overtures, even if the overture

be refused. It would further be immaterial that the refusal was due to a disagreement as to fees demanded, for upon preliminary statement the privilege covers the preliminary statement.

Any advice given by him. No legal adviser is permitted, whether during or after the termination of his employment as such, unless with his client's express consent to disclose any advice given by him to his client during, in the course, and for the purpose of such employment. *Steph Dig Act 115*. So not only communications made to an attorney, but any advice given by him to his client is also privileged. Client are also within the privilege. This seldom been brought into for securing the use of his of the tenor being 0

Crown case—Communication between prosecutor and attorney. Commu

Proviso (1)—Communications in furtherance of any illegal purpose. Profane oral communications are not privileged when such communications are for an unlawful purpose having for their object the commission of a crime. Then they partake of the nature of a conspiracy or attempted conspiracy, and it is not only lawful to divulge such communications but under certain circumstances it might become the duty of the attorney to do so. The interests of public justice require that no such shield from merited exposure shall be interposed to protect a person who takes counsel how he can safely commit a crime. *People v Ian Alstine* 57 M. Ch 69. Moreover no such enterprise falls within the just scope of the relation between legal adviser and client. The case of *William v Quebrada Rj etc* 10 (1895) 2 Ch 701 was considered one of unusual gravity and importance. And *Helreich J* in delivering the opinion of the Court said. It is of the highest importance in the first place that the rule as to privilege of protection from pr which pass between a litigant should not be in any way depa

that it is essential to the due adminis be upheld. On the other hand where or amounting to fraud especially in st good faith the whole askedness to the light of advise his clients in what privilege

Commercial or transaction sh the Court

manner they may commit crime or fraud with impunity hence the privilege does not extend to communications made in furtherance of prospective criminal

acts. If his duty t disp use w every des public wel Gariside v no confil L J said purpose w solic t m role to a

the In m be over legal ere a

Hood & C said. I should first beg leave to consider whether an attorney may be examined to any matter which comes to his knowledge as an attorney. If he is employed as an attorney in any unlawful or wicked act his duty to the public obliges him to disclose it. No private obligations can dispense with that universal one which lies on every member of the society, to discover every design,

which may be formed contrary to the laws of the society, to destroy the public welfare. For this reason, I apprehend that if a secret which is contrary to the public good—such as a design to commit treason, murder, or perjury—comes to where he is concerned the obligation to the client' boundaries of this limitation. It

has not always been kept in mind that the privilege, in its very fundamental presupposes what Bentham so drastically censured—the furnishing of legal advice to the culpable client, as well as to the worthy one: to a client who if the law were duly enforced would lose in the litigation. How, then, can the privilege continue to exist at all, if any exception is to be made by which the confidences of the guilty are to be disclosed merely the practical point of view, and to let it cease to be a cloak for criminal contrivance an arbitrary limit for this exception thus to do violence to the theory of the privilege. Looking at the reasons upon which it rests, they appear by their natural limits to end with the same conclusion. They predicate the need of confidence on the part not only of injured persons, but also of those who being already wrong doers in part or all of their cause are seeking legal advice suitable for their plight. The confidences of such persons may legitimately be protected, wrong doers though they may have been, because the element from an element of right, because properly be employed to obtain the redress, and because the legal adviser must not habitually be in position of an informer. But these reasons all cease to operate at a certain point namely, where the desired advice refers not to prior wrong doing but to future wrong doing. From that point onwards, no protection is called for by any of these considerations. Upon this much there has been a fair consensus among all who have declared themselves upon the subject. But certain minor points of detail still remain, if a practical rule for disclosure it to be settled upon. (1) Must not the advice be sought for a knowingly unlawful end? (2) Must not that unlawfulness be either a crime or civil wrong involving a moral turpitude? (3) Must not the attorney have so far abandoned his professional attitude as to have become, by assent to the design, a partner in the client's intended wrong? *Wigney v. Wigney* § 2298. The law on the subject is thus laid down by *Boulton v. Jones* in *Corney v. Fannahill*, 1 Hill, N. Y. 33, 35, 41. It is the

client, either in the commission of a crime, or the doing of a wrong, by force or

his presence towards the perpetration of the fraud. One who is charged with having done an injury to another, either in his person, his fame or his property may freely communicate with his counsel, without the danger of having his confidence betrayed through any legal agency. But when he is not disclosing what has already happened, but is actually engaged in committing the wrong he can have no privileged witness. In *Annesley v. Earl of Anglesea* 17 How St Tr 1229 *Mounteney B* said. A man (without any natural call to it)

never discover this declaration, because he was retained as attorney. This prosecutor applies in the same manner to a second, a third, and so on, who and

and the document came into the hands of the plaintiff, it was held that there was no rule relating to privileged communications preventing its production in evidence. *Paicheappa v Mt U*, L. B. II (1873-1892), 412. There is no protection approved by the Evidence Act in a doctor as such. When a doctor is called to give evidence he is in a case *Edua May Olua v Haroll I* A. L. J. 14.

127. The provisions of section 126 shall apply to interpreters, and the clerks or servants of barristers, pleaders, attorneys and vakils.

Principle. It has never been questioned that the privilege protects communications to the attorney's *Taylor v Foster*, 2 C. & K. Kennedy L. R. 27 Ch. D. 1. It is penible to his work, and early committed to them by must include all the persons

Scope of the capacity, *Gorkum*, communication, the sed

extends to such a communication, a communication to a pleader 3-2 C. W. N. 649. The evidence *Maung Mya U v Sun Singh*, U. v *Queen Empress*, 25 C. 736, it is also privileged. But the in the attorney's office, nor the was an attorney *Barnes v*.

11. C. W. N. 649

128. If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section 126; and, if any party to a suit or proceeding calls any such barrister, pleader, attorney or vakil as a witness, he shall be deemed to have consented to such disclosure only if he questions such barrister, attorney, or vakil on matters which, but for such question, he would not be at liberty to disclose.

Privilege. The privilege mentioned in section 126 is designed to secure the client's confidence in is not violated by receiving permits to be made. S. 360, 480. *Merle v Moore* is a waiver by implication. In deciding it, regard must be had to every waiver is not element of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation.

* This word in s. 128 was inserted by the Indian Evidence Act Amendment Act (18 of 1872), s. 10.

communications as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others

Principle The privilege being for the protection of the client in his suit only be defeated if the disclosure was still obtainable it has never been *Wigmore* § 2324

Scope of the section Under the old law (*s.c.* Act II of 1855 section 22) a party to a suit who offered himself as witness was bound to produce any confidential writing or correspondence that had passed between himself and his legal adviser The reason for this rule is not very clear and the present section abrogates it so far that such correspondence need be produced only if it is necessary to explain the witness's evidence The English law at present is

to protect professional communications and to leave them unprotected at the examination of which the law to disclose no man would do

with a view to his defence *Greenl Ev* § § 236—240 given or opinions stated their oral or documentary properly relating to the business in hand and to all documents books papers or instruments which may be properly information of his attorney *Crosby v Burr Jones* § 750

same principle the privilege extends the purpose of obtaining the advice of counsel and to the opinion of counsel based upon such statements *Burr Jones* § 750

In *Munchershaw Bezonj v The New Dhurnsay S & W Co* 4 B 576 which was a suit for a declaration by reason plaintiff while in payments made by the permission of the defendant had a letter from the original document

with a case for opinion upon matters connected with it He now produced a translation of the document *Mr Incrarity* for the defendant called for the production of the case submitted to counsel *Hest J* in disallowing the production said In drawing up the Indian Evidence Act chiefly from Taylor on Evidence, Sir James Stephen plainly intended to adopt in section 129 the principle

that if a party becomes equires it be made to disclose every thing necessary to the true comprehension of his testimony

The argument that properly order a perusal of it, protected by it

is against an adversary in litigation Here the document which the plaintiff is asked to produce is in its nature a confidential communication The plaintiff wanted advice for his personal guidance in fulfilling a contract of service The statement which he laid before counsel with this view is his own property in substance as well as form it not being suggested that the consultation was in furtherance of any fraud I do not find it necessary to

0. compel a disclosure of it, in order to explain the evidence given by the plaintiff and in the absence of such necessity it would be wrong to put pressure on the plaintiff. It is obviously desirable that communications with professional advisers should be unembarrassed by any such fears as a contrary duty would give rise to. frank communication by their candour statements, and useless litigation would thus be promoted in numberless cases in which an exact knowledge of facts would have enabled a counsel or solicitor to nip it in the bud by timely warning or suggestion. Lastly, a compulsory disclosure of confidential communications is so opposed to the popular conscience on that point, that it would lead to frequent falsehoods as to what has

disclosures made under section 130 should not be enforced in any case except when they are plainly necessary. Letters written by one of the defendants servants for the purpose of obtaining information with a view to possible they might under the circumstances. *Brigro Das v. ...* compelled cannot mean 'suborned' and it uses the words 'compelled to disclose' with reference to the case when a man has offered himself as a witness and must refer to the force put upon the witness after he is in the witness box. *Moher Sheikh v. Queen Empress*, 21 C 302. Statements of witnesses recorded for the special purpose of being shown to a legal adviser with a view to ascertaining whether there is a good cause to go to the Court are privileged under this section. *Dr. ... v. Fromroz* 43 Ind Cns 71. The documents for which privilege could be claimed would the lay client the defendant of the suit attach to them. *Central India Spinning v. G. I. P. Railway* 29 Bom L R 414-102 Ind Cns 420-A 1 R 1927 Bom 367.

130. No witness who is not a party to a suit shall be

Production of title deeds of witness not a party compelled to produce his title-deeds to any property or any document in virtue of which he holds any property as pledgee or mortgagee or any document the production of which might tend to criminate him, unless he has agreed in writing to produce them with the person seeking the production of such deeds or some person through whom he claims.

Principle. The title deeds to land in England were always a secret of

at the time of the common law, and were so dominant in public interests that a compulsory public registration of the secret of the title instruments comes to be a vital (if selfish) consideration for the occupants of the land. Their possession may be unquestioned, but the instruments under which they claim are constantly defective in some important feature. A boundary may vary, a release be missing, a rectification in correct—a score of defects of one sort or another might be discoverable in the chain of title. But the possession and the title are as yet unquestioned and thus the security of title depends practically on preserving these defects from ascertainment by persons opposed in claim who might be only too glad to take advantage of them. It comes therefore to be a fundamental maxim of the law that the documents of title shall be kept secret. It is the realty

need for such protection, not by what
 tive for demanding n
 help them Where a
 person holds a document, not his own, but subject to a lien which would be lost
 by his surrender of possession or owns and holds a document, such as a bill of
 exchange, whose continued possession is necessary for the enforcement of his
 rights under it he may fairly claim not to be compelled to surrender it for
 evidential purposes in litigation between other parties *Wignore* § 2211

Protection of title deeds by persons not party to a suit No witness
 who is not a party to a suit can be compelled to produce his title deeds to
 say property *Pickering v Noyes* 1 B & C 263, *Adams v Lloyd*, 3 H &
 N 351, *Doe v Date*, 3 Q B 609, *Egremont v Egremont*, 14 Ch D 158
 Where an attorney is called upon, whether by subpoena duces tecum or other-
 wise, to produce deeds or papers belonging to his client, who is not a party
 to the suit, the Court will inspect the documents, and pronounce upon their
 admissibility according as their production may appear to be prejudicial or
 not to the client, in like manner as where a witness objects as to the produc-
 tion of his own title deeds *Copeland v Watts*, 1 Stark 95, *Army v Long*,
 9 East 478, *Peynolds v Rouley* 3 Rob La 201, *Travis v January*, 3 Rob
 1 for are in the hands of the agent or
 in the hands of the owner himself, their
 in the judgment of the Court it may
 3 C & P 591, *Pickering v Noyes*, 1 B
 3, *Doe v Thomas* 9 B & C 288, *Bull v*
 12 Q B 711, *Doe v Hertford*, 13 Jur
Kemp v King 2 Mo & Rob 437, *R v*
 3 C & P 591, *Pickering v Noyes* on

of the
 tion of
 from a
 where not being themselves parties the whole merits cannot be tried *Greenl*
 Ev § 409 (n) A Will as well as the title deeds of an estate in mortgage to the
 party whose privilege is invoked, and the mortgage deed itself would be within
 the protection The object is to protect property by excluding the means of
 picking holes in the document under which it is held Indeed it is not
 necessary that the deeds should be even those establishing the title They would
 be within the protection of the rule, though called for to show the title's
 defeasance Thus in a case in which the witness an attorney was required to
 produce a deed of assignment with a view of showing a departure with the
 deed that it was the deed of his
Cresswell J observing — "The
 it which the law authorised
 to produce it or to answer any
 as not a title deed It was
 however, called for as such and it was intended to show that the title was no
 longer in the defendants It need not be even strictly a deed — any document
 or paper having relation to the title would be within the protection The
 ion of which title might be capable
 f ejectment where the titl of the les or
 of a gentleman who had been in treaty
 but which treaty had gone off was
 title that had
 contents of
 f had refused
 . *Goote v Ex*

PP 150 151
 The protection against the production of the deeds would extend to all
 discovery of their contents It was observed by *Baron Alderson* It would
 be perfectly illusory for the law to say that a party is justified in not producing
 a deed, but that he is compellable to give parol evidence of its content, that
 would give him or rather his client through him, merely an illusory protection
 if he happens to know the contents of the deed, and would be only a round

about way of getting from every man an opportunity of knowing the defects there may be in the deeds and titles of his estate. I am clearly of opinion therefore, that when a party refuses to produce a deed, and is justified in so doing, he ought not to be compelled to give parol evidence of its contents. *Davies v Wales*, 9 M & W 606

There have been cases in England in which the Court has taken on itself the inspection of the document production would be prejudicial to considered as objectionable, and would now upheld, and for the cogent *Soyer*, 13 Com B 236 'Suppose' to examine the document and, in title deed,—his decision might be made the subject of an argument in open Court by bill of exception, and thus the contents of the deed might be communicated to all the world. But Professor Wigmore says, "This principle, then, that the disclosure of title deeds in litigation between other parties was not compellable, appears to have been always accepted in English Courts coming down as an unquestionable tradition and it was occasionally extended to documents other than those affecting land, though it seems ever to have been regarded as limited by trial Court's discretion." Wigmore § 2211, see also *Miles v Dawson*, 1 Esp 405, *Copeland v Watts*, 1 Stark 93, *Reed v James*, 1 Stark 132, *Corson v Dubois* Holt 239, *Roberts v Simpson*, 2 Stark 203, *Harris v Hill* 3 Stark 140, *R v Hunter* 3 C & P 591, 592, *Mills v Odby* 6 C & P 728, *Doe v Langdon*, 12 Q B 711. The rule appears to be the same in India. Vide Order XVI, r 6 of the Civil Procedure Code and s 16 of the Indian Evidence Act.

Although a witness cannot be asked to testify to the contents of such a document, *Doe v* named case instrument for the contents 1 & R 726, 3 Bosc 367.

Imrit v Sidhar, 15 C L J 9

Any document in virtue of which he holds the property as pledgee or mortgagee. Mortgagees or pledgees when not parties to a suit are not hold any property. Vide *Doe v Ross* Lidelett 24 L J Costa Rica Republic

Document the production of which might tend to criminate him. Upon principles of reason and equity, a Judge will refuse to compel either a witness or a party to produce a document the production of which may tend to criminate him. 2 Taunt 115, *Roe v New York Press* Hotel Co (1897) 2 Q B 124. But a book of account cannot be withheld on the ground that it tends to incriminate him. "It is a novel if not a somewhat startling proposition that an officer of a corporation can refuse to produce its books, when he is asked to account for property which has been committed to his charge, upon the ground that the production of the books may tend to incriminate him. If such rule were to prevail, it is not difficult to see how of the books of a public or private property which had come into his hands claiming that the production of though the production was solely for the purpose of the document may remain within the protection of the rule also the privilege does not extend to *Bradshaw v Murphy*

Documents in the official custody of the witness. *Bradshaw v Murphy* 7 C & P 612

Unless he agreed in writing etc. It amounts to waiver on his part.

S. 1
S. 1

131. No one shall be compelled to produce documents in his possession, which any other person would be entitled to refuse to produce if they were in his possession, unless such last-mentioned person consents to their production.

Production of documents which another person having possession could refuse to produce

Principle This section is intended for the protection of persons whose title deeds and other documents happen to be in the hands of their attorneys, stewards, etc., *Falmonth v. Moss*, 4 Price, 455. In such a case the owner's consent is a necessary condition precedent to the production of the documents. *Port Et 315*

Scope of the section Examples of persons having documents in their possession are agents, attorneys, trustees, mortgagees, etc., *Whitely Stokes*, Vol II p 922. Is it in his possession

the document nor is he asked to testify about them. The answer depends upon the other privileges of the client irrespective of the privilege under s 120 *infra*. The attorney is but the agent of the client to hold the deed, if the client is compellable to give up possession, then the attorney is, if the client is not, then the attorney is not. It is merely a question of possession and the attorney in this respect is like any other agent. The extent of the client's obligation to produce must therefore be taken as determining the present question. It follows, then, that when the client himself would be privileged from production of the

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Cas 99 101, see also
140; *Nixon v. Mayo*,
Doe v. Ross, 7 M & W
2 A & E 171, 181, B
produce his client's
C & P 728, 731. In *Newton v. Chaplain* 10 C B 356, *Maule J* said. "The
privilege of the
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procedure *Pearson v. Fletcher*, 11
orsen v. Dubois, Holt 239, *Copen v*
1 Price 455, *Nauling v. Howard*,
288, *Doe v. Langdon*, 12 Q B 711,

132. A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind:

Provided that no such answer, which a witness shall be compelled to give, shall subject him to arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.

Principle According to the English Law it is set led rule that a wife

1453, *May v Haulins* 11 Ex 210 *R v Garbel* 1 Den C C 36, *Carr v Worcester* 6 M & S 191 *Paulhurst v Leuton* 1 Mer 401, *Pye v Bitterfell* 34 L J Q B 17, *Chester v Worby* 18 C B 939 *R v Lord George Gordon* 21 How St Tr 535, *Ex parte Reynolds* L R 29 Ch D 298, *R v Boye* 1 B & S 330 Upon a principle says Mr Stowell of humanity as well as of policy every witness is protected from answering questions by doing which he would criminate himself Of policy because it would place the witness under the strongest temptation to commit the crime of perjury, and of humanity because it would be to extort a confession of the truth by a kind of duress every species and degree of which the law abhors It is pleasing to contrast the humanity and leniency of the law of England in this respect with the cruel provisions of the Roman Law which allowed criminals and even witnesses in some instances to be put to the torture for the purpose of extorting a confession *Stowell* of Ideals

the views of many active lawyers and Judges on this question. A majority of those consulted have expressed the opinion that no innocent person would suffer and that more guilty ones would be detected and convicted if the provision would be repealed. Commenting on the English rule Prof. Wigmore says: "In preserving the privilege however we must resolve not to give it more than its due significance. We are to respect it rationally for its merits not worship it blindly as a fetish. We are not merely to emphasize its benefits but also to concede its shortcomings and guard against its abuses. Indirectly or ultimately it works the common detection of guilt judicially and finally cannot be denied."

But in India the witness was not excused from answering any question relevant to the matter at issue in any civil or criminal proceeding upon the ground that the answer to such question would incriminate or

might tend directly or indirectly to criminate him or that it would expose, or tend directly or indirectly to expose him to a penalty or forfeiture. It contained, however, that no answer the witness might thus be compelled to give for the purpose of punishment for false evidence, or be used as evidence against him in any criminal proceeding. This section re-enacts the provision of section 32 of Act II of 1855.

The reason for the change in thus stated by *Turner C J* in *Queen v Gopal Das*, 3 M 271, 279. Under the English law a witness was not bound to criminate him self, but if he thought fit to do so his admission on oath was equally admissible in evidence against him as any other admission. This state of the law in some cases tended to bring about a fracture of justice, for the allowance of the excuse when the matter to which the question related was in the knowledge solely of the witness, deprived the Court of the information which was essential to its arriving at a right decision. To avoid this inconvenience, and to obtain evidence which a witness refused to give it was suggested that, when the question was material to the issue, it should be left to the discretion of the Court.

generally, the answer should be from any punishment etc. will depend on the nature of the answer related, or at least a criminal proceed-ure di- Judge no option.

end desired, the production of evidence from unwilling witnesses, was sought by depriving them of the privilege they had theretofore enjoyed of claiming excuse, but

remove any not be used of the law and it was an

an infraction of the criminal law, had exposed themselves to penalties. In the same case *Muttusami Ayyar J* said "The necessity under which the witness lay of explaining how the answer might criminate him, amounted in some cases—as observed by *Baron Colclough* in *Alams v Lloyd*, 3 H & N 382 and *Macle J* in *Fisher v Ronalds*, 12 C B 762, since overruled by *R v Boyes*, 1 B & S 311—to a virtual denial of the privilege and to an evasion of the rule that no

extract when a proceed compel to an answer

continued in the sworn examination of the accused in a criminal case. It seems to me that the legislature in India adopted this principle repealed the law of privilege and thereby obviated the necessity for an enquiry as to how the

answer to indemnify and thus of the rule

when a criminal proceeding is of absolute privilege does not apply proviso to this section *McGill* Cr L J 25

Scope of the section This section abolishes the law of privileges and creates an obligation in a witness to answer every question material to the issue, whether the answer criminate him or not, and gives him a right, as correlated to that duty, to claim that that answer shall not be admitted in evidence against him in criminal prosecution. Under this section it is not in the power of the Judge to excuse a witness from answering if the question is relevant to the issue. *Queen v Gopal Das*, 3 M 171. Section 32 of Act II of 1855 is repealed almost *totidem verbis* in this section. *Per Innes J* in *ibid*. Where an accused person has made a statement on oath voluntarily and without compulsion on the part of the Court to which the statement is made, such

must be overruled *Ibid* Where a person he is alleged to have incriminated himself act that he was the person who gave the *Samayyamar*, 2 Wier 794 A statement another, made by a witness in a civil this section of the Act, for which unst criminally If the statement were false he might be prosecuted for giving false evidence *Maladin v Queen Empress* 3 O C 80

Taking a thumb impression of a witness by the Court is not equivalent to asking a question and receiving an answer within the purview of the proviso of this section and therefore, such a thumb impression may be proved against the persons giving it in a criminal trial *Tunno Miah v King Emperor*, 16 C W N 503-15 C L J 399-13 Ind Cas 925-39 C 348 Where an incriminating question is put to a witness, the Magistrate should explain to him his position, and should advise him of his right, or otherwise, he may be induced through ignorance of the state of the law, to deny the truth for fear of penal consequences *In re Jaddonath Dutt* 2 C L R 181, but see 1 Wier 153-8 M H (App) 29 When a co accused is cited as a witness his position is sufficiently protected by this section *Raja Ram v Emperor*, 5 Lah L J 49-73 Ind Cas 521-24 Cr L J 633

Proviso This section makes a distinction between those cases in which a witness voluntarily answers a question and those in which he is compelled to answer, and has given him a protection in the latter of those cases only The words 'be compelled to' clearly answers which a witness has objected excused from giving, and which then he give *Queen Empress v Ganu Sauba*, per *Birwood J* in *ibid*, see also per term 'shall be compelled' in section 132 appears to be the correlative of the term 'shall be excused' and they presuppose the rule that every person giving evidence on any subject before any Court or person authorized to administer oaths and affirmations shall be bound to state the truth, and an authority competent at the time to excuse or compel compliance with this rule They also suggest that the witness has objected to the question and has sought and been refused excuse, and even constrained to answer The terms of this section when read with the rest of the Act afford protection only to answers to which a

compelled to give" in this section are not a mere surplusage, but apply to when he asks to be excused such a statement without warrant used against him in his *Empress* 21 C 392, *Haidar* L J 409-9 C W N 911 *Bhalaj* Rat Un Cr C 3-10 C L J 399-13 Ind Cas 925-39 C 348 *Samayyamar*, 2 Wier 794 A statement another, made by a witness in a civil this section of the Act, for which unst criminally If the statement were false he might be prosecuted for giving false evidence *Maladin v Queen Empress* 3 O C 80

660 The answers J 39 Ind v Sa mu boy being omitted to object, perhaps owing to the want of legal advice to answer the question, on the ground that the answers would criminate them *In re Jaddonath Dutt* 2 C L R 181, but see 1 Wier 153-8 M H (App) 29

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Ramuddu, 2 Weir 792 - When incriminating questions are put from the Bench to a witness, who has become already entangled by self contradictions, such questions should be put with the object of furthering the ends of justice in the judicial proceeding, in truth, and not with a view possibly be taken against the witness under this section should as a rule, be explained by the Court, before any incriminating question is put in the above circumstances *Ma Mo Ma v Queen Empress*, L B R (1893 1900) 91 Where the accused had made in a previous enquiry under ss 162, 163 of Act VI of 1882, depositions on oath, without the Exic against accused

is suing for defendant to answer evidence Act *inga Sahai* L J 186

A witness must claim the benefit of the protection afforded by this section before a question is subsequently raised 206-43 Ind Cas 823-19 Cr L J 68 59 Ind Crs 325

on a answer either tion

not the witness has object 43 A 92-18 A L J L J 825 "Compulsion"

in a criminal made certain the Court of the innocence of the accused and subsequently a prosecution was launched against the witness for such statements which proved to be false held that the statements were not excluded by this section of the Evidence Act *Emperor v Banarsi*, 46 A 254=77 Ind Cas 829-77 A L J 144 25 Cr L J 417

A statement made on oath by a person before a Coroner at an inquest held by him cannot be used against him in a trial for a charge based on such evidence as a statement tending to prove his guilt *Emperor v Kazi Danood* 50 B 56=93 Ind Cas 220=27 Cr L J 433=28 Bom L R 19=A I R 1226 Bom 141

A person who answers questions put to him by court of without seeking the protection of s 132 of the Evidence charge of defamation and all that he is under s 499 I P Code *Peddabba Pea* L W 210=116 Ind Cas 337=30 Cr L I R 1929 Mad 286=56 M L J 570, *Bai Shanta v Mirao*, A I R 1920 Bom 141=50 B 162=28 Bom L R 1 (F B), *Rimchandra Rao v Mahomed* 10 Mys L J 421

133. An accomplice shall be a competent witness against an accused person, and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice

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conviction for the crime. This argument is only broadly related to the maxim *ne mo turpitudinem suam allegans audirendus est*. The notion underlying the maxim is that a person who comes upon the stand to testify that he has at a former time spoken falsely or acted corruptly is by his very confession, a liar and a villain, and therefore untrustworthy as a witness. The argument, however, was judicially repudiated from the very beginning—partly on the ground of necessity, partly on the ground that turpitude, though self-confessed, was no hindrance unless there had been a conviction of crime. *Higmore* § 520, 526. In *Tungs Case*, Kelyng. 18, the Court observed: "It was resolved that some of these persons who were equally culpable with the rest may be made use of as witnesses against their fellows, . . . and the law alloweth every one to be a witness who is not convicted . . . and if it were not so, all treasons would who conspires with never so many." See also *Charmou's Trial*, 12 How Trial, 33 How St Tr 691-921. *Albott C J said*: "It is a deep and a seldom fully them, and can of untainted precaution, it is considered. His purpose does by that very acknowledgment depreciate his own personal credit. If, . . . administration of . . . incredible, the it must not only happen that many heinous crimes must pass unpunished, but great encouragement will be given to bad men by withdrawing from their minds the fear of detection and punishment through the instrumentality of their partners in guilt, and thereby universal confidence will be substituted for that distrust of each other which naturally possesses men engaged in wicked projects and which often operates as a restraint against the perpetration of offences to which the co-operation of a multitude is required." *Higmore* § 520. At common law, when two or more persons were tried upon the same charge, each and all were naturally disqualified. Only by ceasing to be a party in the cause could one then become a witness, for or against his co-defendants. *Higmore* § 4-0.

Accomplice meaning, of . . .

ins such a relation to the criminal act that he would be jointly indicted with the defendant he is an accomplice. *White v Common Wealth* Century Digest Vol 14 Col 1780, cited *Ramasami v Emperor*, 19 B 363, 19 Cr 1-9. If of convicting the guilty, he is charged, he can not be an accomplice, who purpose of supplying marked money for the detection of a crime cannot be treated as that of an accomplice. *Ibid*.

An accomplice confesses himself a criminal. No man ought to be treated as an accomplice on mere suspicion, unless he confesses that he had a conscious hand in the crime or makes admission of facts showing that he had

such a hand. If the evidence of a witness is such as to show that a person is an accomplice, and his testimony must be given with great caution. *Emperor v. Porey Han* 268 = 10 Cr L J 530. A person offering to assist in the receipt of illegal gratifications and those who assist under compulsion. *Queen Empress v. Magculal*, 14 B 115, *Queen Empress v. Chagan* 14 B 331, *King Emperor v. Mathar*, 26 B 193 = 3 Bom L R 691, *Emperor v. Plurid William Smither*, 26 M 1 = 3 Weir 521.

So an accomplice is a person who in some way concerned in the commission of a crime for which the accused is on trial. This includes principals and accessories whether before or after the fact. A person against whom, there is sufficient evidence to indict for the crime upon which the accused is standing trial is his accomplice. Mere knowledge or belief that a crime is to be committed renders

of the constitute an accomplice, the mere concealment of knowledge that a crime has been committed does not make the person concealing his knowledge an accomplice. This is the general rule and is sustained by the majority of cases. *Folk v. State* 36 Ark 117 (Am), *Gallin v. State* 40 Tex Cr App 116. However this may be in the case of an accessory after the fact it is well settled that all accessories before the fact if they actually participate at all in the preparation for the crime are accomplices within the rule, but if their participation is limited to the knowledge that a crime is committed renders

Hatson v. State, 9 Tex App 60, *Goulden v. Emperor*, 27 M 2. A person who assisted in the removal of the dead body from the place of murder to the pit in which it was buried, was not an accomplice.

A voluntary participation in the commission of the crime is required to constitute an accomplice. One who either by threats or coercion inciting in him a fear that he is in danger of losing his life or liberty under and by reason of such coercion and fear participates in a crime is not an accomplice. Whether a person is not an accomplice depends upon the facts in each particular case considered in connection with the nature of the crime. This is usually determined by the Court as a question of law. Parties to be accomplices must participate in the commission of the same crime. Thus a person who receives stolen goods knowing them to be stolen is not an accomplice of the thief where the receiver did not participate in the commission of the larceny. The receiving and the larceny are distinct crimes. In perjury all persons who with knowledge of the falsity of the statement aid in the commission of the crime have been held as accomplices. *Underhill Cr Ev* § 69. A person from whom a charge of murder is brought is not an accomplice of the murderer. *809 F. 11*. A person who aids in the commission of a crime is not an accomplice if he is not guilty of the crime.

Informant about it till the 21st June must be treated in the same way as that of an accomplice. *Aga Po That v. Queen Empress* 1 L B L 29.

The mere fact that a person is cognizant of an offence and omitted to disclose it for him an accomplice when it does not amount to an offence. *Ishan* Government are justified in charging of murder. *809 F. 11*. A person who aids in the commission of a crime is not an accomplice if he is not guilty of the crime. *809 F. 11*. A person who aids in the commission of a crime is not an accomplice if he is not guilty of the crime. *809 F. 11*.

Claudia v. (Cm inc Q) associates with criminals solely for the purpose of discovering or making known their crimes and who acts throughout with this purpose and without any criminal intent is not an accomplice and it is immaterial that he encouraged or aided the commission of the crime. *Emperor v. Clurbin* 3 Ind Cr 111, 15 C W N 171 = 11 Cr L J 560.

But where from the facts of the case, it appears that a person took an active part in carrying away the person whose death the accused was charged with having caused, after he had been grievously injured,

left him in the field where he was subsequently found dead, those witnesses are no better than accomplices. *Alimuddin v Queen Empress* 23 C 361 A bribe giver is an accomplice. *Marsul h Khan v Emperor*, 3 P W R Cr 1919 To constitute an accomplice there need only be the intention of assisting in the commission of a crime but he need not know exactly what crime was being committed. An indication of the meaning of the word 'accomplice' may be found in section 337 of the Cr Pro Code. *Surya Kant v Emperor*, 24 C W N 119 Where a witness is found, from his own testimony, to be privy to the crime alleged to be committed by accused, his evidence is no better than that of an accomplice. *Muhammad v Emperor*, 6 Lah L J 599 = A I R 1917 Lah 203 A person who has knowledge of the commission of an offence but keeps quiet for some days is no better than an accomplice. *United Sikh v Emperor* 2 Cr L J 1011 = 96 Ind Crs 867 = 30 C W N 816, see also *Hayatu v Emperor* A I R 1929 Lah 540 A person convicted and sentenced continues to be an accomplice. *Alisab v Emperor*, A I R 1933 Bom 24 = 34 Bom L R 1438

Who are not accomplices Witnesses to payment of bribes are not accomplices, unless they co-operate in the payment of the bribes, or are instrumental in the negotiation for
Emperor 33 C
 649-10 C W N
 C 144 *Emperor v E*
 Ind Cas 18 But persons who accompany another, who is entrusted with and carries the money, that the money is to they do not actually
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 2 C W N 672

Where money is lent to a money lender for obtaining the relief voluntarily given against the punishment, held that such payment was not an illegal gratification but money extorted and that the money lender advancing the money could not be regarded as an accomplice of the Police officer. *Akhoy Kumar Chuckerbutty v Jagat Kumar Chuckerbutty* 27 C 925 = 4 C W N 755, see also *Deputy Legal Remembrancer v Upendra* 12 C W N 140 = 6 Cr L J 334 A person charged with an offence by the police, but discharged by the Magistrate after examination of the witnesses for the prosecution, because he found that no crime has been made out which, if un rebutted we be said to be an accomplice. *Nga Maung v Queen* 407 *Queen v Behary* 7 W R Cr 44, *Abul B*

A policeman or other person procuring to obtain a conviction is not an accomplice. R (1893 1900) 865 over 1892) 140, see also *Queen v* tion is not necessary in entered into communications conspiracy to the police authorities, under whose direction they continue to act till the matter can be so far matured as to ensure a conviction. In such persons the rule as to corroboration does not apply. The early disclosure is considered as binding the party to his duty and though a great degree of disfavour may attach to a case is not treated as that of Cr C 423 One who defiles the body of the deceased after
Jehana v Emperor, 73 Ind

Accomplices in particular crimes In dealing with intoxicating liquor the buyer is a woman—may be of the crime, a other partner
Corroborate
who have
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is in incest
is a crime
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 C & P

604, *Wigmore* § 2060 But the word "accomplice includes a person who consents to the commission of an unnatural offence with him or her *R v. Jellyman*, 11 C & P 604, *R v. Tate*, (1908) 2 K B 680

Distinction between accomplice and informer In criminal cases the distinction between an informer and an accomplice assumes at times considerable importance, and in order to determine whether a witness who first associated with the wrong doers and subsequently gave information to the police belongs to the first category or is an accomplice whose evidence cannot be accepted without corroboration, it has to be seen whether the witness had entered into the conspiracy for the sole purpose of defeating and betraying it or whether he is a person who concurred fully in the criminal designs of his co conspirators for a time and joined in the execution of those till either out of fear or for some other reasons he turned on his former associates and gave information to the police. If at the time when he joined the conspiracy he had no intention of bringing his associates to book but his sole object was to partake in the commission of the crime, he cannot be called an informer but is an accomplice, and his position is not modified simply because later on he turns round and carries information to the police. *Maungat Rn v Emperor* 10 Lah L J 262=110 Ind Cas 616-29 Cr L J 740=A I R 1928 Lah 647, see also *Karim Buksh v Emperor*, 9 Lah 550=109 Ind Cas 593-29 Cr L J 577-A I R 1928 Lah 193

Scope of the section (1) An accused person can be legally convicted upon

credit unless it is corroborated in some material particulars tending to show that the accused committed the offence with which he is charged, (4) It is for the Court to

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corroborated by the evidence of another approver, or by the confession of a person who is being tried jointly with the accused for the same offence implicating both himself and the accused, (6) It is the duty of the Court to scrutinize with care such corroboration as that mentioned in (5) but whether it is to be treated as evidence against the accused or not is to be determined by the Court having regard to the circumstances of the case. *Aung Hla v Emperor* 9 Rang 404=1931 Cr C 875-A I R 1931 Rang 235 In case of retracted confession of a co accused evidence also
Awar v not
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accomplice the

practice of the Courts to require corroboration of such evidence. *Queen Empress v Hallu*, 7 A 160=A W N 1831 314 It is only under very exceptional circumstances that a conviction based only on the uncorroborated evidence of an accomplice could be sustained. *Hau Khau v Emperor*, 57 P L R 1902=5

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some of them hope, not only to avoid prosecution, but to retain their appointments in the government service *Ibid* 'This section was not necessary' says *Mr Justice Markby* "as s 118 makes all persons competent to testify, except those who are disqualified by law." It requires that the evidence

phatic statement in the desired to encourage accomplice This, however cannot have been the case, because in s 114 we find given, as one of the presumptions based on the common course of human conduct, the presumption "that an accomplice is unworthy of credit, unless he is corroborated in material particulars" Moreover, no conviction based on the uncorroborated evidence of appeal, except under the charge to the jury on such uncorroborated uncorroborated evidence— would however have been

in the Letters Patent 35 M 397, namely — material particulars

before it can be acted upon, it is open to the Court to convict upon the uncorroborated evidence if the Court is satisfied that the evidence is true. The Indian Evidence Act (I of 1872), section 133, really intend to lay down that a conviction upon the uncorroborated testimony of an accomplice is not illegal where the evidence of an accomplice and *Miller JJ* answered, in material particulars

before it can be acted upon uncorroborated testimony if evidence is true. In the Indian Code law is of 1872, which in witness against it proceeds upon opinion there or renders nugatory or which requires and in all circumstances corroborated in material to the Court to act on perfectly true. The to guard against such (not the Court shall be a general rule)

convict on the uncorroborated testimony of an accomplice (See *Best on Evidence*, page 182, *Chittenden*) danger of relying on such evidence is so great that the judges always advise the juries not to convict, or tell them they ought not to convict, unless the story of the accomplice is corroborated.

Queen v Chutterdharee, 5 W R 10 W R 80 Cr ; S.
 63 Cr ; *R v Stubbs*, 25 L J N V R 80 Cr ;
R v Naul Jan, 8 W R 19 : W R 17 Cr ;
R v Mohima Chunder Doss, 15 : 18 W R Cr
 45, 1 Hale P C 303, 301 : r 1377; *Rex v.*
Rudd, Cowp 331; *Rex v Atwood*, 3 Leach, C L 538; *Durham's Case*, 2 Leach
 C L 538

The subject of the credibility of the testimony of an accomplice and the necessity for the corroboration in order to sustain a conviction are involved in some confusion. The proposition that an accused person may be convicted on the evidence of an accomplice alone, and that the testimony of an accomplice must be corroborated, are both sound, though this involves a seeming inconsistency. The proposition that an accomplice must be corroborated does not mean that there must be cumulative or independent testimony to the same evidence in a murder case that a court be-

law which prevents a conviction. There are decisions in which it has been held that the testimony of one accomplice cannot safely be relied on as material corroboration of that of another accomplice for the purpose of these provisions; and that the material corroboration required means corroboration as against individual accused. It has been pointed out that s 133, that a conviction cannot be based on the testimony of facts of evidence which an accomplice's testimony incites has been rebutted. Indeed s 114, Evidence Act itself indicates that it is for the Court to consider whether the maxims given in the illustration do or do not apply to the particular case before it. In *King Emperor v Maithar*, 26 B 193=3 Bom L R 694, after referring to the Supreme Court (Sup 459) the Court held that the general principle unless corroborated in material particulars. But along with this principle must be borne in mind the qualifications, taken apparently from *Peacock C J's* judgment, contained in the further illustrations which the Court is directed to consider when determining the facts of the case. The Court cannot do so. The decisions however show the principle on which the Judges have acted. Their successors to consider are applicable to the circumstances in *Deo Nandan v Emperor*, in considering whether the rule applied to the evidence of an accomplice unless corroborated) applies to any particular case, it must be remembered that all persons coming technically within the category of accomplices cannot be treated as precisely on the same footing and that no general rule on the subject can be laid down. In *Elahee Bux's* case above referred to an observation was cited of *Buller J* that the testimony of the approver must be received and left with the jury under such directions and observations from the Court as they think fit.

in mind the qualifications, taken apparently from *Peacock C J's* judgment, contained in the further illustrations which the Court is directed to consider when determining the facts of the case. The Court cannot do so. The decisions however show the principle on which the Judges have acted. Their successors to consider are applicable to the circumstances in *Deo Nandan v Emperor*, in considering whether the rule applied to the evidence of an accomplice unless corroborated) applies to any particular case, it must be remembered that all persons coming technically within the category of accomplices cannot be treated as precisely on the same footing and that no general rule on the subject can be laid down. In *Elahee Bux's* case above referred to an observation was cited of *Buller J* that the testimony of the approver must be received and left with the jury under such directions and observations from the Court as they think fit.

might be acted on with as much safety as that of any other witness. That we think, is still the law and it would be misdirection either to omit to give the jury a suitable warning or to tell the jury that an approver's evidence against a particular accused has received independent corroboration when this is not in fact the case." *Raghunath v Emperor* A I R 1933 Pat 96=13 P L T 80.

Under sections 118 and 133 Evidence Act an accomplice is a competent witness. *Nga Po Lin v King Emperor*, U B R 1906 Evidence 3-5 Cr L J 300, *Karomal v Emperor*, 81 Ind Crs 881=25 Cr L J 1057. Although it would generally be most unsafe to convict an accused, on the uncorroborated evidence of an accomplice, the evidence thinks that it is his duty to convict.

156, *Queen Empress v Maganlal* 11 B 143, *Queen v Godai* 5 W R Cr 1, *Empress v Shahu* 5 C P L R 1 Cr, *Crown v Hossainee*, 27 P R 1869. The evidence of an accomplice may be admitted without corroboration, if the witness is not open to the same charge as the accused. In the matter of *Rajom Kant* 13 W R Cr 24. The evidence of an approver has to be most carefully analysed and considered. It must be so far above suspicion that a Court has no alternative but to accept and act upon it. When the Court believes in the approver's evidence in part, and disbelieves in the evidence altogether. *Balkaran v Emperor*. The well known rule of criminal law is unless he is corroborated in material particulars" which is formulated in section 114, illustration (b) of the Ev

friend of his own, who actually

the rule rests, and it is a very sound rule. The rule is not an absolute one. It is evident from section 114 (illustration b) and section 133 of the Evidence Act, but it is only in exceptional cases that the corroboration can be dispensed with. A witness who does not carry very much weight is not sufficient corroboration of an accomplice. *Narain Singh v Emperor* 12 O L J 499=89 Ind Crs 261=26 Cr L J 1317=A I R 1925 Oudh 715, *Emperor v Bhim Rao*, 27 Bom L R 190=86 Ind Crs 72. Though illustration (b) of section 114 is

the corroboration of an accomplice. *Emperor v Emperor* A I R 1925 Nag 78, *Mannalal v Emperor*, A I R 1925 Oudh 1. An accomplice is a competent witness and may be examined on oath. *Joseph v Emperor*, 3 Rang 11=26 Cr L J 492=85 Ind Crs 236=3 Bur L J 265. *Abdul v Emperor*, 47 A 39, *Balchand v Emperor*, L R 197 (Cr). Where first statement requires corroboration from independent sources such corroboration cannot be sought in accomplice's evidence recorded in Sessions Court. *Raman Mohan v Emperor*, A I R 1933 Cal 146.

Accomplice evidence and corroboration In *R v Rudd*, 1 Cowp 331 336, Lord Mansfield, after referring to the competency of accomplices as approvers said "Though under this practice they are clearly competent witnesses, this single testimony, alone is seldom of sufficient weight to convict the offenders." "As to it it cannot be clearly Lord Holt, that in 1775) that the principle of accomplices, 2 In 1784, corroborative evidence was not recognized as sufficient to convict the offenders, and it was not until 1811 that the principle was fully established." *Let the evidence be taken in the presence of the jury and the judge, and the jury be allowed to exercise their discretion as to the weight to be given to the evidence, and*

100, *Kashemali v Emperor*, 36 C W N 874, *Sher Singh v Emperor*, 36 C L J 916=140 Ind Cas 19=A I R 1932 Lah 621, *Ghena v Emperor*, 137 Ind Cas 95=32 P L R 16=A I R 1932 Lah 180, *Surendra v Emperor*, A I R 1932 Cal 377, *Emperor v Alisab*, 34 Bom L R 1453, *Musnheb v Emperor*, A I R 1932 Oudh 321, *Kashemali v Emperor*, 36 C W N 874

Although in criminal trials it is the settled practice to require other evidence in corroboration of that of an accomplice, yet the manner and extent of the corroboration required are not so clearly defined. Some Judges have deemed it sufficient, if the witness be confirmed in any material part of the case, others have been satisfied with confirmatory evidence as to the *corpus delicti* only, but others, with more reason, have thought it essential that corroborative proof should be given of the prisoner having actually participated in the offence, and, when several prisoners are tried, that confirmation should be required as to all of them, before all can be safely convicted. *R v Stubbs*, 23 L J M C 16. This last is undoubtedly now the prevailing opinion, the confirmation of the w

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when he shall afterwards endeavour to fix the crime upon the prisoner. *Farler*, 8 C & P 106, *R v Wilkes*, 7 C & P 272, *R v Moore*, 2 C & P 270, *R v Addis*, 6 C & P 398, *R v Wells*, M & M 326, *R v Sheenan*, *Jebb* C C 54, *R v Carey*, *Jebb* C C 263, *Taylor* Ev § 969, *Green* Ev § 381. 'It is a practice' said Lord Abinger in *R v Farler* 8 C & P 107, 109 "which deserves all the reverence of the law, that Judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice unless the accomplice is corroborated in some material circumstances. Now, in my opinion, that corroboration ought to consist in some circumstance that affects the identity of the party accused. A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the jury, without identifying the persons in were to break open a house and

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Criticising on the above statement of law, Chief Baron Joy in his *Evidence of Accomplices* said "There are different opinions entertained upon the subject—First some hold that the corroboration required must go to the criminality or identification of every prisoner on trial, accused by the accomplice—lastly, others are of opinion that the points of corroboration are not necessarily confined to the criminality or identification of any of the prisoners, but that it is enough if the testimony of the accomplice is confirmed in such and so many material parts of it as may reasonably induce the jury to credit him as to the entire narrative, and among other parts as to the guilt of the prisoners. The first opinion appears plausible, and the arguments in support of it are specious and are apt to captivate those who do not attentively consider the subject

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 if we find that in every point in which
 brought into contact with his they fit into one another and correspond exactly,
 it is good ground for presuming that his entire narrative is correct. The
 accomplice, who must be supposed to know the whole details is expected to
 relate them, and is thus exposed to detection in a variety of ways. There is,
 therefore, less necessity for breaking the general uniformity and destroying
 the harmony of the rules of law, in this case, than in the other. Similarly
 in *Tidd's Trial*, 33 How St Tr 1183, in charging the jury *Garrow B* said
 'It may not be unfit to observe to you here that the confirmation to be desired
 to an accomplice is not a repetition by others of the whole story of the accom-
 plice and confirmation of every part of it, that would be either impossible
 or unnecessary and absurd and therefore you are to look to the cir-
 cumstances to see whether there are such a number of important facts con-
 firmed as to give you reason to be persuaded that the main body of the
 story is correct. You are rich of you, to ask yourself this question
 Now that I have heard the accomplice and have heard other circumstan-
 ces which are said to confirm the story he has told does he appear to me to
 be so confirmed by unimpeachable evidence as to some of the persons affected
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Sureshchandra v. Emperor, 47 C L J
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Emperor, 48 C L J 481; *Narain v*

Emperor, 107 Ind Cas 97=29 Cr L J 209

Corroboration as regards the identity of the prisoner In England originally there was no necessity of specific corroboration as regards the accused's identity *R v Don and 99 Han C L J 215, 1827. R v Rirkelt and Brady*, R & R 252
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 152, see also *R v Sheehan*, Jebb 54, *R v Addis*, 6 C & P 388, *R v Webb* 5 C & P 595, *R v Wilkes*, 7 C. & P 272, 273, *R v Parler*, 8 C & P 106; *R v Kelsey*, 3 Lew Cr C 45, *R v Dyle* 8 C & P 261, *R v Bullett*, 8 C & P 722, *R v Stubbs*, 7 Cox Cr 48, 49, *MP Clory v Wright*, 10 Ir C L 514, 521, *Everest's Case*, 2 Cr App 130, *Warren's Case*, 2 Cr App 194 In *Everest's Case* supra, it was held that corroboration must be as regards 'some particular which goes to implicate the accused' But in *Wilson's Case*, 6 Cr App 125 the Court said 'It must not be supposed that corroboration is required amounting to independent evidence implicating the accused' In *Blatherwick's Case*, 6 Cr App 281, the Court said "*Everest's Case*, goes too far *Wilson's Case* is the correct statement of the law" See also *Watson's Case*, 8 Cr App 249 In *Cohen's Case*, 10 Cr App 91, 101 *Reading L C J* said "It is sufficient to say that *Everest's Case* and *Wilson's Case* seem to us to lay down the right principle" Again in *Threlfall's Case*, 10 Cr App 112, 117, the to decide whether *Everest's*

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1876) (7 Cr & P 272) *Baron*
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reference of law, that Judges have uniformly told juries that they ought not to
 put any weight to the testimony of an accomplice, unless the accomplice is
 corroborated in some material circumstance. Now in my opinion, that corrobora-
 tion ought to consist in some circumstance that affects the identity of the party
 accused. A man who has been guilty of a crime himself will always be able to
 relate the facts of the crime, and if the confirmation be only on the truth of that
 fact, without satisfying the jury that it is really no corroboration at all. It
 would not at all tend to show that the party accused participated in it. In
J & D's (5 Cr & P 261) *John Gurney* and *Albion* in some cases
 in direct, it has been held that you will find that in the majority of recent cases
 it is laid down that the confirmation should be in some matter which goes to
 connect the prisoner with the transaction. In *R v Bullett* (8 Cr & P 732)
 the prisoner was indicted for receiving stolen sheep. The evidence consisted
 of the statement of an accomplice and to confirm it it was proved that a
 quantity of mutton or wool in size with the sheep stolen was found in
 the prisoner's house. *John Patterson* said: If the confirmation had
 merely gone to the extent of corroborating the accomplice as to matters connected
 with himself only, it would not have been sufficient. But here we have a
 great deal more, we have a quantity of mutton found in the house in which the
 prisoner resides, and that I think is such a confirmation of the accomplice's
 evidence as I must leave to the jury.

The effect of the view expressed later by *Duon Parke* in *Reg v*
Stall, 25 L J M C 16 = D R C C 55, and shew that in his time, although
 there had been doubt in the past the law as formulated by him was accepted
 as the correct law to be the law to the time of passing of the
 judgment to the present day.

Corroboration must be independent testimony
 which connects the accused by connecting or tending to connect him with the
 crime. In other words
 which confirms in some
 way the crime has been committed
 to determine the nature
 whether the case falls within the rule of practice at common law or within that
 class of offences for which corroboration is required by statute. The language
 of the statute 'implies the accused' compendiously incorporates the test
 applied to the

the evidence which would be required as corroboration except to say that the
 story of the accomplice that the accused committed the crime is true, not merely
 that the crime has been committed but that it was committed by the accused.

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call for some explanation, and it is because they do not always appear to be to
 the same effect that this Court was especially constituted in order that we might
 lay down rules for future guidance.

In *Reg v Evers*, 2 Cr App R 130, the Court said: 'The rule
 has long been established that the Judge should tell the jury to acquit the
 prisoner if the only evidence against him is that of an accomplice, unless that
 evidence is corroborated in some particular which goes to implicate the accused.'
 We think 'tell the jury to acquit' should read 'warn the jury of the danger of

rated as regards every single statement *Sureshchandra v. Emperor*, 47 C L J 471 = A I R 1928 Cal 309, see also *Latafat Hossain v. Emperor*, 33 C W N 58 = A I R 1928 Cal 745, *Kailash v. Emperor*, 48 C L J 481; *Narain v. Emperor*, 107 Ind Crs 97 = 29 Cr L J 209

Corroboration as regards the identity of the prisoner In England originally there was no necessity of specific corroboration as regards the accused's identity *R v Despard*, 28 How St Tr 346, 487; *R v Burdett and Brady*, R & R 252 and finally prevailed the circumstances of the case, 172, see also *R v St* 5 C & P 595, *R v Willes*, 7 C. & P 272, 273, *R v Farler*, 8 C & P 106, *R v Kelsey*, 3 Lew Cr C 45, *R v Dole*, 8 C & P 261, *R v Bullett*, 8 C & P 722, *R v Stubbs*, 7 Cox Cr 48, 49, *St Clary v Wright*, 10 Ir C L 514, 521. *Erce's Case* 2 Cr App 130, *Warren's Case*, 2 Cr App 191 In *Erce's Case* supra, it was held that corroboration must be as regards "some particular which goes to implicate the accused" But in *Wilson's Case*, 6 Cr App 125 the Court said "It amounting to independent evidence" *Wilson's Case*, 6 Cr App 281, *Wilson's Case* is the correct statement of the law" See also *Watson's Case*, 8 Cr App 249 In *Cohen's Case*, 10 Cr App 91, 101 Reading L C J said "It is sufficient to say that *Erce's Case* and *Wilson's Case* seem to us to lay down the right principle" Again in *Threlfall's Case*, 10 Cr App 112, 117, the same learned Judge said "Without attempting to decide whether *Erce's Case* or *Wilson's Case* But in *R v Will's* (19 no intention (in *R v C* and *R v Blatherwick*"

In 28, the same learned Judge however reviewing the law said, "The question of opinion has arisen in the main in reference to the question whether the corroborative evidence must connect the accused with the crime The rule of practice

mation as to a material circumstance occurred in relation to the crime twenty five years practice, it was

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Nature and extent of corroboration "A confirmation does not mean
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place and therefore one accomplice's evidence is not corroborative of the testi-
mony of another accomplice. *Rex v. Noakes* 5 Car & P 326" *Per Lord*
Pending J in Rex v. Barker & Ellis 86 L. J. K. II 29 (73) So long established a
rule of law
here.

merely because it proceeds upon the
 theory of an accomplice. The Courts should give proper
 effect to the provisions of section 111, illustration (b). The rule in section 111,
 illustration (b) and that in section 133 are part of one subject and both are found
 in most of the great judgments, and neither section is to be ignored in the
 exercise of judicial discretion. The illustration (b) to section 111 is the rule,
 and when it is departed from, the Court should show, or it should appear that,
 the circumstances justify the exceptional treatment of the case. *Queen Empress*
v Chagan Dayaram 11 B 331. Although a conviction is not illegal merely
 because it proceeds upon the evidence of an accomplice, the
 evidence of an accomplice is not sufficient to convict a person, who is an actual perpetrator with the principal offender. In dealing
 with the question what amount of corroboration is required in the case of
 testimony given by an accomplice the Court must exercise careful discrimina-
 tion and look at all the surrounding circumstances in order to arrive at a
 conclusion whether the facts deposed to by the person alleged to be an accom-
 plice are borne out by those circumstances, or whether the circumstances are
 of such a nature that the evidence purporting to be given by the alleged
 accomplice should be supported in essential and material particulars by evidence
 abundant as to the facts deposed to by that accomplice. *Kamala Prasad v Sital*
Prasad, 28 C 339=5 C W N 517. The evidence of a pardoned accomplice
 taken with the statements of unpardoned co-prisoners is not sufficient by itself
 to warrant the conviction of those who never confessed. *Queen Empress v*
Phagya Rat Un Cr C 750. Where material discrepancies occur between the
 statements of the accomplice and the statements of the Police and their depositions
 in the case is no corroboration and consequently the conviction is not valid. *Crown*, 36 P W R 1910 Cr =
 11 Ind C 100. The rule laid down in illustration (b) to
 section 111 applies to all persons, who technically
 come within the definition of an accomplice.
 case will effect its application. *Deonandan v Empero*
 11 Ind C 100. In cases where the act of
 the presumption enacted in s 111
 6 S L R 106=17 Ind C 100.
Malhar, 26 B 192=2 P W R 1910 Cr = 11 Ind C 100.
 There is no evidence of an accomplice
 in *Hannun v*
 accomplice, the course of practice not to convict an accused person on the uncorroborated
 testimony of an approver, and the corroboration ought to consist, in some
 circumstances, in the testimony of a person who is not an accomplice. *Byr Krishna*,
 6 Bom L R 117. The testimony of an accomplice is not sufficient to convict the accused
 of an offence, unless it is corroborated by independent evidence
 to be that which is derived from unimpeachable or independent evidence

3. as distinguished from that derived from the earlier statements of the accomplice or the statements of other accomplices *Ibid per Chatterjee J*
There must be corroborative evidence spoken
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convict who are no better than accomplices if
this evidence is not corroborated in material respects by other independent
evidence in the case *Jogendra Nath v Sangar Das* 2 C W N 55

The rule of evidence contained in s 133 and in s 114 (b) of the Evidence Act amounts to nothing more than a direction to all Judges and Magistrates that a fact cannot reasonably be held proved within the meaning of section 3 if there be no other evidence of it than the statement of an uncorroborated accomplice. *Crown v Ramchand*, 6 S L R 195-11 Cr L J 262 19 Ind Cas 531 See also s 114 of the Evidence Act enacts a rule of presumption, and read with s 4 of the Act it indicates that this is not a hard and fast presumption inculcated by rebuttal & *presumptio juris et de jure* *Emperor v Shumoo* 7 Bom L R 93 3 Cr L J, 33

Prior to the Evidence Act, the rule not of law but of practice was that a conviction could not be founded on the unsupported evidence of an accomplice that the accused person's statement was no evidence against a fellow prisoner or one tried jointly with the person making the statement and that such statement was only admissible in evidence when made in the witness box. *Crown v Nihal Singh*, 31 P R 1866 Cr, *Queen v Jumeemulla* 124 P R 1867 Cr, *Queen v Boora* 125 P R 1866 Cr, *Deva v Crown*, 27 P R 1867 Cr, *Queen v Jairam* 28 P R 1867 Cr, *Crown v Ruheemce*, 35 P R 1867 Cr, *Queen v Godas* 5 W R Cr 11, *Crown v Hooraince* 27 P R 1869, *Empress v Shaker* 5 C P L R 1 Cr. But where a Magistrate treated a mere witness as an accomplice and granted him conditional pardon his evidence does not require corroboration. *Reg v Patechand*, 5 B H C Cr 85. In ordinary cases the uncorroborated testimony of an approver is not sufficient to convict a person charged with an offence. *Queen v Fulu* 3 B L R A Cr 66, *Queen v Iyer* 3 W R Cr 8, *Queen v Nawab Jan* 8 W R Cr 19, *Queen v Jamsagar* 8 W R Cr 57, *Queen v Chirag* 12 W R Cr 5, *Queen Empress v Shalin* 11 Cr L J 782, *Queen Empress v Bpin*, 20 C 970, *Naragadu v Emperor*, 13 Cr L J 240-10 Ind Cas 69, *Habla v King Emperor*, 4 Ind Cas 531-12 C 118-11 Cr L J 71, *Queen v Kalla Chand*, 11 W R Cr 21. It is not safe to convict upon the uncorroborated evidence of an approver and the testimony of his wife who is obviously interested in supporting his story which has procured pardon cannot be regarded as independent corroboration of the approver's evidence. *Sullan v Emperor*, 33 P L R 13. Evidence in corroboration need not be direct. It may be circumstantial evidence. *Kunwar v Emperor*, A I R 1032 Oudh 86-9 O W N 1136.

Although s 114 illustration (b) provides that a Court may presume that the evidence of an accomplice is unworthy of credit, unless corroborated, it is not 'must' and no decision of Court can make it 'must'. Therefore in the case of all that has been said to the contrary in law, the evidence of an accomplice stands on the same footing as any other evidence. The Court is not obliged to hold that he is unworthy to consider after taking into consideration all the circumstances—one of which being that he is an accomplice—whether it is or does not rely on the evidence. To entirely rule out the uncorroborated evidence of an accomplice might in many cases lead to miscarriage of justice. *Imperial v Mathews*, A I R 1929 Cal 322.

Judge's duty in charging the jury. In *Rex v Ballewille* (1916) 2 K P 658-86 L J K B 28 Lord Reading in delivering the judgment of the Court said "There is no doubt that the uncorroborated evidence of an accomplice is admissible in law—see *Rex v Atwood*, 1 Lech C C 161. But it is a dangerous rule of practice at common law for the Judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices, and in the discretion of the Judge to advise them not to convict upon such evidence, but the Judge should point out to jury that it is within their legal province to convict upon such unconfirmed evidence—*Reg v*

L. J. M. C. 10 and *Memorandum*, *In re* L. J. M. C. 193—(1901) 2 Q. B. 115. This rule of practice has become virtually equivalent to a rule of law; and since the Court of Criminal Appeal Act, 1907, 17 Edw. 7 C. (23), came into operation this Court has held that in the absence of such a warning by the Judge the conviction must be quashed—*Per v. L. J. K. B. 1013*—(1903) 2 K. B. 618. If after the proper caution by the Judge the jury nevertheless convict the prisoner, this Court will not quash the conviction merely upon the ground that the accomplice's testimony was uncorroborated. It can but rarely happen that the jury would convict in such circumstances. In considering whether or not the conviction should stand this Court will review all the facts of the case and will bear in mind that the jury had the opportunity of hearing and seeing the witness when giving their testimony. As the rule of practice at common law was founded originally upon the exercise of the discretion of the Judge at the trial and moreover as it is anomalous in its nature, it is much to be regretted that it requires confirmation of the testimony of a competent witness, it is not surprising that it has led to the differences of opinion as to the nature and extent of the corroboration required, although there are propositions of law applicable to corroboration which are beyond controversy. The Legislature has sought to lay down in section 114 of the Evidence Act, the rule that the testimony of an accomplice is unworthy of credit so far as it implicates an accused person unless it is corroborated in material particulars in respect of that person, and it is the duty of a Court which has to deal with an accomplice's testimony to consider whether it is or is not, and in a case tried by jury, to lay the principle relating to the reception of such evidence before the jury. *See* *Malabar*, 21 W. R. Cr. 69. The necessary (1) that there is no rule of law prohibiting the conviction of an offender upon the uncorroborated evidence of an accomplice, (2) that, as a general rule of practice, it is considered unsafe to convict upon such evidence, and (3) to point out any circumstances in the particular case which, in the opinion of the Judge afford a sufficient reason for relying upon the evidence. 2 Weir 708—4 M. H. C. Vol. 459. Where the evidence of an accomplice is uncorroborated, the correct practice requires the Judge not merely to tell the jury that it is unusual to convict on such evidence but also to tell them that it is unsafe, and contrary both to prudence and practice to do so. But his omission to state the above particulars does not amount to an error in law. *Per v. Gauhati* 6 B. H. C. Cr. 57, see also *In re Palaziam* 2 Weir 796. If the jury found a prisoner guilty on the uncorroborated evidence of an approver after the Judge in his summing up had pointed out to them the desirability under the circumstances of such corroboration the High Court on appeal would return to set aside the conviction. *Queen v. Mahima* 6 B. L. R. App. 108 10 W. R. Cr. 37. But where a Session Judge has failed to warn a jury that it is unsafe to convict merely upon the testimony of the approver, and where the Judge has not properly explained to the jury the law and practice regarding such cases there is a misdirection of a very serious nature. *Malabar v. Emperor* 12 M. H. C. In his charge to the jury should the approver was given on condition that it will be an error in summing up acting upon the uncorroborated evidence of the accomplice was corroborated by a fact which did not amount to my corroboration at all. *Jinnabhai v. Emperor*, 29 C. 782—6 C. W. N. 553. The evidence of an approver should not be believed without material corroboration and in order to see whether there is such a corroboration it is the duty of the Court to scrutinize and marshal out very carefully the proof relating thereto. Where this duty has not been properly performed by the lower Court the High Court will interfere on the revision side and set aside and set aside and set aside. *Malabar v. Emperor*, 9 Ind. 1911, *Queen v. Elahce* 57 Ind. Cas. 576—29 Cr. L. J. 311—A.

as distinguished from that derived from the earlier statements of the accomplice or the statements of other accomplices. *Ibid per Chatterjee* 171. There must be corroborative evidence not only as to the identity of the person spoken of as the accused but also as to the *corpus delicti*. *Reg v Chatur*, 171 Cr C 102; *Reg v Nankulhan*, Rat Un Cr C 102. A person cannot be convicted upon the evidence of witnesses who are no better than accomplices. This evidence is not corroborated in material respects by other independent evidence in the case. *Jogendra Nath v Sanjay Gao*, 2 C W N 55.

133 and in s 114 (b) of the Evidence Act a direction to all Judges and Magistrates to be proved within the meaning of section 133 than the statement of an unreliable witness. *Crown v Ramchand*, 6 S L R 195 = 14 Cr L J 262 = 19 Ind Cas 531. Section 114 of the Evidence Act enacts a rule of presumption, and reading s 4 of the Act it indicates that this is not a hard and fast presumption incapable of rebuttal, a *presumptio juris et de jure*. *Emperor v Shrinivas*, 7 Bom L R 153 3 Cr L J 33.

Prior to the Evidence Act, the rule not of law, but of practice was that a conviction could not be founded on the unsupported evidence of an accomplice that the accused person's statement was no evidence against a fellow prisoner or one tried jointly with the person making the statement and that such statement was only admissible in evidence when made in the witness box. *Cr v Nihal Singh*, 31 P R 1866 Cr, *Queen v Jameemata* 121 P R 1866 Cr, *Queen v Boora*, 125 P R 1866 Cr, *Deva v Crown*, 27 P R 1867 Cr, *Crown v Jaram*, 28 P R 1867 Cr, *Crown v Rukmensee*, 33 P R 1867 Cr, *Queen v Godai* 5 W R Cr 11, *Crown v Hoorainee*, 27 P R 1869, *Empress v Shrinivas* 5 C P L R 1 Cr. But where a Magistrate treated a mere witness as an accomplice and granted him conditional pardon his evidence does not require corroboration. *Reg v Fatchchand* 5 B H C Cr 85. In ordinary cases the uncorroborated testimony of an approver is not sufficient to convict a person charged with an offence. *Queen v Palsi*, 3 B L R A Cr 6, *Queen v Palsi* 9 W R Cr 11, *Queen v Nawab Jan* 8 W R Cr 19, *Queen v Humagar*, 6 W R Cr 57, *Queen v Chirag* 12 W R Cr 5, *Queen Empress v Shrinivas* Rat Un Cr C 814, *Reg v Chatur* 171 Cr C 102; *Jamiruddin v Emperor*, 12 Cr L J 782; *Queen Empress v Bipin*, 20 C 970, *Aajagadu v Emperor*, 12 Cr L J 240 = 10 Ind Cas 111 = 12 O C 118 = 11 Cr L J 71, Q. It is not sufficient to convict upon the evidence of an accomplice and the testimony of his wife who is obviously interested in supporting his story which has been procured by a pardon cannot be regarded as independent corroboration of the approver's evidence. *Sultan v Emperor*, 33 P L R 13. Evidence in corroboration need not be direct. It may be circumstantial evidence. *Annur v Emperor*, A L R 1932 Oudh 80 = 9 O W N 1136.

Although s 111, illustration (b) provides that a Court may presume that the evidence of an accomplice is unworthy and is not 'must' and no decision of Court can be based on all that has been said to the contrary, it stands on the same footing as any other evidence and the Judge should hold that he is unworthy to consider after taking into consideration whether it does or does not corroborate the evidence. *Emperor v Annur* 1932 Oudh 80 = 9 O W N 1136.

been a rule of practice at common law for the Judge to be careful of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices, and in the discretion of the Judge to advise them not to convict upon such evidence; but the Judge should point out to jury that it is within their legal province to convict upon such unconfirmed evidence. *Reg v Shrinivas*

in England as far back as the 10th December 1662, after conference with all the Judges." Then quoting extracts from *Sir Mithew Hale's Pleas of the Crown*, King v *Attwood*, 1 Leach Cr C 111, King v *Jones*, 2 Camp Rep 131 and from King v *Durham*, 1 Leach Cr C 174, he continued: "The law as above laid down that a conviction is legal, though supported by uncorroborated evidence of an accomplice has been admitted by Lord Denham in *Rex v Hastings and another*, 7 C & P 112, by Baron Almonson in *Rex v Wilkie*, 7 C & P 272; and by many other . . . ruled by the Court of Criminal Appeal . . . of England, therefore, upon this . . . America is the same, and in that country, where in most of the states new trials are granted . . . the verdicts were . . .

Act II . . . by whom the evidence is given . . . desired corroboration . . . not the intention of the Act to render inadmissible any evidence, which but for the Act, would be admissible . . . lessen the legal effect of the evidence . . . in answering the question may be . . . places."

Amount of corroboration. A conviction based on the totally uncorroborated story of an accomplice is bad in law. *Queen Empress v Shudlungappa*, Rat Un Cr C 841, *Crown v Raja Mihar*, 71 P R 1866 Cr, *Crown v Motum*, 11 P R 1867 Cr, *Ator v Queen Empress* U B R, (1892-1899) Vol 1, 103. An approver's evidence cannot be accepted unless it is corroborated in material particulars by other independent evidence. *Lad Khan v Crown*, 19 P W R 1912 Cr = 13 Ind Crs 938 = 13 Cr L J 182 = 47 P L R 1912, *Queen Empress v Krishna Dhat*, 10 B 319, *P S Narayan v Emperor*, (1914) M W N 263 = 15 Cr L J 117 = 24 Ind Crs 153. Not only as to the persons spoken of by an accomplice must there be corroboration, but there must be some *prima facie* direction. *Reg v Chatur*, Rat Un Cr C 841. The evidence of two or more accomplices requires corroboration equally with the testimony of one. *Queen v Dwarika*, 5 W R Cr 18 = 1 Ind Jur N S 100, *Queen Empress v Dhonda*, Rat Un Cr C 810, *Queen Empress v Kunjan Menan*, 1 V L J 397, *Queen Empress v Shudlungappa*, Rat Un Cr C 841. The evidence of two or more accomplices requires corroboration equally with the testimony of one. *Queen v Dwarika*, 5 W R Cr 18 = 1 Ind Jur N S 100, *Queen Empress v Shudlungappa*, Rat Un Cr C 841, *Nga Paw v Q E*, L B R (1872 1892) 51. An accomplice is a competent witness and there is no absolute rule of law which enacts that the conviction on the evidence of an accomplice is bad, but there is an established practice, founded on the judicial experience of generations, which requires corroboration by some untainted witness. . . .

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more persons having been concerned should be confirmed, not only as to the instances of the case, but also as to the identity of the prisoners, and any prisoner as to whom his testimony is not supported should be acquitted. *Rex v Imani Palad*, 3 B H C Cr 57. In dealing with the question what amount of corroboration is required in the case of testimony given by an accomplice, the Court must exercise careful discrimination and look at all the surrounding circumstances in order to arrive at a conclusion, whether the facts deposed to

by the person alleged to be an accomplice are borne out by those circumstances or whether the circumstances are of such a nature that the evidence purporting to be given by the alleged accomplice should be supported in essential and material particulars by evidence *abunde* as to the facts deposed to by that accomplice. The amount of criminality is a matter for consideration, and when a person is only an accomplice by implication or in a secondary sense his evidence does not require the same amount of corroboration as that of a person who is an actual perpetrator with the principal offender. Although a conviction is not illegal, merely, because it proceeds upon the uncorroborated testimony of an accomplice, the evidence of an accomplice, ordinarily speaking, should be corroborated in material particulars, and such evidence should be accepted with a great deal of caution and scrutiny. *Kamali Prasad v Sital Prasad*, 5 C. W. N. 517-28 C. 339. The corroboration of the

required, should be such corroboration in a prudent man, on the consideration of that the evidence is true, not only as to the but also so far as it affects each person. *Srinivas Krishna*, 7 Bom. L. R. 269-3 Cr. 100, 10 C. W. N. 962-1 Cr. L. J. 11-33 C. by the accomplice himself, though consistent, are insufficient for the corroboration. The evidence requisite for the corroboration must proceed from an independent and reliable source. *Peg v Malapa Bin*, 11 B. H. C. A. C. 196. The confession of one of the accomplices against the accomplice is not sufficient. *Heikh Sheru v Emperor*, 81 W. R. Cr. 43, *Hakam Singh v Emperor*, A. I. R. 1929 Lih. 850-1929 Cr. C. 626, *Queen v Hamsaran*, 8 A. 306-A. W. N. 1885, 311, *Queen v Durrani*, 5 W. R. Cr. 18, *Mahomed Usuf v Emperor*, 114 Ind. Cas. 457-A. I. R. 1909 Nag. 215.

The rule laid down in s. 111, illustration (b) corresponds with the rule observed in England. *Reg v Ramasami*, 1 M. 391-2 Weir 799. It is unsafe to convict a person on the uncorroborated testimony of an accomplice. *Queen Empress v Indad*, 8 A. 120-A. W. N. 1886, 7, *Maung Lay v Emperor*, 77 Ind. Cas. 429. The initial presumption is that the evidence of accomplices is only where there are any special circumstances and leave no reasonable doubt as to the belief. *Nja Wa v King Emperor*, 1 U.

The law as expressed in ss. 114(b) and 133 of the Evidence Act is in no respect different from the law of England, but simply reproduces a rule of practice viz., that a conviction based on the uncorroborated testimony of an accomplice is not illegal, that is, it is not unlawful. But experience teaches that it is not safe to rely upon the evidence of an accomplice, unless it is corroborated, and hence, it is the practice of the Judges, both in England and in India, when sitting alone, to guard their minds carefully against acting upon such evidence when uncorroborated and, when trying a case with a jury, to warn them that such a course is unsafe. Not only it is necessary that evidence should be corroborated in material particulars but the corroboration should extend to the identity of the accused person. There must be corroboration independent of the accomplice or of the accomplice and the confessing prisoner, to show that the party accused was actually engaged directly in the commission of the crime charged against him. It is of no value and makes no difference if there are two accomplices. A second accomplice does not improve the position of the first, nor does the fact that there are two make it unnecessary that both should be corroborated. The accomplices must be corroborated not only as to one, but as to all of the persons affected by the evidence; corroboration of his evidence as to one prisoner would not justify his evidence against another being accepted without corroboration. *Queen v Empress Ram Saran*, 8 A. 306-A. W. N. 1885, 311; *Emperor v Jamal*, 11 C. W. N. 536. If some part of his evidence is satisfactorily corroborated, the

is good ground for believing him in other parts in which there is no corroboration S. 13
Queen Empress v Kunjan Menon, 1 M L J 397 (I. B)

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 being merely a sort of guidance to assist the Courts It is impossible to lay
 down any rule as to what extent an accomplice must
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 perjury on occasion, (iii) because he hopes for pardon, or has secured it and so
 favours the prosecution *Barhat Ali v Crown*, 2 P R 1917 Cr = 36 Ind Cas.
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No hard and fast rule
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more reliable witness than the accomplice who is examined under conditional pardon, although proper corroboration is necessary in cases of both *Sudam Chandra v Emperor*, A I R 1933 Cal 148

A conviction based on the uncorroborated testimony of an approver is illegal. *Gurdit Singh v Crown*, 52 P L R 1918=44 Ind Crs 967=19 Cr L J 439, *Pan Gang v Emperor*, 42 Ind Crs 1002=19 Cr L J 47

The retracted confession of an accused person may be sufficient corroboration of the approver's story as against himself but not against a co accused. *Palia v Emperor* 12 P W R Cr 1949=49 Ind Crs 604=20 Cr L J 188, *In re Damur Veerabhadra*, 12 L W 385=61 Ind Cas 528

The approver's evidence is :
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L T 757 Where the corroboration was the recovery of certain articles alleged to be some of the articles stolen and subsequently produced from the house of the accused, his house was into the were traces of error

The approver referred to as appellants to join in the decoy

and bearing consecutive number was strong corroboration of the approver's story as to the appellants having accompanied him to the scene of the occurrence *Hakim v Emperor*, 1923 Lah 163

The production of stolen property by an accused person even from a place which is not in his own possession may be accepted as material corroboration of the evidence of an accomplice who has deposed that the accused joined him in committing the burglary or theft *Mahomed v Emperor*, 111 Ind Cas 417=29 Cr L J 863

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evidence of their connection with the crime. *Lah 111 Ind Cas 423=30 Cr L J 922=A I R 1929 Oudh 321* The mere presence of a person in the house is not a corroboration *Abou v Emperor* 1929 M W N 698 An approver is unworthy of credit unless corroborated in material particulars. Where the only witness who corroborated him was his son aged 7 years who parrot like repeated what he had been tutored to say, it is unsafe to convict the accused on such evidence. *Meher Singh v Crown*, 11 Lah L J 223=30 P L R 422=A I R 1929 Lah 287

Corroboration is not necessary in cases of belief in evidence that the accused

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In deciding a criminal case with reference to the evidence of an accomplice Court must take into consideration the maxim that it is unsafe to convict a person upon the evidence of an accomplice unless he is corroborated in material particulars both as to the circumstances of the offence and the identity of the person whom he implicates. *Lady Mohar v Emperor*, 111 Ind Cas 623-A. I. 1929 Nag 222-30 Cr L J 331 see also *Mahomed v Emperor*, 114 Ind Cas 457-30 Cr L J 311-A I II 1929 Nag 215, *Sundaram v Emperor*, 9 M W N 791, *Mahomed Usuf v Emperor*, 111 Ind Cas 457-30 Cr L J 311-A I R 1929 Nag 215; *Musa v Emperor* 114 Ind Cas 609-A I R 9 Nag 233-30 Cr L J 333, *Hakam Singh v Emperor* A I R 1929 Lah 1, *Monohor v Emperor*, A I R 1930 Cal 430, *Sheo Bashi v Emperor*, A. I. 1930 Pat 161

It is the main duty of the prosecution to bring the accomplice character of evidence to the notice of the Court and then invite it to believe it by reference to the corroborative evidence on record. *Mahomed Usuf v Emperor*, Ind Cas. 457-30 Cr L J 311-A I R 1929 Nag 215. The foremost essential condition for accepting the approver's statement is that it must be trustworthy statement. *Lodys v Emperor*, 111 Ind Cas 623-30 Cr L J 331-A I 1929 Nag 222

Rejection of Accomplice evidence: If the evidence of an approver is rejected, it must be discarded as a whole and the defence cannot have argument, any more than the prosecution. *Sheo Bashi v Emperor*, 11 Pat L T 1-A I R 1930 Pat 164

134 No particular number of witnesses shall in any case be required for the proof of any fact.

Principle "And after all, what is it worth?" said *Jeremy Bentham* in his *Elements of Judicial Evidence* B IX, pt VI C 1 § 1, 'In the multitude of witnesses says the proverb, there is safety, in the multitude of witnesses there may be some sort of safety but nothing more; it is by weight, full as much as by tale, that witnesses are to be judged. *Pundere non numero* From numbers (by weight)'. -

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their agreement with other matters of fact too notorious to stand in need of corroboration - single witness (especially if situation and character be taken into account) will be enough -
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I do not mean to say that (as it is said to be) to insinuate) that the position of a single witness against perjury No security, the greater that security, (be it or less), is not so necessary as that you should pay so great a price for it as you do pay, and must pay by the license you thereby grant to commit the crime in the presence and view of two witnesses. I make assertion against this by way of which cause a man to be taken to liberty. This is a question of liberty? What is the meaning of it? What my own meaning is?

more reliable witness than the accomplice who is examined under conditions of pardon, although proper corroboration is necessary in cases of both *Sudas Chandra v Emperor*, A I R 1933 Cal 148

A conviction based on the uncorroborated testimony of an approver is illegal *Gurdi Singh v Crown*, 52 P L R 1918=44 Ind Cas 967=19 Cr L J 439, *Pan Gang v Emperor*, 42 Ind Cas 1002=19 Cr L J 47

The retracted confession of an accused person may be sufficient corroboration of the approver's story as against himself but not against a co accused *Pallia v Emperor*, 12 P W R Cr 1949=49 Ind Cas 601=20 Cr L J 189 *In re Damur Veerabada*, 12 L W 385=61 Ind Cas 528

The approver's evidence is in itself of little weight. It may be of belief for various reasons. The approver taken at the end of the trial *v Emperor*, 56 Ind Cas 667=21 Cr L J 507, see also *Kalia v Emperor*, Lah L J 296. An accused cannot be convicted unless the Judge is satisfied that the evidence of the accomplice was corroborated in some material and satisfactory manner *Dhanu v Emperor*, 2 Pat L T 757. Where the corroboration was the recovery of certain articles, alleged to be some of the articles stolen and subsequently produced from the house of the accused, his house was searched and the articles were found. *Eaching the*

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The approver referred to a story by one A who invited him along with the story told by the approver. They were seen with the approver. The possession of the three articles was strong evidence.

corroboration of the approver's story as to his presence at the scene of the occurrence *Hakim*

The production of stolen property by an accused person even from a place which is not in his own possession may be accepted as material corroboration of the evidence of an accomplice who has deposed that the accused joined him in committing the burglary or theft *Mahomed v Emperor*, 111 Ind Cas 447=29 Cr L J 863

The testimony of a proffered accomplice requires to be carefully scrutinized with anxious search for possible corroboration *Macdonald v Fred Latimer*, 29 L W 155=112 Ind Cas 876=A I R 1929 P C 15. The well known rule is that the evidence of an accomplice is of little weight unless it is corroborated by other evidence.

evidence of their connection with the crime *Lah v Emperor*, 423=30 Cr L J 922=A I R 1929 Oudh 321. The mere presence of a person is not sufficient evidence of his guilt.

1929 M W N 293. An accused person's son aged 7 years who is unable to convict the accused is unsafe to convict the accused. *Lah L J 223=30 P L*

including the character and antecedents of the approver and the degree of suspicion attached to his evidence *Hakim Singh v Emperor*, A I R 1929 Lah 860. The degree of suspicion attached to his evidence is a material consideration. *Hakim Singh v Emperor*, 111 Ind Cas 447=29 Cr L J 863. The degree of suspicion attached to his evidence is a material consideration. *Hakim Singh v Emperor*, 111 Ind Cas 447=29 Cr L J 863.

he may safely violate any engagement, however solemn, contracted under similar circumstances 2 Artificial rules of this kind hold out a temptation to the subornation of perjury, in order to obtain the means of complying with them 3 They produce a mischievous effect on the tribunal by their natural tendency to react on the human mind, and they thus create a system of mechanical decision dependent on the number of persons.

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proceed on intelligence and credit, and not on the number of the witnesses examined or documents produced in evidence—is a just one, there are cases where, from motives of public policy, it has been wisely ordained otherwise Best & §§ 597 601; Wigmore § 2033

"What we must conclude, then, is that our whole presumption should be against any specific rule requiring a number of witnesses, or corroboration of a single witness; that such arbitrary measurements are likely to be of little real efficacy and to introduce disadvantages greater than those which they purport to avoid, and that therefore any such rule, when advanced for a specific issue—for example, treason or perjury—or for a specific witness—for example, an accomplice or a raped complainant—must justify itself by experience as overwhelmingly useful and efficacious" Wigmore § 2033

Scope of the section Section 28 of Act II of 1855 enacted "Except in cases of treason, the direct evidence of one witness, who is entitled to full credit shall be sufficient for proof of any fact in any such Court or before any such person But this provision shall not affect any rule or practice of any Court that"

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tion either for treason or misprison for treason, the offence is required to be established on the testimony of not less than two witnesses This is a statutory provision of the reign of William III, and requires the oath of either two witnesses to the same overt act, or one to one, and the other to another overt act of the

using part of the act or treason even though part of the general proof; as for instance, in an indictment for adherence to the Queen's enemies, proof that the accused was a part of the Queen's enemies. In the case of an indictment for

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also Raja Prosonno v. Romonte 10 W II 236, Govindo v. Narain, 21 W. R. Cr 18; Arjun v. Emperor, 53 A 598=A. I. R. 1931 All 363.

In Queen Empress v. Ghulet, 7 A 41 at p 50 Dulton, J said "R. Harris, 5 B & A 926, has been followed in Mary Jackson's Case, 1 Lew C 270, in R. v. Whealland, 8 C & P. 238, in R v Hook, 15 D & R. and in cases As regards all these cases I remark generally that the assignment of perjury, and of showing question of defending, is not law in India

135. The order in which witnesses are produced and examined shall be regulated by the law and the court.

in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and, in the discretion of the Court.

witnesses and criminal procedure respectively. In the absence of any such law, by the discretion of the Court.

Attendance of witnesses This chapter deals with the examination of witnesses, by incorporating the rules of English law on the subject. The o

produce any documents. This chapter does not say
the production of witnesses or documents before the Court. The Civil and Crim
Provisions have be

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been recognized and enforced by the common law from
 v Long, 9 East 473 The process by which this writ is enforced is the subpoena
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 to the trial to give his testimony It is a writ or order directed to
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to hear and determine any suit, may so call for all adequate proofs of the facts in controversy, and, to the end, may require the attendance of witnesses before it,"

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Accordingly, we find it extend."

Exclusion of witnesses from Court room. Before discussing the general principles, it is proper to call attention to the exercise of its discretion, direct the exclusion of witnesses, while the testimony of other witnesses is being given. *Burr Jones & Co., Inc. v. L. E. 1400-1402.* When excluded

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the truth by securing testimony not influenced by the statements of other
 witnesses or the suggestions of counsel as well as to prevent collusion and
 covert of testimony among witnesses. While this order will generally be made
 by the Court on the application of counsel, before the examination of the witness-
 es, it is generally held to be a matter of discretion, rather than of strict right;
 yet in some States it may be claimed as a right. *Burr Jones* § 807. Parties to
 the litigation except for some impropriety will not generally be excluded,
 since their presence is usually necessary to a proper management of their
 case. Nor will an attorney for one of the parties be excluded, but see *Everett*
v. Lordham, 5 C & P 91; *Promitory v. Baddely*, Ry. & M 130
 The same is true of one who is party in interest, though not a party
 to the cause.
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The mere fact of the necessity for the presence of such an agent will not out-
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Burr Jones § 804, *Delje v. Isaacson*, 11 & 1 191; *Charnock v. Jennings*, 3 C
 & K 378; *Fussel v. Pilson*, 28 R L Jo 810, *Ramsden v. Jacobs*, (1922) 1 K
 B 640; *Contra, Outram v. Outram*, (1877) W N. 75; *Usher v. Henuood*, 20
 S J 598; *Tay* § 1400

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States, 1 Okl Cr 291, *Burr Jones* § 8
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coun has discretion, the Court has also power and jurisdiction to direct
 the order in which witnesses cited by a party shall be examined. In the goods
 of *Gopesar Dulla*, 16 C W N 265-39 C 215 In *Kedar Nath Ghosh v*
Blupendra Nath Dose, 5 C W N. 21, at the close of the examination-in-chief

the first witness called, Mr Jackson referring to cross-examination of the plaintiff by his counsel. In a Court is very slow to in which witnesses should be examined. I think that in the present case the ordinary practice should regulate the order of examination. At the conclusion of the cross-examination of the complainant on the ground that the cross-examination of the complainant before some other witnesses will embarrass and prejudice the defence, the mere fact that the complainant, a sickly man, is present in Court and may not come on some other day due to his bad health, is not sufficient of the defence, but the defence *Moosa Hay* is not the duty of the

L R 136

the discretionary control of the trial Judge

And where permission has been given to recall a witness omitted to be examined by the other side, the Court may question the evidence to be introduced, out of its order, in the examination-in-chief, though the witness is needlessly protracted, arrest it, and the Judge may on motion *Burr Jones* § 814. On behalf Cr P Code as not thereby vitiated *Nayan* N 170-A I R 1930 Cal 134.

Right to begin. In the regular order of procedure, the party having the burden of proof to support the substantive allegations should begin. As a subject of burden of proof lies on that party who ordinarily the plaintiff. Additional facts of the relief begin. Civil C L R 274.

prove the other party. The day to which he is bound to give evidence (if

any) and may then address the Court generally on the whole case. The party beginning may then reply generally on the whole case. *Civil Procedure Code, Order XVIII, rule 2*. If there be some defendants who support the plaintiff's case, in that case, they should address the Court and call their evidence before the other defendants. *Haji Bibi v. Sultan Mahomed*, 32 II 599. Where there are several issues the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party; and in the latter case, the party beginning may produce evidence on those issues at a later date. The party beginning may then begin; but the other party may then begin; but the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant and not otherwise.

As regards order of production of witnesses in criminal cases, *rule 2, Chapters XVIII XX, XXI, XXII, XXIII, of the Criminal Procedure Code*

136 When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant, and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant and not otherwise.

If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the first fact mentioned, unless the party undertakes to give proof of such fact, and the Court is satisfied with such undertaking.

If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may, in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.

Illustrations

(a) It is proposed to prove a statement about a relevant fact by a person alleged to be dead, which statement is relevant under section 32.

The fact that the person is dead must be proved by the person proposing to prove the statement, before evidence is given of the statement.

(b) It is proposed to prove, by a copy, the contents of a document said to be lost.

The fact that the original is lost must be proved by the person proposing to produce the copy, before the copy is produced.

(c) A is accused of receiving stolen property knowing it to have been stolen.

It is proposed to prove that he denied the possession of the property.

The relevancy of the denial depends on the identity of the property. The Court may, in its discretion, either require the property to be identified before the denial of the possession is proved, or permit the denial of possession to be proved before the property is identified.

(d) It is proposed to prove that the accused is the cause of the effect.

It is proposed to prove that the accused is the cause of the effect.

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It is proposed to prove that the accused is the cause of the effect.

Para I 'The reception of clearly incompetent evidence is a practice which leads to the expense of money which may follow. *Mc* y shall offer his evidence in for the counsel to determine, unless it is made to appear to the Court that some undue advantage of the opposite party is thereby attempted. When evidence is offered which proves or tends to prove any relevant fact, it is to be presumed that this will be followed by such other proof as is necessary to establish the proper connection. Hence, it is of no consequence in what order the evidence is introduced, so far as its ultimate legitimacy is concerned, provided in its relation to the other evidence in the case, it is at the end pertinent to the issue. A case consists frequently of various parts neither one of which makes it out and to hold that a party is not entitled to introduce any part until he establishes the whole is that the particular involved in the issue

ded by other he case. The testimony is unsworn must be allowed to begin somewhere upon the expectation that other links are to be afterwards supplied, and for this the Courts rely upon the statement of counsel professional honour being a guarantee against abuse. For example, the Court may permit a sheriff's deed to be given in evidence before the judgment and execution on which it is founded are introduced and where one relies on his right as assignee of a bond he may introduce the bond in evidence before he shows a title and interest in it. *Burr Jones* § 812. So it is clear that relevant may be given in evidence as of right and not depend upon itself but rests upon some reception as a matter of privilege. In other the absence of that testimony without which it been declared that the relevancy of testimony need not always appear at the time when it is offered, since it is the usual course to receive at any proper and convenient stage of the trial, in the discretion of the Judge any evidence which the counsel shows will be rendered material by other evidence which he undertakes to produce. If it is not subsequently thus connected with the issue it is to be laid out of the case. *Green* Ev § 51(a). But if the testimony is apparently irrelevant before counsel can ice otherwise or in some nt. But on cross examination much more latitude is necessarily allowed to counsel. In the absence of such assurance the evidence should not be received. If it is plain and there es not rought idence re not relevant

Para 2 Vide Section 104 illustration and Notes. It often happens that an agent for instance to carry a message and bring back an answer or do some other act, is put into the box before his agency or authority is proved. There upon an objection is taken by the opposing counsel that the evidence is not receivable, because the agency, etc., is not proved. An undertaking, is usually then given that evidence to prove the agency will be forthcoming at a later period, whereupon the case proceeds. If the proof of agency should break down, the whole of the alleged agent's evidence is expunged from the Judge's notes. It would often be highly inconvenient to interrupt the witness in his story, and call another witness in the middle of his examination, to prove the

agency It is to meet such a state of things that the clause is provided Not S 1
F. p 319 S. 1

Para 3 Vide notes under para (1) It is doubtful whether s 136 gives
the Court any discretion to allow evidence to corroborate a witness to be given
" *Ujan v King Emperor*
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have a just cause of complaint if the Judge afterwards turns round and says
I decide against you on that point. *Havaji Bhajant v Dhondiram* 6 Bom
L R 636

Examination in chief 137. The examination of a witness
by the party who calls him shall be called
his examination-in-chief

Cross examination The examination of a witness by the
adverse party shall be called his cross-
examination

Re examination The examination of a witness subsequent to the cross
examination by the party who called him,
shall be called his re-examination

138 Witnesses shall be first examined in-chief, then (if
the adverse party so desires) cross examined,
then (if the party calling him so desires)
re examined

The examination and cross-examination must relate to
relevant facts but the cross examination need not be confined
to the facts to which the witness testified on his examination
in chief

The re-examination shall be directed to the explanation of
matters referred to in cross-examination
and if new matter is by permission of the
Court introduced in re examination, the
adverse party may further cross examine upon that matter

Direction of re ex
amination

Witness
called by
any
party

Every party to a suit is entitled to have all the witnesses, whom he desires to call, and is ready at the trial to produce, heard by the Court, whatever opinion the Court may form by anticipation as to the probable value of the evidence when it shall be given. *Looloo v. Rajender*, 8 W R 364, see also *Bungshee v. Chowdhry*, 1 W R 263; *Morno v. Bheem*, 6 W R 231, *Choudhury v. Shib*, 11 W R 220; *Jaisingjee*, 2 M I of taking upon witness should be J 156=27 Ind Cas 220

Witness to testify orally When testimony is to be given in Court at a trial, it is to be given verbally, in the presence of the Court and jury, where the behaviour, expression, and gesture of a witness may be seen. One cannot write out his testimony, and read it to the jury himself, or have it read. One of the strongest indications of the truthfulness of a witness is his manner under the particular circumstances which surround the giving of his testimony. This is of course, lost to the jury unless the witness testify orally before it. Whenever orally such facts testify from his own ice is brought out

between the ideas and language of various witnesses in reference to their own knowledge of the facts about which they are questioned. One witness will know a thing extent of giving With certain made by sign

Referring the truth of a part transaction will probably ever be devised by human ingenuity. If a witness is asked a question which requires a long answer, the witness should be allowed to answer in his own words. The Court should not be concerned with the form of the answer, but with the substance. The witness should be allowed to answer in his own words, and the Court should not be concerned with the form of the answer, but with the substance. The witness should be allowed to answer in his own words, and the Court should not be concerned with the form of the answer, but with the substance.

Examination in chief The first rule is this — Counsel can ask a witness whom only as are strictly relevant to the issue. A matter immediately in issue. No question direct examination, the probable answer to which cannot have a tendency to prove the offence or defence, or other matter put in issue by the pleadings. And relevant facts must be proved in the legitimate way, a fact may be most material, still that is no reason for admitting hearsay evidence. Again, counsel must confine his questions to matters of fact; he inferred from witness on any matter scientific witnesses training or special competent judgment on any matter in issue. *Pouell Ev* 526. Generally it is not the province of the Court to examine witnesses and as a rule Courts should leave the witnesses to the pleaders to be dealt with as is provided in section 13. *Janki v. Sheo Narain*, 82 Ind Cas. 154=25 Cr L J 1226. The necessity for expediting trials frequently precludes the Court from permitting the repetition

of questions especially in direct examination. To repeat a question once excluded for any other purpose than to seek, in good faith, its introduction after a change of condition in the proof, is opposed to the canon under consideration *Chamberlayne's Et* § 551.

Importance of examination in chief Cross-examination is far easier than examination-in-chief. In cross-examination one cannot avoid getting answers which are not desired, but in chief a great deal depends upon the way in which witnesses are examined. *Lord Alton's Recollections of the Bench and the Bar* The examination of a witness in chief or the direct examination of witnesses as it is sometimes called, is very much underrated in its significance and its importance. *Parry's Seven Lamps of Advocacy*, 82-85. If a direct examination is properly and skilfully conducted, the impression thus made by an honest witness is more lasting than any argument of counsel. The vivid story of a single witness told in a winning way will leave a first impression upon a juror's mind that no eloquence can efface. It is no easy matter for an advocate to get his own evidence properly before a Court and jury. It is an important fact for him to remember that cases are often won or lost by the straight forward statements of the witness.

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Advocacy, pp

An impression very generally prevails in both branches of the profession that the examination in chief is the most important part of the trial.

powers of no inferior order so to interrogate each witness, whether, learned or unlearned. *Ibid* p. 37. The examination in chief is the most important part of the trial. It is the duty of counsel to bring out clearly, and in proper chronological order every relevant fact in support of his client's case to which the witness can depose. This task is more difficult than may at first sight appear. The timid witness must be encouraged, the talkative witness repressed, the witness who is too strong a partisan must be kept in check. And yet counsel must not suggest to the witness what he is to say. An honest witness, however, should be left to tell his tale in his own way with as little interruption from counsel as possible. In criminal cases, the duty of counsel

exercise your sagacity at the moment, it must depend upon the particular facts of the case." *Ibid* p. 37.

Duty of counsel It is the duty of counsel to bring out clearly, and in proper chronological order every relevant fact in support of his client's case to which the witness can depose. This task is more difficult than may at first sight appear. The timid witness must be encouraged, the talkative witness repressed, the witness who is too strong a partisan must be kept in check. And yet counsel must not suggest to the witness what he is to say. An honest witness, however, should be left to tell his tale in his own way with as little interruption from counsel as possible. In criminal cases, the duty of counsel

for the prosecution is wider. It is the practice, and probably the duty, of a prosecuting counsel to ask a witness questions favourable to the prisoner, for he must lay all the material evidence before the Court, whether it tells in favour of the prisoner or not, and not unduly press for a conviction. *Powell Ev* 526, *Ramranyan v Emperor*, 42 C 422

The Rambling witness. Testimony in itself intelligible is often rendered difficult of comprehension by the incompleteness, or the want of continuity, with which it is presented. These evils are due either to the defective mental constitution of the witness, or to his moral weakness, or to his personal hostility, or to the in- . . . ital constitution manifests itse . . . many indivi . . . a single object duals there . . . individual it is and persistent . . . useless to expect any exhaustive and coherent statement of the facts within his knowledge. Any idea which suddenly arises in his mind, during the course of his narration, diverts his thought into another channel; he loses sight of many details which he should . . . ithout conscious . . . ness of the omission . . . lea his effort to explain it leads him . . . when he returns

to the fact at which it was abandoned, while to the comprehension of the whole a witness of this defective mental . . . binson's *Forensic Oration*, *Wignores*

Jud Proof § 160

The dull and stupid witness. The same obstacles are encountered in eliciting the evidence of a dull and stupid witness. His perceptions are cloudy and indefinite. His processes of recollection and reflections are slow and examination must be . . . his story in order to . . . effort of his memory, to construct questions which contain some word or phrase suggestive of the missing thought, to contrive methods of explanation or illustration which enables . . . ties . . . or . . . of

Timid and self-conscious witness. . . . testimony of a witness whose moral . . . id self consciousness is subject . . . L. E.

disclosure of . . . work through . . . he omits or . . . ideas uttered, however, than he becomes conscious of their error. If he now attempts an explanation, it usually results in his entire discomfiture. If he persists in the misre . . . arises in the fear . . . hoods and suppress . . . knowing matters of importance to the . . .

Binson's Forensic Oration p 120, *Wignores* . . .

Judicial Proof § 160

The Bold and Zealous witness. . . . The main weakness of a . . . 15 . . . 16 . . . n . . . if . . . 5 . . . 5

delivered, and avails himself of every opportunity to assert his own opinions S. 1

Incompleteness or obscurity in the difficulties of an entirely different

the examination of the rambling, the

self conscious or the stupid witness arise from intellectual or emotional defects, and can be overcome by enlightening the mind of the witness, or by assisting him to bring his impulses under control The obstacle encountered in an

compelled to yield it, to communicate it in language which makes it as valuable as possible Where such a witness is the sole repository of ideas which are

course than to produce him,

he should avoid him altogether

Principles of Judicial Proof

y 100

Paul Brown's Golden Rules—Examination-in chief 'No better general rules" says Mr. Wrottesley, "for the examination of witness in chief, that we know of" *Brown*, who was one of took the test of experience the United States, and rowed largely from them concluded to give the rules in full" Wrottesley on examination of witnesses p 40 The following are *David Brown's Golden Rules* for the examination-in chief of witnesses —

"1 If they are bold, and may injure your cause by pertness or forwardness, observe a gravity and ceremony of manner towards them which may be calculated to repress their assurance

"2 If they are alarmed or diffident, and their thoughts are evidently scattered, commence your examination with matters of familiar character, remotely connected with the subject of their alarm, or the matter in issue, as for instance,—Where do you live? Do you know the parties? How long have you known them? etc And when you have restored them to their composure, and the r of the ca may agai

"3 If the evidence of your witness be unfavourable to you (which should always be carefully guarded against), exhibit no want of composure; for there are many minds that form opinions of the nature or character of testimony chiefly from the effect which it may appear to produce upon the counsel

"4 If a witness is imbued with preju unless there be such that witness on as possible

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"5 Never call a witness whom your adversary will be compelled to call. This will afford you the privilege of cross examination—take from your opponent the same privilege it thus gives you—and, in addition thereto, not only render everything unfavourable said by the witness doubly operative against that party, but also deprive that party of the power of counter acting

without an object, nor without being able to connect that object with the case, if objected to is irrelevant

7 Be careful not to put your question in such a shape that if opposed for informality, you cannot sustain it or at all events produce strong reason in its support. Frequent failures in the discussion of points of evidence enfeeble your strength in the estimation of the jury, and greatly impair your hopes in the final result.

final result

'8 Never object to a question from your adversary without being able and disposed to enforce the objection. Nothing is so monstrous as to be constantly making and withdrawing objections; it either indicates a want of correct perception in making them, or a deficiency of real or of moral courage in not making them good.

"9 Speak to your witness clearly and distinctly, as if you were awake and engaged in a matter of interest, and make him also speak distinctly and to your question. How can it be supposed that the Court and the jury will be inclined to listen when the only struggle seems to be whether the counsel or the witness shall first go to sleep?

10 Modulate your voice as circumstances may direct—Inspire the fearful and repress the bold.

11 Never begin before you are ready, and always finish when you have done. In other words do not question for question's sake, but for an answer.

allow money best & own way. The advocate may either is own way, or he may bring out his testimony is intelligent and honest the stories but if he is stupid and inclined to

speak of irrelevant matters, it is
 Wrottesley p 38 But strictly
 must depend upon your discernm
 recall facts by recalling all the associated circumstances, however irrelevant
 they must repeat the whole of a long dialogue and describe the most trivial
 occurrences of the time, in order to arrive at any particular part of the transac
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afterwards connect together in your reply, or which may dovetail with the rest of the evidence, so as to form a complete story' *Ilrottesley* 11 62 citing *Cox's Advocate*

Continuous narration without question May not the witness narrate his knowledge in continuous speech and without the interruption of questions? It is obvious that this method, on the one hand has often the advantage of preserving continuity and clearness of thought for the witness himself and saving time for all parties concerned. *Wigmore* § 767. 'One of the important branches of advocacy' said *Mr Harris* 'is the examination of a witness in chief. One fact should be remembered to start with, and it is this, the witness whom he has to examine has probably a plain straightforward story to tell, and that upon the telling it depends the belief or disbelief of the jury and their consequent verdict. If it were to be told amid social circle of friends it would be narrated with more or less circumlocution and considerable exactness. But all the facts would come out, and that is the first thing to

insure if the case is as I have suggested, in private, all the company would understand it, and if the narrator were known as a man of truth, all would believe him. It would require the events would flow put audience, let the same. His first feeling is that he must not tell it in his own way. He is going to be examined upon it, he is to have it dragged out of him piecemeal, disjointedly, by a series of questions—in fact, he is to be interrupted at every point in a worse manner than if every him about what he was going is not unlike a *post mortem*. to the painful operation. Now the best thing the advocate can do under these circumstances is to remember, that the witness has something to tell, and that but for him, the advocate, would probably tell it very well, in his own way. The fewer interruptions, the the less questions will be needed specially to see that the story be matter." *Harris on Hints on Advocacy*; --

Objection to questions by other party The general principle governing the time of the objection is that it must be made as soon as the applicability of *S; Kissen Kamini v Ram Chandra*, W R 244 For evidence continued ordinarily be made as soon as the

question is stated, and before the answer due, not to subject of the question, but to some feature of the answer. *Wigmore* § 13, vide p. 73 *supra*. If objection be not made in proper time it is generally considered as being waived. But the rule of waiver is not applicable in case of inadmissible evidence *Miller v Madho Das* 23 I A, 106 (116)—19A 70, *Sri D. v. D.*

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Cross Examination When a witness has been examined in chief, the other party has a right to cross examine him. The powers of cross examination has been justly said to be one of the principal, as it certainly is one of the most efficacious tests, which the law has devised for the discovery of truth. By means of it the situation of the witness with respect to the parties, and to the subject of litigation, his interest, his motives, his inclination and prejudices, his means of knowledge of the facts to which he has used those means, his powers all fully investigated and ascer of the jury, before whom he has testified, and who have thus had an opportunity of observing his demeanour, and of determining the just weight and value of his testimony. It is not easy for a witness who is subjected to this test, to impose on a Court or jury, for however artful the fabrication of falsehood may be it cannot embrace all the circumstances to which a cross examination may be extended *Greent Ev* § 416; *Starkie Ev* Vol I, 160. On the ex adverso *W. D.*

may be led into such a strait that what he will not say, he cannot deny. For as in an oration we generally collect scattered proofs, which singly do not appear to press on the accused yet by being put together, prove the charge so a witness of this sort should be asked many things as to what went before—what crime after—as to place, time, and persons, and other things so that he must fall upon some answer after which he must necessarily either confess what is desired, or contradict his former statements. If this does not happen, it may become apparent that he will not speak, or he may be drawn out and detected in some falsehood foreign to the cause or by being led on to say more than the matter requires in favour of the accused, the Judge may be led to suspect him, which will damage his cause not less than if he had spoken the truth against the accused. If the truth given by a witness is consistent with frequent case) one witness contradicts produce by art that which usually happens accidentally. Apart from these witnesses are usually asked many questions which may be useful as to the lives of other witnesses as to their own character and position may crimes they have committed their friendship or enmity to the parties—in the answers to which they may either make some useful admission, or be detected either in a falsehood or the desire of injuring the opposite party.

It is certainly implied by s 133 of the Evidence Act that a party must have had an opportunity to cross examine and does not mean that merely a right to cross examine a witness without an opportunity being offered for cross examination is sufficient compliance with the requirements of the law. *Mohi Singh v Dhanuk Dhan*: 73 Ind Cas 339=24 Cr L J 595=(1923) P 53

Cross examination as a distinctive and vital feature of English Law. For centuries past the policy of Anglo Saxon system of Evidence has been to

experience so often found value. It may be that in more than one sense it takes the place in our system which torture occupied in the medieval system of the civilians. Nevertheless of

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may be led into such a snarl that what he will not say, he cannot deny. For as in an oration, we generally collect scattered proofs, which singly do not appear to press on the accused yet by being put together, prove the charge so a witness of this sort should be asked many things as to what went before—what came after—as to place, time, and persons, and other things so that he must fall upon some answer after which he must necessarily either confess what is desired, or contradict his former statements. If this does not happen, it may become apparent that he will not speak, or he may be drawn out and detected in some falsehood foreign to the cause or by being led on to say more than the matter requires in favour of the accused, the Judge may be led to suspect him, which will damage his cause not less than if he had spoken the truth against the accused given by a witness inconsistent with frequent & produce by witnesses

of other witnesses as to their own character and position any crimes they have committed, their friendship or enmity to the parties—in the answers to which they may either make some useful admission, or be detected either in a falsehood or the desire of injuring the opposite party

It is certainly implied by s 138 of the Evidence Act that a party must have had an opportunity to cross examine and does not mean that merely a right to cross examine a witness without an opportunity being offered for cross examination is sufficient compliance with the requirements of the law *Moti Singh v Dhanuk Dhan*, 73 Ind Cas 339—24 Cr L J 595—(1923) P 53

Cross examination as a distinctive and vital feature of English Law For centuries past the policy of Anglo Saxon system of Evidence has been to regard the necessity of testing by cross examination as a vital feature of law The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience. Not even the abuses the mishandlings and the puerilities which are so often found associated with cross examination have availed to nullify its

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observed what a very different shape their story appears to take in each of these stages, will at once see how extremely dangerous it is to act on the ex parte statement of any witness and still more of a witness brought forward under the influence of a party interested. However artful says Mr Starkie, the fabrication of the falsehood may be, it cannot embrace all the circumstances to which the cross examination may be extended, the fraud is therefore open to detection for want of consistency between that which has been fabricated and

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former, which is to be regretted, as the point still appears to be left open' *Powell v. Powell*, 200 A. 2d 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000

When a witness has been examined in chief the other party has a right to cross-examine him *R v Burdett*, 6 Cox 458; *Lord v Colvin* 3 Drew 232, 235. But the question often arises, whether the witness has been so examined he witness is called merely is proved by another witness, *Gibson*, 1 Ad & El 48, 1 Stark 132, *Rush v Smith*, 1 M & A 94; *Summers v Mosely*, 2 C & M 477, *Dracgirdle v Bailey*, 1 F & F 536. In England, when a competent witness is called and sworn, the other party will ordinarily, in strictness, be entitled to cross-examine him, though the party calling him does not. *Brook* 2 Stark 472; *Phillips v Famer* 61, *R v Murphy*, 1 A M & O 201, 1. Unless he was sworn by *Ch D* 642. *Rush v. Smith*, 1 C M & R 91, *Hood v Mackinson*, 2 M & R 213 or, unless an immaterial question having been put to him, his further cross-examination has been stopped by the Judge (*Greay v Carr*, 7 C & P 64) *Green* Ev § 435. And even where a plaintiff was under the necessity of calling the defendant in interest as a witness, for the sake of formal proof only, *Id* that he was the examined to the whole of cross to that o *The right is adverse* *I R* 1932

Lab 105-155 Ind Cas 209

A witness summoned and examined by Court cannot, as of right, be cross-examined either by the prosecutor or by the accused. The Court as a general rule, should however, allow the parties to cross-examine the witness if they desire to do so. *Chwas v Queen*, S C 275 Oudb. Such a witness is a witness of the Court. "The Court may allow the parties to cross-examine him with whether said in an the parti counsel cross exa v *Dwyer* *Gurudas* *Gurish*, 5 C 614, *Sharfara v Dhinno*, 16 W R 257

It is the duty of the Magistrate to insist on the trials proceeding from day to day and rigidly to check prolix examination and cross-examination of witnesses in exercise of the powers inherent in all Magistrates to prevent abuse of process. *F. IV Sole v Crown*, 11 S L R 27

Death of witness after examination in chief Where a witness dies after examination in chief but the stances there is may even R 1925 A 127, R witness's examination but for the voluntary act of the witness himself or the party offering him—as by a postponement or other interruption brought about immediately must be where the death of witness prevents cross-examination under such circumstances that no

responsibility of any sort can be attributed to either the witness or his party it seems harsh measure to strike out all that has been obtained on the direct examination. Nevertheless, the principle requires in strictness nothing less. The true solution would be to avoid any inflexible rule and to leave it to the trial Judge to admit the direct examination so far as the loss of cross examination can be shown to him not in that instance a material loss. *Wigmore* § 139. In *R v Mitchell*, 17 Cox Cr 503, a dying woman was examined in chief, and after her cross examination had continued for about 10 minutes, the Magistrate stopped on account of her condition. She died a few minutes after. Her evidence was held inadmissible. But in *Fuller v Rice*, 4 Gray 343 *Shaw C J* said: "No general rule can be laid down in respect to unfinished testimony. If substantially complete it ought not to be rejected."

Cross examination by Court. In *Nur Buz Kazi v Empress* 6 C 279 *Garth C J* said: "We think it right to point out to the Sessions Judge, that the course which he adopted in the examination of the witnesses for the prosecution was irregular, opposed to the provisions of section 138 of the Evidence Act and not fair to the prisoners. We find that on the examination in chief being finished, the Judge questioned almost all the witnesses at considerable length upon the very points to which he must have known that the cross-

on either side have omitted to put some material question or questions, and the Court should, as a general rule leave the witnesses to the pleaders to be dealt with as laid down in section 138 of the Act. The Judges' power to put questions under s 165 is certainly not intended to be used in the manner which we have had occasion to notice in the present case." Generally it is not the province of the Court to examine witnesses and as a rule the Court should leave the witnesses to the pleaders to be dealt with as provided for in section 138. *Jinnah v Sheo Narain*, 82 Ind Cas 154.

"Although we do not regard it always safe to interfere with the discretion of counsel while cross-examination privilege is abused it seems but right that the control over cross examination assuming as in *R Mining Co v Buxton Mining Co*, 91 Ind Cas 101 that examination of witnesses must not be pro-

logically relevant
opinion of the trying
drawn without going
y protract the case
" 4 C W N 221

So where the examination of a witness is needlessly protracted it is within the discretion of the Court to arrest it. *Burr Jones* § 814, *Danks v Kanhaiya A I R 1922 Oudh 124*. This discretion the Court can use even where a witness is examined in chief. *Standard L J Co* 80 C. But a Court should not arrest the examination of statements by

a witness or the repetition of interrogatives, until full answers are obtained. *Burr Jones* § 814.

Cross examination, whether should be confined to relevant facts. In England great latitude will not be stopped by the relevant facts and calculated neither the credit of the witness may be relevant and of the examination. In cross examination irrelevant to the matter in issue, the answer to which may tend to affect his credit, but he will not always be obliged to answer the question and if he does answer it he cannot as a rule be contradicted. He may be asked questions which affect his veracity, such as, whether he has been convicted of a crime,

whether he is a relation, or intimate friend, or under any special obligation, to the party who calls him, whether he is not identified or connected with him in interest, whether he has not been a party to any such transaction, or whether he is not otherwise connected with the adverse party; and the court may, in its discretion, require the witness to answer such questions as may be asked him, touching any of the matters hereinbefore mentioned, and may, in its discretion, require the witness to answer such questions as may be asked him, touching any of the matters hereinbefore mentioned, and may, in its discretion, require the witness to answer such questions as may be asked him, touching any of the matters hereinbefore mentioned.

Powell Ev 533

the cross examiner's case *Berwick v Murray*, 19 L J Ch 231, 280, *Morgan v. Brydges*, 2 Stark, R 314; *R. v. Murphy*, 1 Arm M & O 296. So also under section 139 of the Evidence Act an accused has the right to cross examine prosecution witnesses at the conclusion of their examination in chief and such cross examinations may be on all points and by means of all questions not disallowed by the Evidence Act. Cross examination need not be confined to matters raised elsewhere in the evidence *Mohomed Ali v Emperor*, 12 Cr L J 277=10 Ind Cas 917, *R v Ishan*, 6 B L II App 88=15 W. R. Cr 341; *Major v Murray* 19 L J Ch 231, *Subramanyam v. Government of Mysore*, 6 Mys L J 551 (F B).

ask questions of the witness as to his transactions with a third person. *Powell*

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deems obligatory, or by such affirmation or declaration as may by law be substituted for an oath. Proportioned to these is the degree of credit his testimony deserves from the Court and jury. *Archib Cr P* (27th ed) 483, *Beas* §§ 22 6, 189 195, *Phip Ev* 401. It is unprofessional on the part of counsel to cross-examine a witness as to facts within his personal knowledge. *Donald Watson v Peary Mohan*, 40 C 808=18 C W N 18. Where counsel acting under instructions from the court cross-examines a witness as to facts which counsel did not substantiate by evidence, it is unprofessional conduct on the part of counsel. *People v*

and the parties to the suit, the imputation complained of ought to have been withdrawn. *In re Messrs Crompton & Co v Secretary of State*, 26 M L J 549

Knowledge, ing the weight of opportunities of power of memory and perception, and any special circumstances affecting his cross examination to impeach,

Although a witness is perfectly disinterested, although he is a man of

only answered and accounted for by the other party, so as to convince the witness himself that he laboured under a mistake (See *Munsterberg, Psychology and*

3. Crime) Where there is a doubt, therefore, whether the evidence given by a witness is not founded on some misconception, it is the duty of the counsel who cross-examines him to question him as to the sources of his knowledge, his reasons for believing the fact to be as he has stated, his reason for recollecting it the circumstances attending its occurrence, whether it was light or dark, and whether he was near or distant at the time, it occurred, and the like, so that the tribunal may be able to judge of the degree of confidence it should place in the witness's testimony. If a witness refuses to answer such questions, or does not answer them his credit in questions on omissions, testimony.

Disinterestedness A witness to be perfectly credible, must not be in the slightest degree biased or partial to one party or the other. Therefore, if it appears that the witness is prejudiced against the party against whom he appears or has before expressed sentiments indicative of such prejudice, or it appears him for the same or a similar offence acts charged in the indictment against offences which detract proportionately from

is presented. Asking a witness at this stage, to repeat the evidence given on direct examination may well serve to test the truth of the original statements, and be, therefore, entirely within the legitimate rights of the party. Ability to repeat a story not only involves memory and accuracy; it throws valuable light on the questions as to whether a narrative concerns actual facts, in which case the reality of the events or circumstances narrated will enable the witness to repeat them as often as asked, with substantial accuracy, or, the story is a fabricated one, in which event, attempts at repetition may well break down, unless the story is a short one, or learned with remarkable thoroughness and retentiveness of memory. *Chamberlayne's Ev* § 552. Where perjury is claimed, by reputable counsel, directly or by implication from conduct, the Court in exercise of its administrative function for the furtherance of justice, may permit repetition on cross examination, not alone of the same questions asked on direct examination but of questions asked on cross-examination, to which the examiner cannot get an answer or only one with which he is not satisfied as being in accordance with the facts. He will, if permitted, ask the same question until he gets either an answer, or one which he thinks is true. With many perhaps most, witnesses the test is one of the most effective that can be employed. Where the mind of the witness is interposing a barrier of falsehood or equivocation between the examiner and the true state of his own mind the effect of repeating the question, psychologically, is not unlike that of an ancient battering ram. Each blow, delivered at the same point adds its quota of disintegrating force until the barrier is broken down. The auto-suggestion of the witness that he remains steadfast to the pre-arranged story is steadily undermined by the counter suggestion of the insistent questions, until it is mastered hand, the canon ect perjury no such

gain is promised, a trial judge may exclude questions on cross examination which are chiefly argumentative or combative in their nature. *Chamberlayne's Ev* § 553.

Judge may restrict number of counsel in the examination of a witness The Court may expedite trials by declining to permit more than one counsel to intervene in the examination of any given witness. He may properly require that a counsel who has started the examination or cross examination of a witness, sel on the same side, 1 M & Rob 400, elaboration, conflict one of administration

and circumstances may arise which will justify or require a trial judge to permit more than one counsel to interrogate a witness. The practice and certain obvious considerations affecting it are thus stated by Lord Ellenborough in *Doe v Roe*, 2 Camp 280: "Convenience certainly requires that the examination of a witness should be carried on by one counsel only."

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nesses where several

defendants rely on

separate defences

tried in the same

action." "The witnesses

are to be examined

by the counsel successively,

in the same manner."

Should the examining

counsel

deviate from the

customary practice or

right of the Court to

permit

undoubted. When

such a deviation

interferes with the

interests of expediting

business,

it is proper to

intervene or prescribe

general conditions

to avoid useless

repetition, or other

waste of Court's

time. *Chamberlayne's Ev* § 555, *Wigmore* § 783

What facts are not relevant in cross examination. In cross examination

too the facts inquired into must be relevant. A witness may not be cross-

examined as to facts not in issue.

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facts that will actually be extracted will be favourable or unfavourable to the cross examiner's purposes. It is here that the art (that is, the technical skill) of cross examination enters. On this hangs all the lesser rules of the art. Hence it is that it must call to its aid so many other elements than mere knowledge of law. Experience of human nature, judgment of chances, knowledge of the case, tact of manner,—all these things, and more, have to do with the art. Yet the theory of the process underlies and influences at every point. To cross examine or not to cross examine,—that is the fundamental question, which springs from the essential nature of the process and arises anew for every part of every witness's testimony. The greatest cross examiners have always stated this as the ultimate problem. *Wigmore § 1368*

David Paul Brown's Golden Rules for cross examination '1 Except in indifferent matters, never take your eye from that of the witness. This is a channel of communication from mind to mind, the loss of which nothing can compensate —

' Truth, falsehood, hatred, anger, scorn, despair,

And all the passions,—all the soul is there

"2 Be not regardless either of the voice of the witness. Next to the eye this is perhaps the best interpreter, of his mind. The very design to screen conscience from crime—the mental reservation of the witness—is often manifested in the tone or accent or emphasis of the voice. For instance it becoming important to know that the witness was at the corner of Sixth and Chestnut Streets at a certain time the question is asked were you at the corner of Sixth and Chestnut Streets at six o'clock? A frank witness would answer, perhaps I was near there. But a witness who had been there, desirous to conceal the fact, and to defeat your object, speaking to the letter rather than the spirit of the enquiry, answers, "No" although he may have been within a stone's throw of the place or at the very place, within ten minutes of the time. The common answer of such a witness would be, I was not at the corner, at six o'clock. Emphasis upon both words plainly implies a mental evasion or equivocation and gives rise with a skilful examiner to the question. At what hour were you at the corner, or at what place were you at six o'clock? And in nine instances out of ten it will appear that the witness was at the place, about the time, or at the time about the place. There is no scope for further illustrations, but be watchful I say, of the voice, and the principle may be easily applied.

'3 "

honest;

a thunder

dignity. Bring to bear all the powers of your mind not that you may shine but that virtue may triumph and your cause may prosper

4 In a criminal especially in a capital case so long as your cause stands well ask but a few questions, and be certain never to ask any the answer to which, if against you may destroy your client, unless you know the witness perfectly well, and know that his answer will be favourable equally well, or unless you be prepared with testimony to destroy him if he play traitor to the truth and your expectations.

"5 An equivocal question is almost as much to be avoided and condemned as an equivocal answer, and it always leads to or excuses an equivocal answer. Singleness of purpose clearly expressed is the best trait in the examination of witnesses, whether they be honest or the reverse. Falsehood is not detected by cunning but by the light of the truth, or if by cunning it is the cunning of the witness and not of the counsel.

6 If the witness determine to be witty or refractory with you you had better not quarrel with the that he does you do assured

upon the
case may

"8 Never underestimate your adversary, but stand steadily upon your guard, a random blow may be just as fatal as though it were directed by the S.
no often cures, and sometimes

jury, kind to your colleague,
civil to your antagonist, but never sacrifice the slightest principle of duty to an
overweening deference towards either."

Cross examination of the perjured witness "It seldom happens that a witness's entire testimony is false from beginning to end. Perhaps the greater part of it is true, and only the crucial part—the point, however, on which the whole case may turn—is wilfully false. If at the end of this direct testimony, we conclude that the witness we have to cross examine, comes under this class, what means are we to employ to expose him in the jury? Let us first be certain we are right in our estimate of him—that he intends perjury. Embarrassment is one of the emblems of perjury, but by no means always so. The novelty and difficulty of the situation—being called upon to testify before a room full of people, with lawyers on all sides ready to ridicule or abuse—often occasions

his own accustomed language

If, however, the manner of the witness and the wording of his testimony bear all the earmarks of fabrication, it is often useful, as your first question, to ask him to repeat his story. Usually he will repeat it in almost identically the same way.

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it to mind as a whole, and not facts entirely dissociated with it entirely unprepared for these new for answers. Distract his thoughts and then suddenly, when his considerations to which you had same question a second time. E and very likely will give a different in the net. He cannot invent answers as fast as you can invent questions, and

at the same time
his answers
from the
it appears

he will not keep
no confused and
you have made
the Art of Cross

examination pp 50-53

But
Nothing
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manner to be displayed towards such a witness. It all depends upon the individual character you have to unmask. In a large majority of cases the chance of success will be greatly increased by not allowing the witness to see

that you suspect him, before you can lead him to commit himself as to various matters with which you

Wellman, the Art of Cross

"You must sometimes try or repugnancy to know

feigned. The following

this sort of cross-examination: 'Open gently, mildly, do not appear to doubt him (the witness)

are not afraid

and collateral

from the main

between the tale he had told and the questions you are about to put to him. Then by slow approaches bring him back to the main circumstances by the investigation of which it is that you propose to show the falsity of the story.

"If however you adopt the other course (i. e.) to show that you suspect him at the first, and instead of surprising the witness into the betrayal of his falsehood you resolve to bring out of him the truth by a bold and open attack—to awe him, as it were, into honesty,—aspect and voice must express your consciousness of his perjury and your eye upon him will certainly help you to assure

stated as a general rule, that a and fully in the face with a steady cast down or wanders restlessly speaking the truth or what he believes however timidly, will look at you when he answers your questions, and will

at first, you patience. upon reformation will be test points have been instantly he matter or purpose

culars which he must

upon which you surprised him into invention on the moment. It is probable that after such a diversion of his thoughts he will have forgotten what his answers were, what were the fictions with which he had filled up the

and so one so

at not ideas, your own to

cross examination in the middle of his narrative, then jump to the end

previous question S. 1
 e he speaks from
 perplexed and will
 acts by association,

"When you are satisfied that the witness is drawing upon his invention, there is no more certain process of detection than a rapid fire of questions. Give him no pause between them, no breathing pause, no time to rally. Few minds are sufficiently self-possessed to maintain a consistent story under such a catechising. If there be a pause or a hesitation in the answer, you thereby lay bear a t
 the ans
 and he
 him to time and place, and names. 'You heard him say so?' 'Where?' 'Who were present?' 'Name them' 'Name one of them' Such a string of questions following one upon the other as fast as the answer is given, will frequently confound the most audacious. Fit names and times and places are not readily invented or if invented not readily remembered" *Recd's Conduct of law suits*, 307-308

Truthful witness "The truthful witness has been said to be the most difficult of all to cross examine. I cannot help differing so much from that opinion as to
 I say truthful
 If it were so, it
 ful witness is
 true
 truth-
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Flippant witness When a witness comes into the box with whet
 with a determined pose of the head, as
 "counselor I am your man, tickle me,"
 id masterful being to deal with He
 come determined to answer concisely and sharply, means to say "no"
 and "yes", and no more, always to be accompanied with a lateral nod, as much
 as to say, "take that" D. tal be ch I have used the masculine pronoun, this
 witness is ver
 friends, she to
 "any counselor as et
 should carefully absta
 witness down" His
 encourage that fine frenzied exuberance, which, bye and bye will most surely
 damage the case she has come to serve *Harris Hints on Advocacy* pp 65,
 107, *Wigmore Principles of Judicial Proof* § 160

The Dogged witness The Dogged witness is the exact opposite of the
 one I have just been dealing with He will shake his head rather than say no
 As much to say "You don't catch me You see him, gentlemen and you
 see me I am up to him" He seems always to have fear of perjury before hi
 eyes, and to know that if he keeps to a nod or shake of the head, he is safe He
 is under the impression that damage the case he must, whatever he says

He will answer
 magnifies his indep
 'uprightness and
 himself to have ever
 coverer *Ibid*
 dazzling luster that
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 not the actual dis-

The Hesitating
 truthful witness, c
 to cross-examine
 the answer will have upon the case and not what the proper answer is By no
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 what effect

3. means hurry this individual. Let him consider well the weight of his intended answer, and the scale into which it should go, and in all probability he will put it into the wrong one after all. If he should, leave it there by all means. Hesitation, however, may result from a desire to be scrupulously accurate in which case you must be careful that the mere strictness of language does not convey a false impression. The latter sometimes, even in advocacy, kills where the spirit would make alive. *Ibid*

The Nervous witness A nervous witness is one of the most difficult to deal with. The answers either do not come at all or they tumble out two or three at a time, and then they often come with opposites in close comparison, a 'Yes' and a 'No' together, while "I don't know" comes close behind 'I believe so' or 'I don't think so' is a frequent answer with this witness as it is with the lying and the truthful witness. They are all partial to the expression, but all from different and opposite motives.

You must deal gently with this curious specimen of human nature. He is to be encouraged. It is no use to bray him in a mortar. You should deal gently with a weakness of this kind as you would with a shy horse. Great allowance is always made for a nervous witness, who invariably receives the sympathy of the jury. You have to guard, therefore, against offending that sympathy, as you undoubtedly would by a severe tone or manner. *Ibid*

must be dealt with cunningly and question out of character at only, straightforwardness may not be out of place with the jury. Whatever of honesty, whether of appearance, manner, tone, or language contrasts with the vulgar, self asserting and mendacious acting of this witness will tend to destroy him. It will be the antidote to his craftiness. It is strange, but, true, that no man can be what is usually understood as a "cunning person" and conceal the fact. He is not really a shrewd man but only thinks he is tries to be, and above all wishes to be thought so. He always pretends that he has some deep and hidden meaning in what he says and does, which no amount of skill or perception on your part can penetrate. He would be an impostor to the world if he could! but the only person he really imposes upon is himself. Every one can see that he tries to appear what he is not and that he pretends to know a great deal more than he does. This is the man to show to the jury in his real character and they will enjoy your good humoured exposure of the cheat. *Ibid*

The canting Hypocrite The canting hypocrite is not the least pleasing object of creation when in the witness box, nor is he the most difficult to cross examine. He invariably speaks from the very best and purest of motives. His desire is only to speak the truth, no not merely that but without so much as an apparent tinge of partiality. He has no interest in the case—no feeling. It is such a pity it could not have been settled out of Court as he proposes himself to be arbitrator.

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a gap somewhere hard by or a somewhat lower fence that he may scurry over and so not do violence to himself in the event of a mishap. His evidence which may and will be always on the confines of truth, must be closely examined. He is too excellent quantities at a time with it the shadow of cost. *Ibid*

The Positive witness There is another class of witness which may be mentioned, and that is the positive witness (generally a female or of female tendencies). It is usually very difficult to make the witness unsway anything she has said, however mistaken she may be, but you may sometimes lead her by

S. 13

her that she must be wrong. Such questions as 'How can that be?' will only draw the answer, 'I don't know how it can be, but I know it is' *Ibid* ^{to convince}

Spy ■ ■ ■ witness
tion or suspicion,
whether the
of the credit
remains to be
fixed design
in punishing
morally, and
his evidence against them, the mere character of spy ought not to prejudice, or
stain the credit of the witness To this man no guilt of the plotted offence
attaches. Another description of spy may be a man, who has undesignedly
been present at
to join it, or a
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ral, and often the mediator,
the witness by a skilful adver-
favourable to the witness in as
character he bears of a spy;
argue a want of self respect
is. 171-179

AN EVALUATION OF DISORDER

scientific facts from the knowledge of the expert as will help his case, and thus
 and to the fact that the expert given against him
 mind is that no question
 to give the expert
 and thus afford him an oppor-
 way, for his opinions, which
 otherwise have fully brought

pp. 74-75

and examination.

Heuman's

The Art of

Cross examination,

"A successful method of cross-examination is to gradually
 and gradually
 defended. If it
 now and then
 witness is to be taken over is a very different one from that which the examiner
 has resolved he shall travel. The examiner must not, however, for an instant,
 lose his temper, nor suffer his attention to be drawn from the time he means to
 take. When the witness is taken over, the examiner must not let the witness know

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Woman witness "Women, I have usually found are much better witness of
 what they have seen than men. Men reflect on and draw inferences from what
 they have seen, and are apt to mix in their evidence what they surmise must
 have happened with what they actually saw happening. Women usually tell
 what they saw. Their evidence, however, is reliable only so long as their
 passions are not excited. Their evidence, however, is reliable only so long as their
 husband or children, or hatred
 word they utter can be trusted.

Bar p 69 "Now and then
 rosiest perjury, but when she is
 called as a witness she far surpasses man in the perspicuity of her narrative
 and in the honesty of her replies. No counsel who has any pretence to tact
 ever tries to get the better of a plain country woman giving evidence at the
 assizes. You treat
 her with pride
 these artifices
 mind in the
 Cross exam-
 but even
 ide up her
 Ayar's

Re examination When the cross examination of the witness is concluded,
 the party who called him has the right to re-examine him on all matters arising
 out of the cross examination for the purpose of reconciling any discrepancies
 that may exist between the evidence on the examination in chief and that which
 has been given in cross examination; or for the purpose of removing or diminish-
 ing any suspicion that the cross examination may have cast on the evidence
 in-chief, or to enable the witness to state the whole truth as to matters which
 have only been partially dealt with in cross examination. If there has been
 no cross-examination, it is unnecessary. And it is, as a rule,
 unnecessary. already put in chief
 Only such with and arise out of
 the cross-ex- ever, may in his dis-
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Queen's Bench
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expressions used by the witness on cross examination, it may be in evidence
 doubtful, as also of the motive by which the witness was induced to use those
 expressions, but I think he has no right to go further, and to introduce matter

witness's evidence in chief is not directly or indirectly challenged in cross examination, there is of course no occasion nor any right to re-examine thereon
Wills Ev 2nd Ed 328

139. A person summoned to produce a document does not become a witness by the mere fact that he produces it and cannot be cross-examined unless and until he is called as a witness

Cross examination of person called to produce a document

Scope of the section Where a witness is summoned by *subpoena duces tecum* merely to produce documents, he need not be sworn *Perry v Gibson*, 1 A & E 48; *Summer v Moreley* 2 C & M 477 But if he has to speak to the proper or safe custody of the document the course of business in his office with respect to documents, filing, noting, docketing, and the like or to do more than merely produce, he must be sworn *Nort Ev 323* When a witness is not sworn 1 A & E 48, *Summer* x 355 But if he is called

is entitled to cross examine him so although he is not examined but is merely called to produce a document But a party is not entitled to cross examine a witness called by mistake, if the mistake be discovered before any question is put to him *Wood v MacInson*, 2 M & R 373 In the above case *Coleridge J* said "Upon the whole it appears to me that the more satisfactory principle to lay down is this, that if there really be a mistake, whether on the part of counsel or officer, and that mistake be discovered before the examination in chief has begun the adverse party ought not to have the right to take advantage of his mistake by cross-examining the witness Here the learned counsel explains that there has been a mistake

to prove, but knew other withdraw his no right to

called action, led to here

Witnesses to character

140. Witnesses to character may be cross-examined and re-examined.

Scope Where witnesses are called simply to speak to the character of a prisoner, it is not usual to cross examine them except under special circumstances *R v Hodgkins*, 7 C & P 298, but no rule of law expressly forbids this *Taylor* § 1429, see also *R v Wood* 5 Jur 225 But where a witness for the prisoner having proved that he had known him for some years, and given him a good character, any further taken 'Did you object to the prisoner of that The man his belief *Wood*, 5 Jurist 225

141. Any question suggesting the answer which the person putting it wishes or expects to receive is called a leading question.

Leading questions

Leading questions—meaning of A leading question is one which suggests to the witness the answer which it is desired he should give If the questions

2. are asked to which the answer "Yes" or "No" would be --

which is put in such a way as to suggest to the witness the answer which is expected or wanted. There is no particular form which will make a question leading, or will save it from being such. The fact that a question is put so as to require a categorical answer does not necessarily make it leading, though it may do so, nor does the fact that a question is put so as to avoid a categorical answer.

Willis v Quimby, 31 N H 485

one, when it indicates to the witness that the witness expects and desires to have confirmed by the answer. Is not your name so and so? Do you reside in such a place? Are you not in the service of such and such a person? Is not your name such and such? It is conveyed to the witness that the witness expects and desires to have confirmed by the answer.

It is very clear that a question is leading which suggests to the witness the answer which is expected or wanted. It is conveyed to the witness that the witness expects and desires to have confirmed by the answer.

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"no" the answer is "yes" that in the proposed in that desired. And it be proved which is not proved. More properly, such questions may be called misleading, and are objectionable both as likely to mislead a fair witness. *Durr Jones* § 816.

142. Leading questions must not, if objected to by the

adverse party, be asked in an examination-in-chief, or in a re-examination, except with the permission of the Court.

The Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved.

Principle "The assigned reason is that the witness usually has a strong feeling in his mind, and is disposed to answer anything which is suggested to him. He is not to be trusted to give an answer which is not the truth. He is to be treated as a witness, and not as a party. He is to be examined in a fair and honest manner, and not in a manner which is designed to elicit a particular answer. He is to be allowed to reflect and answer after an exertion of his own memory. *Joseph Chitty's Practice of Law*, Vol III, 892. But *Chief Justice Appleton* in his Evidence said: "The end proposed in extracting testimony is the obtaining of the actual recollection of the witness, not the allegations of another person suggested to and adopted by the witness. The real danger is that of interrogating and the witness will answer as he may suggest, instead of reflecting and answering after an exertion of their own memory." *Joseph Chitty's Practice of Law*, Vol III, 892. But *Chief Justice Appleton* in his Evidence said: "The end proposed in extracting testimony is the obtaining of the actual recollection of the witness, not the allegations of another person suggested to and adopted by the witness. The real danger is that of interrogating and the witness will answer as he may suggest, instead of reflecting and answering after an exertion of their own memory." *Joseph Chitty's Practice of Law*, Vol III, 892.

the expectation on his part and with an understanding on the part of the witness that he will assent to the truth of the false facts thus suggested ' *Appellou*
Ex 227

S. 1

Scope of the section The witness must not be examined in chief by means of 1-1-2

allowed to frame his questions to the witness in such form as to suggest what answer he desires to receive *Wills* 2d Ed p 315 Such evidence would obviously be inadmissible of the party *Phipps* v 166 Court of appeals of all Courts excluded terms

Reg IV of 1797, s 6, Madras Reg VII of 1827, s 36) the oldest of the Regulation Presidency of Bengal) and which may be taken in principle as a sample of the others, provides — 'In the examination of witnesses leading questions suggesting an answer, or having a tendency to such suggestion, are to be carefully avoided, and the interrogatories to them are to be proposed in such general terms as may bring forth all the information they possess and lead to a discovery of the truth' Up to the point of dispute, however,—that is while the examination is introductory only to what is material,—the witness may be led. Were it otherwise a very unnecessary consumption might be had of the time of the Court, and a great infliction practised on its patience *Goodeve*

'It is often a convenient way of examining' says Mr. Alison to ask a witness whether such a thing was said or done, because the thing mentioned aids his recollection and brings him to that stage of the proceeding to which it is desired he should dilate. But this is not always fair, and when any subject is approached, on which his evidence is expected to be really important, the proper course is to ask him what was done or what was said, or tell his own story. In this way also, if the witness is at all intelligent & more consistent and intelligible statement will generally be got there by putting separate questions' *Alison's Practice*, 546

But the determination of what is, and what is not leading is in itself frequently one of difficulty, whenever the test has to be applied to any particular question. And the particular difficulty on the one hand is to secure that all the essential portion of the narrative be given in its entirety, and on the other to prevent a needless prolixity of statement. It is not a very easy thing says Mr Stirling, to lay down any precise general rule as to leading questions. On the one hand, it is clear that the mind of the witness must be brought into contact with the subject of enquiry, and on the other hand that he ought not to be prompted to give a particular answer - a leading question to which the answer 'yes' or 'no' would be conclusive to particularize in framing the question each individual case. *Stirling on Evidence* p. 101.

The "Yes or No" test suggested by Mr. Starke is not however as submitted a very accurate and at all events must not be taken as an universal one. There are many instances in which it would be the natural response, without the question which evoked it being leading. Thus, suppose it was required might be natural requisite present? the quest words, to other hand all such question as— Did one say so and so? or did he do so and so, —while obviously capable of being answered by the curt—"Yes

or No,"—would by suggesting what it was required of the witness to state, naturally provoke the reply. An illustration may be supplied from the duly practice of all Courts, where the question is one of personal identification. If there be no ground of suspicion, the individual is pointed out to the witness, as he is asked directly,—"Is that the party?" and the answer is the simple—"Yes or No." Let the witness, however, be suspected, the question would not be allowed to be put in that form, and the witness would be told to look round the Court, and point out the individual in question. The invitation to the answer—"Yes or No"—would, in truth be leading or not, according to the circumstances. *Goodeve Et 217*

One great test as to whether a question were to be regarded as leading would be its tendency to elicit an answer conveying rather in itself the result of facts, than a statement of the facts themselves, from which the Court was to draw the result. Thus, if it were a question of some given arrangement come to at a
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 ight require

Winn v. L. D. 101, Goodell L. D. 218

Merely suggestions in the way of stimulants to the memory accordingly would not fall within the category of leading questions, and may be made wherever the incapacity to answer sufficiently appears to arise either from want of recollection, or absence of some connecting link with the subject of examination. Thus the names of persons, or places, or dates, may be suggested, and sometimes particular transactions, or connecting circumstances. Though a touch stings only to memory, they might awaken the whole association in the mind, all the entire tune. In a firm, the names might e them on repetition, but could not rehearse them from memory. So he might be asked as to his knowledge or recollection of a particular date or circumstance, and he might be led from them to more detailed allusions as to occurrences in connection with them. have made a given statement which another

particular conversation,

offers, statements, or other matters sworn to have been made in the course of a conversation. In such cases, therefore, this form of enquiry is absolutely necessary for obtaining complete information on the subject. So where a witness is called to prove affirmatively what a witness on the other side has denied, as for instance, to prove that on some former occasion, that witness gave a
 may frequently arise in proving
 e such other statement, without a
 ough, C J said: "I have always
 the meaning of a leading question
 was an advocate who produces a

Leading questions such as can properly be put in cross examination of a hostile witness cannot be put by the Public Prosecutor in examination-in-chief. *Dhannu Beldar v. Emperor*, 2 Pat L T 737. The refusal to allow a question to be put in cross-examination merely because it was in form a leading question

would be improper. If it is so disallowed the counsel should ask both the question and the order to be recorded. *Dey v. King Emperor*, 9 L. R. 88 = 9 Bur. L. T. 133 = 17 Cr. L. J. 500 = 36 Ind. Cas. 468

If objected to, etc. If the objection is not taken at the time, the answer will be taken down in the Judge's notes. Sometimes the Judge himself will interfere to prevent a leading question or series of leading questions being put; but it is the duty of the opposing counsel to take the objection, and it is only

At the same time, it is

of leading questions

much weakened, for

scarcely escapes the notice of the Judge. It is advisable, therefore, for a counsel, examining in chief or on re-examination, not to put leading questions except of course as to those points on which they are expressly permitted by the Act. *Nort Ev* 325

The Court shall examine from being open to review, (*Lauder v D* 681, *Exp Bottomly* it seems any in the interest cases (*Phipson Ev* 453) —

(1) Introductory matters. — Leading questions may always be asked on merely introductory matters, such as name or occupation of a witness. *Cockle's Cas* 266. So also leading questions are proper where they are merely introductory and designed to lead the witness more quickly to matters which are material to the issue. For example, in cases of conversations, admissions or agreements, the attention of the witness may be drawn to the subject, occasion, time, place, &c. — anything on said. Questions and if so, what he and experience of a witness are largely within the discretion of the Court, and, unless it manifestly appear that such questions are put for an improper purpose, such discretion is not receivable as error. *Burr Jones* § 817

"The good sense of the rule" says *Mr W D Evans* in his *Notes to Pothier* II, 226, "is perfectly manifest with respect to all cases where the question propounded involves an answer immediately bearing upon the merits of the cause and indicating to the witness a representation which will best accord with the interests of the party. But where the questions are merely introductory, where the mere answer of 'yes' or 'no' will leave the point of the case precisely as it found it and a — inquiry to be reluctant

position to interrupt the course of examination

2 On other matters not in dispute. A question is not objectionable as leading when it relates to matters as to which there is no dispute. In most cases it is necessary to prove a certain number of uncontested facts, in order that Judge and the perin put in th

3 Assisting memory. Even upon points which are keenly contested between the parties who calls him to sought to be inquired indication of the point be unintelligible. that "A was a bankrupt" appear in the next Gazette, reasons was allowed to be asked, *Nichols v Dowding* 1 Stark 51 remember the suggestion, but allowed to be

the terms by questions necessary for that; if his memory is at fault, I may suggest contemporaneous events, with a view to stimulate or fix his recollection" Wigmore § 777. It is not necessary to name all the details, the mention of one or more of the remainder of the person's adult A related situation is that of a person too ill or too lethargic of speech to be able to articulate sentences; here the sentences may be framed for him suggestively, leaving him as little as possible to articulate and yet avoiding the danger of a misunderstood signal of assent or dissent Wigmore § 778.

be in the highest degree unfair so to prompt the witness. *Best v. Wharf* 502. *See also Berenger* if the witness has a question, cases often here it would be in the highest degree unfair so to prompt the witness. *Best v. Wharf* 502.

5 Contradiction Another exception arises where it is desired to show that a witness on the opposite side has, at another time made a statement contrary to his present statement. When the attention of such witness has been called to his alleged contradictory statement, and he has answered the direct question whether the parts of his statement are true, *See Stark 7*, *on this*, *h a case, the*, *and relative*, *leading form*, *ence, Taylor*, *should only*, *the cause; the*, *parts of the*, *ere, however,*, *radiation, the*, *Ev 414.*

6 Adverse witness A similar situation arises where the witness, though called by party examining, is in fact biased against his cause and in this case his testimony is adverse. In such a case, *See Stark 7*, *on this*, *h a case, the*, *and relative*, *leading form*, *ence, Taylor*, *should only*, *the cause; the*, *parts of the*, *ere, however,*, *radiation, the*, *Ev 414.*

Discretion of the court in allowing or refusing leading questions is not generally a ground for appeal. *See Stark 7*, *on this*, *h a case, the*, *and relative*, *leading form*, *ence, Taylor*, *should only*, *the cause; the*, *parts of the*, *ere, however,*, *radiation, the*, *Ev 414.*

stated that the right to lead in cross examination exists whether the witness be favourable or not. *Parkin v Moon* 7 C & P 408 In that case the plaintiff's witnesses (who, it seemed, were willing one on the part of the usual way. The defendant's leading questions ought not to be put to person B in admitting leading questions said: 'I apprehend you may put leading questions to an unwilling witness on the examination in chief at the discretion of the Judge, but you may always put a leading question in cross examination whether a witness be unwilling or not

Further question: 'Will you allow him for asking questions of a witness unwilling or not?' (Parker v Moon 7 C & P 409) some restriction should surely be imposed where the witness betrays a vehement desire to serve the cross examining party. It is no answer to say that the party, who originally called the witness has brought the evil on his own head for a fraudulent witness might purport to conceal his lies in favour of one party, and thus induce the other to call him, or he might be an attesting witness, or other person whom it was necessary to examine in order to establish some technical part of the case. To allow such a witness to have the most favourable answers suggested to him through the medium of leading questions, would be obviously unjust. Taylor Ev § 1431 In America the Judge in his discretion, may prohibit leading questions from being put to an adversary's witness, who shows a strong interest or bias in favour of the cross examining party and needs only an intimation to say whatever is more favourable to his cause. *Mooly v Howell* 17 Pick 495, Taylor § 1431

What may be in the mind of the witness at the time he gives his evidence, is not for the jury to decide. It affords the witness an opportunity to state what he really intended to say, and not what he has stated to the jury. Conversely such a question may become improper on cross examination because it may by implication put into the mouth of a witness, a statement which he never intended to make, and thus incorrectly attribute to him testimony which is not his. *Wigmore* § 780, *Courteen v Fouse* 1 Camp 43, *Edmonds v Walter* 3 Stark 8 The law on the subject was thus laid down by Mr Joseph Chitty in his Practice of the Law, 2nd Ed 111 91 'It is an established rule as regards cross examination, that a counsel has no right, even in order to detect or catch a witness in a falsity, falsely to assume or pretend that the witness had previously sworn or stated differently to the fact or that a matter had previously been proved when it had not. In fact if a witness is debased below the level of a St Tr 751 Mr Erskine alleged seditious meeting

asked: 'Then you were never a spy?'—As you call it, you take any title you choose. I say there should be no name given to a witness on his examination. He states what he went for, and in making observations on the evidence, you may give it any appellation you please. After repetition of the practice, Mr Gibbs on the other side contended: 'I am sorry to interrupt you but your question is the proper one of a cross examination. You can but perjure him.'—us you have done just now. Mr Erskine: 'But, on a cross examination or counsel are not called to be so exact. The questions that are put are not to be upon all the previous parts of the evidence of everybody, they load us in point of time so much, and that that the time for observation upon the character and situation of a witness is so

apparent that as a rule of evidence it ought never to have been departed from," *Higmore* § 780.

144. Any witness may be asked, whilst under examination, whether any contract, grant or other disposition of property, as to which he is giving evidence, was not contained in a document and if he says that it was, or if he is about to make any statement as to the contents of any document, which, in the opinion of the Court, ought to be produced, the adverse party may object to such evidence being given until such document is produced, or until facts have been proved which entitled the party who called the witness to give secondary evidence of it.

Explanation.—A witness may give oral evidence of statements made by other persons about the contents of documents if such statements are in themselves relevant facts.

Illustration

The question is, whether A assaulted B.
C deposes that he heard A say to D
and I will be revenged on him.' The
motive for the assault, and evidence may
be given about the letter

Object of the section In this section we have a rule for the purpose of
currying
evidence
grant or
writing.
document enforced, or the right to give secondary evidence made out by this
section merely points out the manner in which the provisions of sections 91
and 92 as to the exclusion of oral by documentary evidence may be enforced
by the party to the suit. 'Documents which in the opinion of the Court might
be produced' would of course include the cases referred to in section 91
where the law requires a matter to be reduced to the form of a document. Care
must, however, be taken not to apply it to cases in which oral evidence is given
of statements of other people about the contents of documents, when those
statements are relevant (*vide illustration*). Suppose for instance, that the
question was whether A had murdered B. A witness might prove that A had
said "B's bond is inequious, I will kill him sooner than pay it," without the
bond being produced, the reason obviously being that what the witness wants
to prove is not the contents of the document, but A's feeling about the contents
of the document, as applying a motive for his crime. *Cun Li* pp 64, 326.
Even where the adverse party does not object it is the duty of the Court not
to allow inadmissible evidence. *Yule* § 298. *Criminal Procedure Code*;
Imperial v. Deol 100 Ind 53 (67=29 C W N 300. A private duty contain-
ing
for
like under ss 141, 144 and 155
make the document itself evidence
11=23 Ind Cas 893

145. A witness may be cross-examined as to previous
statements made by him in writing or
into writing and relevant to matters in
question, without such writing being
to him, or being proved, but, if it is

Cross examination
as to previous state-
ments in writing

showing to the tribunal either that the witness cannot remember or incorrectly members or that he is willing to falsify as to the contents, is entirely taken way by the requirement that the writing must be shown to him at that stage the rule, then, so far as it does not allow the counsel to wait until the putting in his own case, but requires him in a lance, before cross-examining, to produce and to show the writing to the witness, is both unsound in principle and unfair policy." *Green v Er* § 157(a)

Scope of the section Under this section a witness may be cross examined as to previous statements made by him in writing, when his attention may be drawn to the parts of the former writing which are to be used for the purpose of contradicting him. But in the examination in chief, before the Court of Session, his attention should not be directed to his deposition before the Magistrate. *Queen v Rinchandra*, 13 W R 13 Cr. The complainant's pleader

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the
gment, *Annie J* said: "We observe that the Deputy Magistrate was together wrong in refusing to allow the complainant's pleader in cross examination to question the witness as to the facts of the case made statements before the Magistrate on the first time. He was, moreover, at liberty to cross examine the witnesses, as to previous statements made by them and reduced to writing, without showing the writing to the witness. *Queen v Rinchandra*, 13 W R 13 Cr. The Deputy Magistrate per bat the act and is e used as explaining o i not given evidence"

Where a person employed by another for the purpose of writing up his account books had made entries therein on information furnished by that other person, such entries could not be regarded as previous statements made by him in writing which could be given in evidence to contradict him as witness. *Tuchershaw v New Dhermsey*, 4 B 476

If the defence wishes to cross examine a witness on a previous deposition drawn to him. In such the whole the time of argument with a view to the discrepancies being pointed out. In view of the strict Subbiah v Emperor, 1929 M W N 789. In view of the strict ment which are practice in this (v)=26 A L 1930 Lah 991, 59, Kallam v

The deposition of a witness which has not been read over to the witness. act
be witness at 15
04 Ind Cas 10
previous statements of a prosecution witness used under s 145, for cross examining the person or under s 155 of the Evidence Act for discrediting the evidence of the witness cannot be used as substantive evidence against the accused. *Bishen Dutt v Emperor*, 25 A L J 991=105 Ind. Cas. 677=28 Cr L J 915=A. I R 1927 All 705

It is not necessary in order that an accused person may be allowed under s. 163 to contradict a statement used by the witness of what the witness saw. 45 C L J 561 = I R 1927 Cal 644, see also *Jadunandan v Emperor*, 101 Ind Crs 212 = A I R 1927 Oudh 321.

Writing need not be produced in absence of intention to contradict. *Ramalakshmi v Naqaram*, 93 Ind Crs 133 = A I R 1925 Mad 145 - 48 M L J 59. A statement made by a witness before a coroner is admissible at the trial of the accused for the purpose of impugning his statement. Ind.

A statement made by a witness cannot be disbelieved without his attention being drawn to the documents inconsistent with his examination. *Ram v A*. 138 = 33 M L T 303. *egam v Ali Begam*, 138 = 33 M L T 303. *UP W R 1914-127 P L R 1914-22 Ind Crs 861*.

Where the purpose of the production of the document must have been well understood by the witness and from the record of the deposition it was manifest that after being shown the document, he was directly asked whether it was not a fact that he was at a particular place on the alleged date as was clear from the document and when on re-examination no attempt was made to elicit explanation; Held the witness was properly contradicted. *Bukhari Nath v Prasannomoyi*, 1923 P C 109. Where a Court finds certain discrepancies between a witness's statement made before it and that previously made before another Court, the witness should be asked to explain them as required by s. 145 of the Evidence Act. *S. v. Datt*, 1921 Ind Crs 291.

Previous statements, unless used to impeach a witness given in the suit, cannot be used for any other purpose. *un- less the specific statement they cannot be used* Crs 267. The evidence conditions and for the purposes described in the Evidence Act, section 145. *Nga Seik v Aja Pu* U B R (1913) 3rd Qr 181 = 22 Ind Crs 676. The deposition of a witness in a previous case is not relevant in a subsequent case in which he is examined, except to contradict him. *Queen Nolo v Kristo* 8 W R Cr 87. Although section 145 of the Evidence Act admits of previous statements being referred to, for purpose of cross-examination, it does not authorise a Court to treat such statements as evidence against an accused. *Ritua v Emperor*, 157 P L R 1911 = 10 Ind Crs 119 = 12 Cr L J 214.

In a trial for giving false evidence the record of a previous deposition is not admissible.

to the Evidence Act to try to impeach a witness by means of contradictory statement unless the contradictory statement is put to him in cross-examination. *Maung San v. Emperor*, Ind Rul (1930) Rang 91.

Police diaries. It is only what is written in the Police diaries that can be used under s. 115 of the Evidence Act to contradict the witness and what the

Sub-Inspector of Police stated that a witness said or did not say, is inadmissible. The way to prove these portions of the written statement of a witness which have been specifically put to him in order to contradict him is for the accused to mark the passage or passages in the copy from the police diary given to him and then to ask the writer of the statement to say that it is a true copy. *Dharam Singh v Emperor*, 105 Ind Cas 162-21 Cr L J 313-A I R 1928 Lah 507-9 A. I. Cr. R 567. If police diary is used, the provisions of s. 145, Evidence Act and s. 162 of the Criminal Procedure Code will have to be borne in mind. *Ashu Rani v Emperor*, 26 A. L. J 159-9 L R 11 Cr-109 Ind Cas 120-29 Cr L J 472 (2)-A I R 1928 All 250. A Police officer who recorded the statements cannot be cross-examined under section 161 of the Evidence Act, with regard to such statements, such cross-examinations being allowable only with regard to the entries properly recorded in the diary kept under s. 172 Cr. P. Code, if the Police officer refers to such entries for the purpose of refreshing his memories. *Dillon Goss v Emperor*, 33 C 1023-10 C. W. N 890-1 Cr L J 79.

Where a police officer making an investigation under this section took statements from the persons who were afterwards called as witnesses, the accused person would be entitled to call for and inspect such documents and cross-examine the witness thereon, as such statements would not amount to a portion of the diary referred to in section 172. *Jhkas v Queen Empress*, 16 C 610; *Sheru Sha v Queen Empress*, 20 C 612, *Empress v Dhanu*, 21 C 140, *W N* 193, *Empress v Salera Teh* 9 C P 1. A statement made by a witness can be used only to contradict the witness. *King Emperor v Kumaramuthu* 29 Cr L J 251, *Dhulai v King Emperor*, 11 Cr L J 117. Only those portions of the statements of witnesses made before the police as have been actually used under s. 162, Criminal Procedure Code, to contradict the witness in the manner provided in s. 115, Evidence Act, in the course of the trial are admissible. Statements made by a witness in parts of the judicial record and in parts of the statements cannot be used in determining the guilt or innocence of the accused. *Ind Rul* (1920) Lah 162.

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It is not necessary in order that an accused person may be allowed under s 162 to contradict the very words used by the random of wh
 45 C L J
 I R 1927 Cal 644, see also *Jadunandan v R* 1927 Oudh 321

Writing need not be produced in absence of intention to contradict
Ramakka v Nagaram, 92 Ind Cas 133=A I R 1925 Mad 145=48 M. L J 89
 A statement made by a witness before a coroner is admissible at the trial of the accused for the purpose of impugning the credit of the witness, even though the accused had no opportunity to cross-examine the witness *Emperor v Raghuo*, 28 Bom L R 775=97 Ind Cas 37=27 Cr L J 1061=A I R 1926 Bom 404

A report made by a Police officer in connection with an enquiry made by him in the exercise of his lawful jurisdiction is not admissible in evidence in a judicial proceeding unless the Police officer is examined as a witness *Billoo Ram v Kunkun Ram*, 88 Ind Cas 586=A I R 1925 All 808 A witness cannot be disbelieved without his attention being drawn to the documents inconsistent with his examination or further cross-examination I 138=33 M L T 309 (P C)=1923 *egam v Ali B qam*, 9 P W R 1914=127 P L R 1914=22 Ind Cas 861

Where the purpose of the production of the document must have been well understood by the witness and from the record of the deposition it was manifest that after being shown the document, he was directly asked whether it was not a fact that he was at a particular place on the alleged date as was clear from the document and when on re-examination no attempt was made to elicit explanation, *Held* the witness was properly contradicted *Bailauth Nath v Prasannomoy*, 1923 P C 409 Where a Court finds certain discrepancies between two depositions before another Court, it is not necessary to require a witness to produce the original document before another Court. *See* s 145 of the Evidence Act. Previous statement of a witness given in the suit, cannot be legitimately used, and even then the particular matter or point must be placed before the witness as one for explanation in view of its discrepancy with the evidence tendered, unless the specific statements are put to the parties sought to be contradicted, they cannot be used in evidence. *Thunlan Nath v D. N. Nath*, 1923 P C 207 The evidence in a previous case is not relevant in a subsequent case in which he is examined, except to contradict him. *Queen Nolo v Kristo*, 8 W R Cr 87 statements being made before a Court to contradict the evidence of a witness in a previous deposition. *See* s 145 of the Evidence Act. *See* also *Emperor v 157*

When the depositions in a former criminal trial were used to contradict the evidence of a witness in a subsequent trial, it is not necessary to produce the original document before another Court. *See* s 145 of the Evidence Act. *See* also *Emperor v 157*
 to the Evidence Act statement
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Police diaries: It is only what is written in the Police diaries that can be used under s. 115 of the Evidence Act to contradict the witness and what the

material to the issue, he might be afterwards contradicted by secondary evidence. Still the question remains, as to whether the cross-examining party might first interpose evidence out of his own turn, to prove the loss or destruction of the document, or to show that it was in the hands of the opponent, that he had notice to produce it, and that he refused to do so; and might then cross-examine the witness as to its contents. *Taylor* § 1447; *Green* P. § 161.

Admission not put to party. When an admission is not put to the party making it and the party making it is not examined on it under s 145, the admission is not legal evidence, and is not admissible. *Muhar*
ram v Birkitt, A I R 1939 Lah. R Lah 1923
 114, *Saradamba v Putta Biharam*, I L J 11
Guj v Emperor, A I R 1930 Lah 191. Failure to object to the admission of a previous statement made by a witness does not amount to the use of it as substantive evidence or its use against the provision of s 145 of the Evidence Act. *Ganley v Buldeo*, A I R 1929 Pat 485.

146. When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend—

Questions lawful in cross-examination

- (1) to test his veracity,
- (2) to discover who he is and what is his position in life, or
- (3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

Scope of the section. Sections 132, 136, 137 and 148 together embrace the whole range of questions which can properly be addressed to a witness. *R v Gopal Das* 3 M 271 (273). In section 138 it is stated that cross-examination must relate to relevant facts. In addition to questions on those facts a witness can be asked any questions as regards the facts mentioned in this section. So this section extends the power of cross-examination far beyond the limits of section 138, which confines the cross-examination to relevant facts, including facts in issue. *Markby* Ev p 106. All the questions covered by s 146 are governed by the provisions of ss 143, 173. *Ibid* p 107. Sections 148 152 were intended to protect the witness against being improperly cross-examined. *Ibid* p 107. "Cross-examination to credit is necessarily irrelevant to any issue in the action, its relevancy consists in being addressed to the credit or discredit of the witness in the box so as to show that his evidence for or against the present witness is that he was uncomfortable when he accounts is to adopt a course which the *George Farwell*, in *Bombay Cotton Mutual Shirlal*, 19 C W N 617—171. statement of a witness being testimony, when require the examination of the witness always be understood. *J in Perkins* usually allowed great latitude of enquiry, III only by the judge in the trial,

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of principle, the skill, the
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Hathaway v Crocker, 7 Metc 266; Wigmore § 941

the truthfulness and our
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259 It is permissible
edit but when questions
answered them, the ex
not allowed. Many
examination it is usual to
1933 Cal 474.

To test his veracity A witness may be cross examined not only as to
all facts which reasonably tend to affect the
cross examination
which are relied on
some of the witness

But this term is perhaps somewhat misleading as suggesting that any cross
examination is permissible which tends in any way whatever to disparage the
character of the witness unless it has so
of knowledge,
2nd Ed 823.
witnesses was 1

R 67 (H L) "I cannot help saying, that it seems to be absolutely essen
tial to the proper conduct of a cause, where it is intended to suggest that
a witness is not speaking the truth on a particular point, to direct his attention
to the fact
is intended
altogether

that imputation
it by as a matter
to explain,
has been put to him,
story he tells ought
of credit My lord,
witness you are bound
making any explanation
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sional practice in the conduct of a case, but it is essential to fair play and fair
dealing with witnesses Sometimes reflections have been made upon excessive
cross examination of witnesses, and it has been complained of as undue,
but it seems to me that a cross-examination of a witness which errs in the
direction of cases may be far more fair to him than to leave him without
cross examination, and afterwards to suggest that he is not a witness of truth.
I mean upon a point on which it is not otherwise perfectly clear that he has
had full notice beforehand that

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impeached, and is to be impeached, in
ry to waste time in putting questions to him
will not do to impeach the credibility of a
witness upon a matter on which he has not had any opportunity of giving an
explanation by reason of there having been no suggestion whatever in the
course of the case that his story is not accepted "

To discover who he is and what is his position, etc As preliminary to
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more behalf he was
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in favour of the
§ 259 "The range

(external circumstances from which probably bias may be inferred is infinite. Too much refinement in analysing their probable effect is out of place. Accurate concrete rules are almost impossible to formulate, and where possible are usually undesirable. In general these circumstances should have some clearly

... or, as it is usually
... sorts of circumstances
... to one of the parties
... (L. 7 C & P 350), or
... than a party who is involved on one
... is otherwise prejudiced for or against one
... ment, present or past, by one of the

parties, is also usually relevant. The tendency of civil litigation between the witness and the opponent is usually relevant not only as a circumstance tending to create feeling but also as involving conduct expressive of feeling; and while the mere fact of litigation upon a disconnected matter may not necessarily show bias, still it is well to attempt to distinguish and refine for the purpose of exclusion. That the witness is or has been under indictment may have several bearings: (1) if the indictment, present or past, was laid by the opponent's procurement or for an injury to him, it is relevant as having tended to excite in the witness a hostile feeling to him; (2) if the indictment was

tion can be attempted
suggestion of personal prejudice; and the decision should be left entirely in the hands of the trial Judge. *Higmore* § 919

Character — ... of the Evidence Act,
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his untruthfulness, are actual qualities having probative force because conceived of as existing in or attributed to him or more of these qualities, to restore reputation is not the immediate, telling reason.
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Kind of character, Veracity as the Fundamental Quality from the point of view of modern psychology, the moral disposition which tends for or against truth in connection with other testimony, is of testimonial credit. In determining the relevancy of character as affecting the credit to be given to a witness, since the truth upon and in his case or as and for quality, or probal leads us bad more

truth This must be
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... involving necessarily
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ity in particular,

is admissible. The argument for the use of bad general character to discredit a witness is, in brief, that it necessarily involves an impairment of the truth telling capacity, that to show general moral degeneration is to show an inevitable degeneration in veracity, and that the former is often more easily betrayed to observation than is the latter. Wigmore § 922. The argument in favor of the above statement is thus forcefully stated by Toomer J in *State v Boswell* 2 Dev 210, 'Should a witness, whose general character is proverbially false to licentiousness and lewdness, who in his habit is regardless of the precepts of religion and reckless of the consequences of vice, be entitled to the same credit as another whose character is without stain, and whose whole life has been marked by piety, virtue and truth? An unprincipled man, although grovelling in other vices which he has long practised, may for selfish purposes artfully conceal the weakness of his character on the score of veracity. Should not such habits lessen the weight and impair the credit of a witness, although he may have established no general character bad as to truth?' 'The arguments made in answer to these' says Prof Wigmore 'are chiefly three (1) that as a matter of human nature, a bad general disposition does not necessarily or commonly involve a lack of veracity, and that therefore the former is of little or no bearing probatively, (2) that the estimate of an ordinary witness as to another's bad general character is apt to be formed loosely from uncertain data and to rest in large part but on personal prejudice and on mere differences of opinion as to facts of belief or conduct,—a chance of error which is relatively

in *Atwood v Impson*, 40 N. J. 341, 1874, 1875, 1876, 1877, 1878, 1879, 1880, 1881, 1882, 1883, 1884, 1885, 1886, 1887, 1888, 1889, 1890, 1891, 1892, 1893, 1894, 1895, 1896, 1897, 1898, 1899, 1900, 1901, 1902, 1903, 1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 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and complained of as 'lending the authority of their example to the abuse of cross-examination to credit which was quickly followed by barristers of inferior positions, among whom the practice was spreading of assailing witnesses with what was not unfairly called a system of innuendoes, suggestions and bullying from which sensitive persons recoil.' And Mr Charles Gill, one of the many imitators of Russell's domineering style was criticised as 'bettering the instructions of his elders.'

"The complaint against Russell was that by his practices as displayed in the *O'Brien* case—robbery of jewellers—not only may a man's, or a woman's whole past be laid bare to malignant comment and public curiosity, but there is no increase afforded by the Courts of showing how the facts really stood or of producing evidence to repel the damaging charges.

"Lord Bramwell in an article published originally in *Nineteenth Century* of February, 1892 and republished in legal periodicals all over the world

...les Russell and his imitators Lord
...perience of forty seven years' practice
...aintenance with the legal profession

...however much repented of, is not the
...consequent loss of character in addition which
...never called to the witness stand' 'Women

and whose husband die of poison, must not
complain at having the veil that ordinarily screens a woman's life from public
inquiry rudely torn aside' 'It is well for the sake of truth that there should be
a wholesome dread of cross-examination' 'It should be understood to be no
trivial matter, but rather looked upon as a trying ordeal' 'None but the sore
feel the probe' such were some of the arguments of the various upholders of
broad license in examinations to credit

'Lord Chief Justice Cockburn took the opposite view of the question 'I
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147. If any such question relates to a matter relevant to

When witness to be the suit or proceeding, the provisions of
compelled to answer section 132 shall apply thereto.

...such" it is presumed refers to the last
the word "any", in the earlier part
can be asked in cross examination
of a twofold character, it may be
directly relevant in its bearing on, elucidating, or disproving, the very merits
of the points in issue. In such a case, the witness is not protected from
answering, notwithstanding the answer may criminate him For section 132 is

made applicable to this case. There is another kind of relevancy which is collateral to the issue. Such is the character of the witness, which is always relevant, because if he is dishonest, no faith can be put in the story he utters. Where questions are put to a witness, not for the purpose of proving or disproving the point in issue, but exclusively and merely to show what is the character of the witness, the Court is to decide whether the question is to be answered or not. This appears to differ from section 32 of Act II of 1855 which drew no distinction between the several kinds of relevancy. Under that Act a witness was bound to answer every criminating question, while the proviso threw a protection over him from all criminal consequences, other than those attaching to perjury. *Nort Li* 329

148. If any such question relates to a matter not relevant

Court to decide when question shall be asked and when witness compelled to answer to the suit or proceeding, except in so far as it affects the credit of the witness by injuring his character, the Court shall decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witness that he is not obliged to answer it. In exercising its discretion, the Court shall have regard to the following considerations:—

- (1) such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies :
- (2) such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies .
- (3) such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence :
- (4) the Court may, if it sees fit, draw, from the witness's refusal to answer, the inference that the answer if given would be unfavourable.

Scope of the section "Such questions" mean the questions referred to

asking of such questions that the answer to them might tend to criminate the witness, or expose him to penalty or forfeiture. It is necessary however to make careful

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the view of testing or injuring the witness's character. When a question is asked merely for this purpose the Court is to decide whether the witness is to be compelled or not to answer it. In deciding whether such a question is proper or not the Court is to consider the effect of the answer on the witness's character.

evidence given. If the evidence is very unimportant, and the imputation on the witness's character very serious, the question ought not to be asked. A witness, for instance, who proves the posting of a letter or the entry of some important item, ought not to be asked questions, the answers to which might blast his reputation. With a view to such considerations as these, it is further provided that the Court may infer from the witness's refusal to answer that the answer, if given, would be unfavourable to him, but that it is not bound to do so." *Cum Fr* pp 65-66

In *Queen v Gopal Day*, 3 M 271 (278), *Turner C J* said "Irrelevant questions should not be allowed, and it may be implied from the limitation in this section (s 118) that a witness should be excused from answering

which are irrelevant. To under-connection with the subsequent embrace the whole range of a witness. By section 133 it

is enacted that a witness must be examined and cross-examined as to relevant

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which I understand no more than was meant by relevant to a matter in issue, the provisions of section 132 are by section 117 declared applicable to it. If it

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rest of the Act impel me to the conclusion that the answers to which a witness has objected or has been constrained by the Court to give. I am led to the same conclusion by a consideration of the alteration

that was called for in the English law of Evidence, which the Indian Legislature appear to have had in view. Except where otherwise provided by special law, a witness was bound to give evidence, and if he objected on this ground, the Court considered the objection well founded. It excused him from answering it, on the other hand if the Court improperly refused to excuse the witness, and compelled him to answer, his answer could not be used against him to support a criminal charge, except on a charge of having given false evidence by his answer."

In the same case *Muthusami Ayyar J* at p 285 and "Section, 149 which confers upon a witness the privilege that is material only in so far as it injures his credit, expressly gives power to the Court not to criminate himself until it is decided that the question must be answered.

Clause (2)—So remote. "On analysing the nature of the argument from a witness's character we find it to be really this. The moral qualities of the person who is now speaking, the probability of his truthfulness, his probability of being sincere or the reverse."

Obviously, our argument, because it believes in the present influence of a witness's disposition upon his testimony, expects and requires us to exhibit to the Court a character at the precise moment directly. We may have to go

back only an hour or a day or a week, but we are at least going back some space of time when we call for either personal knowledge (of another witness) or reputation, which cannot possibly carry the proof down to the precise moment of utterance, and, besides this, the character of a former period, more or less distant, always enters into every estimate (reputed or individual) of character even though it may be expressly predicated as of the present moment. Nevertheless there is nothing improper, in the resorting in part or entirely, to the character of a prior time. We are simply adding another step to the argument, for while first using present character to throw light on the probability of shaking the truth, we then have this present character to prove in its turn and we argue from prior character to the probability of its persistence at the time of utterance. The second step of the argument is an

149. No such question as is referred to in section 148

Question not to be asked without reasonable grounds. ought to be asked, unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well-founded.

Illustrations

(a) A barrister is instructed by an attorney or vakil that an important witness is a dakait. This is a reasonable ground for asking the witness whether he is a dakait.

(b) A pleader is informed by a person in Court that an important witness is a dakait, the informant, on being questioned by the pleader, gives satisfactory reasons for his statement. This is a reasonable ground for asking the witness whether he is a dakait.

pleader, vakil or attorney of the class referred to in s 149 and gives the Court the names of such Courts as of course in that case a question was asked without Court, but it limits instances mentioned

in the sense of being protected from disclosure to the opponent There is no privilege as against the Court The Court's disciplinary power over advocates in relation to g reflecting on the parties as well a charge against is made the charge privileged only

instructions; they have a responsibility in the matter and are not justified in making charges of fraud and crime unless they are personally satisfied that there are reasonable grounds for putting them forward *Donald Weston v Peary Mohan*, 18 C. W. N. 185-40 C 893

"The bill as originally drawn up provided, in substance, that no person should be asked a question which reflected on his character as to matters irrelevant to the case before the Court, without instructions; and if the Court considered the question improper, it might require the production of the instructions; and the giving of such instructions should be an act of defamation, subject, of course, to the various rules about defamation laid down in the Penal Code. To ask such a question in the person asked

made to the proposal we first place, that the difficulty was practically insuperable; country were already sufficient; and in the third place—and perhaps this was the most important argument of under so many kind, that be open to amongst the rest, that the sections proposed have accordingly been substituted for

of Sir to 152 were substituted for the old ones as

occasions been a grave inconvenience is concerned speak for sound by all honourable act without a few remarks

whether she was made pregnant by a certain person The question was objected to by the witness me of rty of estion t as a

witness, the Court will have to consider the provisions of s 116 and ss 118 to 120 of the Evidence Act. *Subala Devi v Intra Kumar*, 1923 Cal 315; see also *Panda v Abdul*, 65 Ind Cas 693-5 N. I. J 138

In recent and scandalous questions may be put to shake the credit of a witness or as relating to facts in issue; or to determine whether or not a fact in issue existed. If they are put merely to shake the credit of a witness the Court has complete dominion over them and may forbid such questions, even though they may have some bearing on the question before the Court. But if they relate to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed, the Court has no jurisdiction to forbid such questions, though they may be indecent or scandalous. Advocates have ample discretion in the conduct of cases of which they are in charge and the Court cannot better their discretion by insisting that their case should be put to this witness or that. *Mahomed v Emperor*, 62 Ind. Cas 54-20 Cr L J 566. When a question in cross-examination reflects not on the witness but on the third party, s 150 of the Evidence Act, which must be referred back to s 146 can have no application. *Pearry Mohan v Donald Watson*, 9 Ind Cas 509. There is nothing in the provisions of the Evidence Act to prevent the prosecution of a person for defamation, if he puts defamatory questions and answers. *Weir* 819

153. When a witness has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him; but, if he answers falsely, he may afterwards be charged with giving false evidence.

Exception 1—If a witness is asked whether he has been previously convicted of any crime and denies it, evidence may be given of his previous conviction.

Exception, 2.—If a witness is asked any question tending to impeach his impartiality and answers it by denying the facts suggested, he may be contradicted.

Illustrations

(a) A claim against an underwriter is resisted on the ground of fraud. The claimant is asked whether, in a former transaction, he had not made a fraudulent claim. He denies it. Evidence is allowed to show that he did make such a claim.

was not dismissed from a situation for dishonesty

A is asked whether he missed work that day at Calcutta. He denies it.

his question in Lahore. In each of these cases the witness might, if his denial was false, be charged with perjury.

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He denies it. He may be contradicted on the ground that the question tends to impeach his impartiality.

Principle. to discredit a witness
introduce matter that, if controversy
about the matter it would be occupied
but the merits of the witness, and thus
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relevant, strictly speaking to the issue, but tending to contradict the witness.

would follow from a continual course of those sorts of cross examinations which

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of this nature and the time which it is practicable to bestow upon them. If we lived for a thousand years, instead of about sixty or seventy, and every case were of sufficient importance, it might be possible and perhaps proper to throw a light on matters in which every possible question might be suggested, for the purpose of seeing portion of it was no statements made to be impossible. tend to divert the attention of the jury from the real enquiry before them,

and the evidence trial of the issue between the real parties to the cause, and such illegal testimony may make

of clear and easy proof. If a witness is asked whether he has been previously convicted and denies it, the previous conviction may be proved; and if he is

this general rule excluding evidence to contradict a witness can be considered compared with necessary if indefinitely collateral and to prove that he is Ev 2nd

Id 326

Scope of the section. Where a fact which has a direct bearing on the issue is denied by a witness, it may, of course, be proved *alibunde*. See illustration. the answer. The matter cannot be carried further at the trial, except in the two cases provided by this section. The only redress which a party has, is to charge the witness with perjury, and try him for it. To this rule there are however two exceptions. *Nort Et* p 332. So the right to cross examine to credit is subject to this rule,

that with two exceptions, the answers of the witness as to matters not relevant to the issue are conclusive, in this sense that they cannot be contradicted by evidence in chief on the other side. *Baker v. Baker*, 32 L. J. P. D. & A. 145. However untrue they may be, they cannot be treated as if their truth or falsity were an issue in the cause. *Wills v. Wills*, 2nd P. D. 325. The rejection of the

this evil,
hence that
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Company,

13 B 297, forms no real exception to the above rule. There an action was brought by a ship owner against underwriters on a policy of insurance, and the plaintiff's claim to recover was for a total loss rested on the abandonment of the vessel by the captain. The captain was called as a witness by the plaintiff, and, on cross-examination, he admitted that he had been an habitual drunkard, and that he had established that fact, and was tending to show that

judgment in reference to the abandonment, and that consequently, the judgment actually exercised by him was not entitled to any respect from the jury. *Taylor v. Taylor*, 1439. Sections 153 and 155 of the Evidence Act must be strictly construed and narrowly interpreted if the cases governed by the Act are to be spared. *Bhogal v. Bhogal*, 593-103 Ind. does not go 91, on which it is based.

Evidence to contradict relevant facts. Where witnesses have been examined in a particular place, and have given evidence in proof of a fact, it is not to be contradicted by them. It is not

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which may assist in determining the respective value of conflicting testimony. And where the trial is by a Judge and not by a jury, there is probably less reason for excluding such evidence. *Greenleaf on Evidence* is incapable of affording any assistance in this matter. It is not

Exception I. At the common law a witness might be cross examined as to whether he had been convicted of any felony or misdemeanour, but if he denied it he could not be contradicted, unless the commission of the offence was relevant to the issue. This state of law was altered as to civil causes by section 25 of the Common Law Procedure Act, 1854 (17 & 18 Vict. C. 125), and afterwards as to both civil and criminal causes by the statute 28 Vict. C. 18, of which section 6 enacts as follows:—"A witness may be questioned as to whether he has been convicted of any felony or misdemeanour, and, upon being so questioned, if he either denies or does not admit the fact or refuses

to answer, it shall be lawful for the cross-examining party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the clerk of the Court or other officer having the custody of the records of the Court where the offender was convicted or by the Deputy of such clerk or officer (for which certificate a fee of five shillings and no more shall be demanded or taken) shall, upon proof of the identity of the person, be sufficient evidence of the said conviction without proof of the signature or

the same. Although
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to his credit with regard to it. *Wells v. Wells*, 13 L. J. C. P. 696; *Wells* 2nd Ed 341. Similarly in *R. v. Watson*, 2 Stark 169, Lord Ellenborough observed: "For the purpose of ascertaining the credit due to witnesses, the Courts indulge free cross-examination; but when a crime is imputed to a witness, the Court knows the case, that a witness is guilty of a crime, and that a witness is not credible."

of auxiliary policy: (1) the reason of confusion of issues and (2) the reason of unfair surprise. *Wigmore* § 979 S. 1

But when the extrinsic testimony is in the shape of a record of a judgment perate (n) There is no record of acts of misconduct so the judgment cannot be re-opened and no new issues (other than the occasional ones occurring in the process of authentication of the record) are raised thereby, (b) there is no danger of unfair surprise—not, however, because (as is sometimes said) the witness well knows whether he was ever convicted, this assumes the very thing in the contrary. The judgment is not used by the Court. It is a record of

a judgment of conviction may be made not because an exception is carved out of the rule, but because the reason of the rule does not apply. *Wigmore* § 980

A finger print expert was called as a witness who compared certain finger prints of the accused taken in Court with some other finger prints on a paper which contained a record of certain convictions which purported to be the convictions of the accused and pronounced them to be similar. Held that the previous convictions were not properly proved. *Ramdas v King Emperor*, 21 C W N 469=39 Ind Cas 302

Whether subsequent pardon affects the admissibility of such evidence. A pardon does not remove the admissibility of the original judgment for the purposes of impeachment, for (unless otherwise expressly declared therein) a pardon does not imply a finding of innocence of the person convicted. *Mr Finington* in arguing in *Crosby's Trial* 12 How St Tr 1296, said 'Though the offence was taken away by the pardon yet the credit of the party must be diminished thereby, and no consequences of a crime (though it makes a man a new creature, as long as a malicious spirit still remains' "the ground of innocence or to does not change."

conviction of an infamous general character of a person as a witness must be bad is restored by the executive. *Doe J in Curtis v Cochran*, 50 N H 242, *Wigmore* § 980

Exception 2 This exception refers to matter which is easily susceptible of proof and strikes at the very root of the witness's trustworthiness. *Curtis* Ev 383

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I think the expression 'as to subject of inquiry' is far too vague and loose to be the foundation of any judicial decision. And I may say I am not at all prepared to adopt the proposition in the case that a witness may be contradicted as to his being in any way connected with the with the issue as a matter capable must be so far connected with it as to be a matter which if answered in a particular way would contradict a part of the evidence observed as contradicted before the jury at the trial of the witness

wards one party or the other. It is certainly allowable to ask a witness in what manner he stands affected towards the opposite party in the cause, and whether he does not stand in such a relation to that person as is likely to affect him and prevent him from . . . whether he has not used expressions . . . d on some one or that he would . . . the cause in one way or the other . . . dence as to what he said,—not with . . . ie, but to show what in the state of . . . may exercise their opinion as to how . . . here you may show the condition of . . . ie parties, are not to be confounded with other cases where it is proposed to contradict a witness on some matter unconnected with the question at issue." In the same case *Alderson B* said: "The question is this, can you ask a witness as to what . . . of any . . . e at . . . shed . . . ties, . . . ment . . . be . . . tra- . . . ther . . . the . . . ie is . . . that . . . you can with propriety permit a witness to be examined first and contradicted afterwards on a point which is merely and purely collateral." *Wigmore* § 1020

Particular circumstances and expressions indicating bias; they are therefore also provable in *r. G. 49*; *Wigmore* § 1005. In *Thomas v* "If the question had been whether the . . . that would a charge, whether the . . . e her the . . . why as . . . and had . . . denied that."

A party may call evidence to show that a witness on the other side has . . . motive, . . . ie bias . . . on the . . . called . . . hers to . . . he has . . . epted; . . . rible is . . . offer." . . . less to . . . within . . . 17 Ho . . . id been . . . to him . . . that, as . . . e might . . . Typet, 2

It is allowable to ask a witness in what manner he stands affected towards the opposite party to that per-
 unprejudiced would be disposed of the cause in one way or the other; and if he denies it, evidence may be given as to what he said not with the view of having a direct effect, but to show what is the state of mind of that witness, in order that the jury may exercise their opinion as to how far he is to be believed. *All Gen v. Hitchcock*, 1 Ex 93. In an action on a promissory note (in which the defence appears to have been that the note was forged), the female servant of the plaintiff, who was one of the attesting witnesses to the note, was asked on cross examination whether she did not constantly sleep in the same bed with the plaintiff, which she denied. *Coleridge J* held that a witness might be called by the defendant to contradict her, as the question was whether the witness had contracted such a relation as to be likely to conspire with the plaintiff and been seduced by him, and that the witness was a prostitute, that would have been a collateral fact which could not have been contradicted. *Thomas Collier* 15 Q B 883, Russ Cr 2319.

154. The Court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

Question by party to his own witness

Principle The examination of an adverse party sometimes becomes

necessary during the examination of a witness, whether or not it necessarily tends to establish a case in favour of the party calling him, and it is not necessary to put questions to him at variance with his statement, when called. A witness may be asked questions which tend to establish a case in favour of the party calling him, and it is not necessary to put questions to him at variance with his statement, when called. A witness may be asked questions which tend to establish a case in favour of the party calling him, and it is not necessary to put questions to him at variance with his statement, when called.

where he seems to have forgotten some material point, it may be supplied in his mind in the form of a leading question. *Mackenzie's Ev* § 250.

Scope of the section A party is his own witness as correct. It is very clear that a party may prove the truth of material facts, though the effect of such testimony is to directly contradict his own witness, and this, not only when it appears that the witness was innocently mistaken, but even when the witness is shown to have been mistaken. This common law rule has been recognized and is now taken by surprise.

has been previously called by the party, and it is not necessary to put questions to him at variance with his statement, when called. A witness may be asked questions which tend to establish a case in favour of the party calling him, and it is not necessary to put questions to him at variance with his statement, when called.

hand it was possible that the party must be the general rule, that a witness *Ph & Am Ev* would tend to multiply

S.

of the purpose of its being reserved, and afterwards used to contradict him; and that the jury might regard such a statement as substantive evidence in the cause. Moreover, the use of oaths and other sanctions of truth is to extract facts which parties might be willing to conceal; and the allowing a witness to be thus contradicted holds out an inducement to him to maintain by perjury in Court any false and hostile statements he may have made out of it. *Best*

Ex. § 615 The following reasoning was put forward on the other side: "It may be argued, the evidence is not open to the objection that the party would thus discredit his own witness by general testimony, that although a party who calls a person of bad character as witness, knowing him to be such, ought not to be allowed to defeat his testimony because it turns out unfavourable to him, by direct proof of general bad character, yet it is only just that he should be permitted to show, if he can, that the evidence has taken him by surprise, and is contrary to the examination

of the witness, preparatory to his own statement against the contrivance of himself to an opponent in the interest of that the rule with it ought to be the other, and that the

substantive of collusion, be further r the bringing truth, in crim

attained by estimating its value more especially, if attended with the

In this state was originally applicable only to Civil Courts but has since been extended (28 & 29 Vict. C 18, ss 1-3) to all Courts of judicature as well criminal as all others, and to all persons having by law or by consent of parties authority to hear, receive, and examine evidence, and which enacts that "A party producing a witness shall not be allowed to impeach his character, but he may, in case the witness prove adverse, contradict him by other evidence that he made at other times

testimony of the mention such statements sense of the not merely a party *Gre*

Adverse witness

appears to be contrary to 261, *Taylor* 160 *Hillman* where unfav

Judge shall consider him hostile and (2) that the Judge shall also give leave, which he need not do even though the witness is hostile; *Cockburn C J* not altogether assenting. In *Coles v Coles*, L R 1 P & D 70, *Sir J P. Wilde* said An adverse witness is one who does not give in evidence what the party

calling him in which he to the fact's and instructed "adverse" as merely "different" *v* Wilson, 4 F. & F. 301; *Paulner v Brine*, 1 F. and F. 254; *Martin v. Ins Co* 1 F. & F. 505; *Anstell v Alexander*, 16 L. T. R. N. S. 830, R. 188 In *Rice v Howard*, L. J. "adverse" as equivalent to 860 (869), Mr Justice Mukerjee the opinion of the Judge, and not merely when his testi Wilde J remarked in *Coles* one who from the manner in desirous of telling the truth; and secondly, as *Lara Campbell v* in *Paulkner v Brine*, 1 F. & F. 254, when a witness is treated as hostile and cross examined by the party calling him, this must be done to discredit the witness altogether and not merely to get rid of part of his testimony; see also *Grenough v. Leles*, 5 C. B. 786; *Reede v. King*, 30 L. T. 290; *R. v Smith*, 11 Cr App R 86, 106 A witness who is gained over by the other party is a hostile witness *Parnesuar v Emperor*, 94 Ind Crs 705-706 19-44 Ind Cas 33 in manner in which he is willing to go back desirous of telling the truth to the Court *Panchanon v. Emperor*, A. L. R. 1930 Cal. 276-74 C W 526-51 C. L. J 203

holding a fair account, are also very proper circumstances to be taken into account in forming his decision. A son will not be very forward in stating he has been the only witness; a servant master, be very ready to acknowledge the

Appleton C J said: "If the witness is

interest, or withheld to elicit the truth ding questions are r interested by the r & Moo 126, R. v.

Chapman, 8 C. & P. 559; *R. v. Bull*, 1 C. & P. 715; *Ohlson v. Terreno*, 1 R. 13 Ch 129; see also *Alexander v. Gibson*, 2 Campb 556; *Bradley v. Ricardo*, 8 Bing 57; *Friedlander v. London Assurance Co*, 4 B & Ad 193. This rule is applicable in cases of witnesses unwilling for any other reason to tell all they may know *Parkin v. Moon*, 7 C. & P. 109; *R. v. Murphy*, 8 C. & P. 306; *Wigmore* § 774; *R. v. Ball*, 8 C. & P. 745. Putting leading questions to one's own witness with the permission of the Court under ss 151 and 143 of the Evidence Act does not amount to declaring the witness as hostile and cross-examining him so as upon the evidence of the Ind. Rul. (1930) Cal desire to add that in many cases together do not give own witnesses even with that they may, with cross-examine him. The wording of s. 151 shows that the Legislature did not intend to distinguish the law in this country from the law which obtains in England."

Impeachment
Court did not
2 Stra. 100
8 How St.
Trial, Lord
reasons are
is bound to
Lord Ellenborough L. C. J. in *Alexander v. Gibson* 2 Campb 556. "If a witness is called on the part of the plaintiff, who swears what is palpably false, it would be extremely hard if the plaintiff's case should for that reason be sacrificed, but I know of no rule of law by which the truth is on such an occasion to be shut out and justice is to be perverted." Similarly in *Bradley v. Ricardo*, 8 Bing 58, *Tindal C. J.* said "The object of all the laws of evidence is to bring the whole truth of
his own
witness
of belief
having
afterwards to impeach their general reputation for truth. *Wigmore* § 808
Due answer to the question is that the supposed guarantee ought not to be discovered the witness's
Another and more satisfactory
not to be subserved by
having the parties with guarantees and vouchings, and that it is the business of a Court of Justice, whatever
Wigmore § 808
trials, neither party does know, and much less does he guarantee the character and trustworthiness of the witness called by him. *Chief Justice May*, in 11 Amer. 1, it is to be in such order—at least those called are under such persons as happen to have been cognizant of the facts, and all the cases as the

parties have selected at their pleasure. In point of fact it is substantially true that parties call particular persons as witnesses simply because they are of legal to and can call no others. If a lawsuit was a manufacture, and the party bringing it could select his materials—facts and witnesses—, there might be some propriety in these materials but as both character is out of the quest he can get to make out
r 19 L J Q B

493 So the Indian Legislature wisely departed from the rule of English law and under this section, a person who calls a witness may with the permission of the Court ask him questions to show his general bad character. *Cum Er*
384

Prior self contradiction—Party's own witness. Prior self contradiction neutralizes the statement on the stand, by showing that the witness can not be correct in both statements and is as likely to be wrong in the latter as in the former, and further more, that his certain error in this one respect indicates a possibility of error upon other points. But what is not to be necessarily implied from this error is any reflection upon the witness's character nor indeed upon any specific testimonial quality. The implication is merely that in some respect his testimonial capacity is capable of error memory, perhaps through bias or disposition, but not definitely in any one rule forbidding the impeachment of one's own witness does not extend its prohibition to this sort of evidence
is of
adic

tion as a legitimate reason for such apprehension on the part of the witness. *Wignmore* § 902, see also *Parmeshwar v Emperor*, 91 Ind Cas 705=A I R 1926 Pat 316

Calling the other party as a witness. If there is any situation in which the first party is the best person to be called, the party is the best person to be called.

§ 916 But it is not only the defendant at the very outset of the case, to be put in the witness box nominally as plaintiff's of the plaintiff before tell his own story. *Max* where a plaintiff was cross examine him. Any refusal on the part of Court to allow such cross examination would cause miscarriage of justice. *Radhajeetun v Taramonee* 12 M I A 380 (393). This case was explained and distinguished by *Mookerjee* J in *Lucharam v Radhacharan* 31 C L J 107. His Lordship observed, "In support of this position he placed Committee in *Radhajeetun v Taramonee* 11 W R P C 31. That decision. There the witnesses summoned for the plaintiff (except one) did not appear. The plaintiff thereupon filed a petition praying that the case might proceed on the basis of the deposition of the plaintiff. The court whether the defendant submitted asked leave to ask further questions to the plaintiff and dismissed the case went up to

the Judicial Committee, their Lordships fully concurred in the propriety of that S. 1
 censure. The
 calls the defer
 of right; in
 a witness called by the Court. If the contention of the appellants were to
 prevent, it would
 in emphatic terms I
Lal v Chum Lal

... would appear from the judge's report
 of the artifices of a weak and somewhat
 cause his opponent to be summoned

person who calls a witness to put any question to him which might be put in
 cross-examination by the adverse party. The rule recognized in *Clarke v*
Saffery, R & M 126 and *Boston v Carter*, R & M 127, namely, that when the
 witness stands in a situation which naturally makes him adverse to the party
 who desires his testimony, as for example, when a defendant is called as
 the plaintiff's witness, the party calling the witness is entitled to cross-
 examine him, cannot be held applicable in this country in view of the provisions
 of section 154 of the Indian Evidence Act. Indeed, even in England, it has
 been ruled in later cases that the situation in which a witness stands towards
 either party does not give the party calling the witness a right to cross-examine
 him unless the witness's evidence be of such a nature as to make it appear
 that the witness is unwilling to tell the truth; *Parkin v Moon*, 7 C & P 408,
R v Ball, 8 C & P 745, and it now appears to be settled law in England that a
 party when called by his opponent cannot as of right be treated as hostile,
 the matter being solely in the discretion of the Court. *Price v Manning*,
 43 Ch D 873.
 ed as one who
 he is not desirous
 P & D 70, G
 47 C 1043-32 C
 Cas 814

Necessary witness
 must be called
 Hence it is conceded
 ment of the Will
Mos & Rob 501
 C J said I
 and consequently
 the event of one
 as for instance by
 See also *Jones v Jones*, 21 F L R 855; *Pratt*
 13. But in *Surendra v Raner* *Doe* 21 C
Mookerjee said: "We regret that
 the cross-examination were at
 Not only were the proceedings
 to shake the credit of a witness
 in violation of the provision
 leading questions were put in
 provisions of the law. It is
 pounder was obliged under section 163 of the Act
 attesting witness to the Will, such witness

... must one of the attesting witnesses
 ase of a Will (*Vide* s 68)
 perishment by the propo
 , *Bouman v Bouman*, 2
 C S 745 747, *Cockburn*
 who claims under a Will,
 tnesses to it, cannot, in

should be treated as a witness

called by the Court and liable to be cross-examined, as a matter of right, by this contention cannot be upheld under which provides that the Court may, in its calls a witness to put any questions to him which might be put in cross-examination by the adverse party. There is in this respect, no distinction on principle between an attesting witness whom a party is obliged to call and any other witness whom he may cite of his own choice, but the Court may, in the exercise of its discretion, be more easily persuaded in the former case than in the latter. In view of the provision of the Indian Evidence Act, it is thus plain that there is no room for the application, in this country, of the view taken in the case of *Bouman v Bouman*, 2 Ma & Rob 501, *Jackson v. Thomason*, 1 B & S 717, and *Cole v Coles*, L R 1 P. & M. 70, 71, that a necessary witness, that is, one whom a party is compelled to call, is not to be cross-examined by the adverse party. The Court in *Jones v Jones*, 42 Ch. D (1909) P 101, expressed no doubt that a witness called by a party is liable to be cross-examined by the adverse party. In *Jones v Jones*, 42 Ch. D (1909) P 101, the Court said: "two important points must be borne in mind, first, that a witness is considered adverse when calling him words, as 'I' from the man of telling the v Brine sup party calling merely to get rid of part of his testimony."

The Court may exercise its discretion as to whether or not it will allow cross-examination of a witness called by the prosecution. In *Surendra v Ranees Dass*, 24 C W. N. 869 It is not open to the prosecution in a criminal trial to cross-examine a witness called by the Emperor.

1 Pat 758-4 Pat L T 232=24 Cr. L J. 69=71 Ind Cas 117=1923 F. 62,

and the proper course in such a case is to give permission to the prosecution to ask the witness a leading question and then to read out evidence before the Court of truth.

S.

The accused are entitled in cross examination to elicit facts in support of their defence from the prosecution witnesses, though the facts thus elicited had no relation to the facts to which the witnesses had testified in the examination-in-chief. In course of cross examination of this character, the defence are entitled in view of the generality of the provision of section 113, Evidence Act, to ask leading questions and the Court might, in its discretion under section 154 permit the accused to do so even though he had been previously examined by the defence and his decision by the judge.

these questions to be put by the prosecution was to deprive the accused of the benefit which might accrue to him from any statement which the witness might have made in favour of the accused and which the defence could have relied on if the witness had not been allowed to be cross examined by the prosecution. For the -

examined by the Court before which the matter comes up for consideration. *Per Moores J in Khayraddin v Emperor*, 42 C L J 501. So if a counsel is given permission to cross examine his own witness it must be done to discredit his own witness altogether, and not merely to get rid of part of his testimony, because if that which is suggested is true, the witness is not to be discredited. Therefore, his whole testimony must be discredited. *See also Akbul Khan v King Emperor*, 3 C L J 1013. *But in v. Jehangir Cama*, A I R 1927 Bom 501—29 Bom L R 996—106 Ind Cas 106, the Court observed: 'As to the legal consequence, the prosecution sought to discredit the statements of witnesses they considered hostile only on certain points. It is contended for the defence that the legal result was to discredit the evidence in toto of those witnesses including those portions on which the prosecution wished to rely. This view is founded on the dictum of Lord Campbell C J in *Faulkner v Brive*, 1 F & F 251, accepted by the Calcutta High Court in cases such as *Khayraddin v Emperor*, A I R 1926 Cal 139—53 C 372. But as was pointed out in the lower Courts, the view of Lord Campbell is not accepted even in England. *Bradley v Ricardo*, 8 Bing 57, Halsbury's *Laws of England*, Vol XIII, p 600. It does not find support in any provision of the Indian Evidence Act or other enactment in India. With all respect, therefore, I am unable to say that the total discarding of the evidence of such witnesses can be formulated as a necessary legal result, amounting in fact to *Falsus in Uno, Falsus in omnibus*. If it cannot be formulated, then the result must be the same as in other cases, and it must be a matter for the Court on

the particular facts in each case to credit or to discredit the different portions of the evidence of each witness in other cases. The view taken by the Bombay Court appears to be consonant with law - but a less logical reason. Nevertheless we should bear in mind the obse

for counsel as to the degree of credit to
maxim *'Falsus in Uno Falsus in omnibus'*
point will
bility, but
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it merely c

it merely (told, and in the others it is absolutely false as a maxim of life, and secondly in point of utility, because it merely tells the jury what they may do in any event not what they must do or must not do and therefore it is a superfluous form of words. *Higmore* § 1008. Commenting on the decision of *Cunningham* and *Lot Williams JJ* in *Malibul Khan v Emperor*, *supra*, *Sir Courtne J Terrell CJ* said. The theory so stated is fallacious. A party is allowed to cross examine his own witness who displays hostility and not necessarily because he displays untruthfulness. The theory has gained currency owing perhaps to the common belief that the sole object of cross examination is to discredit the witness whereas its main purpose is to obtain admissions and it would be ridiculous to assert that a party by cross examining a witness is thereby prevented from relying on admission and to hold that the fact that the witness is being cross examined implies an admission by the cross examiner that all the witness's statements are falsehoods. The correct view was in my opinion expressed in *Jehangir v Emperor* 106 Ind Cas 100=29 Bom LR 996=AIR 1927 Bom 501. Moreover the opinion of *Lord Campbell* has never been followed in England and English law upon which the Indian Evidence Act is founded was clearly stated by *Tindal CJ* in *Bradley v Ricardo*, 8 Bing 57=1 LJ C P 30. *Shorai Sao v Emperor* AIR 1939 Pat 250 11 PLT 148. But *Panchanon*

set at rest by the
la Hum v Sircar v
11 (F B) In that
was discussed the

1st result of the 1st Bench case is as hostile need not be rejected, (ii) such it is in favour of the party calling rejected so far as it is in favour of the opposite party. See also *Annamatha Juru* 1st *mal v Official Assignee* A I R 1933 Mad 137-56 Mad 7-64 M L J 1933

155 The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him —

- (1) by the evidence of persons who testify that they from their knowledge of the witness, believe him to be unworthy of credit,
- (2) by proof that the witness has been bribed, or has accepted * the offer of a bribe or has received any other corrupt inducement to give his evidence,
- (3) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted.

*The word accepted in s 155 para (2) was substituted for the original word 'had' by the Indian Evidence Act Amendment Act (18 of 1872) s 11

(4) when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character. S. 1

Explanation—A witness declaring another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief, but he may be asked his reasons in cross-examination, and the answers which he gives cannot be contradicted, though, if they are false, he may afterwards be charged with giving false evidence.

Illustrations

(a) A sues B for the price of goods sold and delivered to B. C says that A delivered the goods to B.

Evidence is offered to show that, on a previous occasion, he said that he had not delivered the goods to B.

(b) A sues B for the price of goods sold and delivered to B. C says that A delivered the goods to B. Evidence is offered to show that, on a previous occasion, C said that the goods were not given by A or in his presence.

The evidence is admissible.

Scope of the section—Besides being asked questions tending to discredit, a witness may be discredited by the evidence of other persons to the effect that (1), they, from their knowledge of the witness, believe him to be unworthy of credit, (2) that the witness has been bribed or has accepted the offer of a bribe, (3) that he has on former occasions made statements inconsistent with his present evidence, and which the prosecutrix is a witness and, with the consent of the court, may be asked his reasons for his belief.

Any of the above facts may be proved by the evidence of any person who is a witness and, with the consent of the court, may be asked his reasons for his belief. Here, again, precautions are taken to prevent any controversy by the following rule: Where a witness states that he believes another to be unworthy of credit, he must be asked his reasons for his belief. If he does not give his reasons, they will not be taken into account.

It is clear that but for some such rule, there might be a pitched battle fought over the character of every witness, and that suits would be simply interminable. *Cum Li 67* Cross examination is by no means the only method of impeaching the credit of a witness. What he states as fact may always be disproved by other independent witnesses. Generally speaking a party cannot discredit his own witness. If a witness is shown to be unworthy of credit, and though the story he tells may be true, that affords no just ground for saying that the witness is not worthy of credit. The party who calls him, is evidently the best qualified to judge of his credit.

to impeach the credit of a witness. There are three ways of doing so: (1) By giving evidence of his general bad character for veracity, (2) By giving evidence of his general bad character for veracity, (3) By giving evidence of his general bad character for veracity. The evidence of persons who depose that he is in their judgment unworthy of belief, even though he may be a witness of fact, is not admissible for the purpose of impeaching his credit. The evidence of persons who depose that he is in their judgment unworthy of belief, even though he may be a witness of fact, is not admissible for the purpose of impeaching his credit.

On occasions made statements inconsistent with the evidence in the proceedings, or other circumstances showing

5. that he does not stand indifferent between the contending parties. Thus it may be proved that a witness has been bribed to give his evidence or has offered bribes to others to give evidence for the party whom he favours or that he has used expressions of animosity and revenge towards the party whom he favours. *Best* = 644 The Indian Evidence Act first two instances *in toto* and has taken

possible to prove that a witness is a
Case, 7 How St Tr 446, *All Gen*
is also taken from the English
of rape and when the prosecutrix is

examined

Under the provisions of section 153 of the Evidence Act the credit of a witness may be impeached by proof of part of the statement which is irretrievably false. *Maung A I R 1927 Rang 247=6 I 1927 Rang 247* This section does not allow evidence of witness's general bad character to be brought in. *Maung San v Emperor, Ind Rul (1930) Rang 91*

Clause (1) This clause is chiefly based on *Queen v Brown*, L R 1 C O R 70-36 L J M C 59 At the close of the case for the prosecution the counsel after having called several witnesses to character, proposed to call witnesses to prove that they would not believe the Court decided on refusing

the Court for the opinion of the Court consisting of *Kell, C B, Martin B, and Byles Keating and Shee JJ* declining to hear any further argument on the subject observed that all the text writers were agreed that the evidence could be given, and that the practice was so ancient, and hitherto without doubt the authority of the legislature bears it out as an opponent's witness unworthy of belief. *R v Watson* 1 Stark 159. "I propose questions being 'Have you the means of knowing what the general character of his witness was?' and 'From such

Watson - Stark 189 "arrows proposed questions being 'Have you the means of knowing what the general character of his witness was?' and 'From such
of knowing what the general character of his witness was?' and 'From such
I believe him on his oath?' Marston
v Brown L R 1 C O R 10
e put in that way, as it would
out the means of knowing the
that degree of credit was due to
the assertion, and the means that witness then called had of informing himself
e the question may be shortened thus
ss would you believe him on his oath?'
St Tr 223 counsel asked "Is he a
oath or not? Witness 'I must tell
istakes about his own wife that by God, I
would not take his word for a half penny" So the law is that 'you may ask

would not take his word for a half penny" So the law is that "you may ask

When
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Tr 842
126 In
is objected to
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Bayley J said: "The witness... his oath" See also *R v Hemp*, 5 C & Cox Cr 48; *R v Du* enquire whether they character, and whether onb' *Phillips' Evidence* 1st Ed 109. Commenting on this passage Prof. Wigmore says: "We are now in a position to understand the language of the e, for instance, in the sense of particular acts

...they employed the term 'general character', any meaning of 'reputation', as distinguished from personal knowledge, was far from their minds, and would have been... L & C 520, as character, and both

testimony of others cannot be

...to dep... general opinion oath" Vide 1st Law Vol I, at witnesses who w oath" So the is to be given The same law explanation, which enjoins that in cross-examination he may be asked his reasons for his belief

Estimate of a witness in another case. Evidence of a particular estimate formed by... of a witness matter of L R 2 a witness before it and not on what another Court thought of the witness in another case, and therefore the opinion of Court in another case as to the witness cannot be put in to impeach his credit *Chandreshwar Prosad v Bishevar Prosad*, A 1 R 1927 Pat 61-101 Ind Cas, 239-5 P 777

Re establishment of credit. "Where the general reputation of a witness has been thus impeached the party calling him may re-establish his credit, by cross examining the witnesses (vide *Explanation*), who have spoken against him as to the means of... sink, 4 Esp testimony they calling other Murphy 19 Ho tion of the impeach to impeach A, and end of this process, in a mass of testimony amounting to not much more than mutual verification Three courses are open to pursue first, to exclude absolutely the impeachment of the character of an impeaching witness, secondly, to admit the impeachment of an impeaching witness, but no more, thirdly, to admit it only to such an extent as the discretion of the trial Court deems best The preferable rule is the third" *Wigmore* § 895

Foundation for discrediting a witness By the English law it is necessary, before giving evidence for the purpose of discrediting a witness, to lay n

particular instance speaks falsely, and although it is (thus) not altogether im-
 a general public convenience, for great
 continual course of those sorts of cross-
 ere of a witness being called for the
 reasons of auxiliary policy, inconsistent
 be shown. This section lays down the
 Kurzem, 17 C 311, Wilson J said "I am
 the Evidence Act the words, 'which is
 mean 'which is relevant to the issue.' Now the
 question is what matters are not relevant. The only test in vogue that has
 of application—
 "Could the facts,
 e been shown in
 evidence for any purpose independently of the self-contradiction?" In that
 case *Follock C B* said "My view has always been that the test whether
 the matter is collateral or not is this. If the answer of a witness is a matter
 which you would be allowed on your part to prove in evidence, if it have
 such a connection with the issue that you would be allowed to give in evidence,
 then it is a matter on which you can contradict him." In the same case
Alderson B said, "The question is this, can you ask a witness as to what
 he is supposed to have said on a previous occasion? You may ask him any
 fact material to the issue, and if he denies it you may prove that fact, as you
 are at liberty to prove any fact material to the issue."

Th. 1. A is enough
 to per witnesses
 made writing
 it is undesirable to permit the putting of such questions. In such a case the
 written and right thing to
 prove the provisions of s 145,
 Eviden will have to be borne
 in mind. A copy of the statement made before the police cannot be used as
 against the witness till he has been confronted with it. The right procedure
 then when a witness
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 cop
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is admissible under this section and may be relied on by the defence to impeach
 the informant's credit. *Aximuddi v Emperor*, 44 C L J 253—A I R 1927
 Cal 17

Statements made by third parties to the police in the course of their
 investigation are admissible to impeach the credit under s 155 of the Evidence
 Act provided the person who made the statement is called as a witness. *Aximuddi*
v Emperor, 44 C L J Statements made before a
 police officer and reduced
 to contradict a witness,
 the Evidence Act had been complied with in the matter of putting specific put
 of it which were to be relied upon to the witness in cross examination. *Thomas*
v Kedar Nath, 30 C W N 835—91 Ind C 15 801—A I R 1925 Cal 1017, see
 also *Ram Charitar v Emperor*, 8 Pat L J 568 4 Pat L W 325—45 Ind Cas
 272—19 Cr L J 512

A statement made by a witness before a Coroner under the Coroner's Act
 is admissible in evidence at the trial of the accused. *Emperor v Ragho* 22 Bom
 L R 775—97 Ind Cas 37—27 Cr L J 1061—A I R 1920 B 404, In re
Bayana, 2 Weir 831. When the persons who made certain statements are
 called as witness, then those statements become admissible, not as substantive
 evidence in the case, but merely as evidence to corroborate or contradict their
 statements in Court. *Nagina v Emperor*, 19 A L J 447, see also, *Malaya*
Goudan, In re, 14 L W 612—(1921) M W N 873

The statement of in a radical proceeding cannot be
 used in any subse
 down in section 33
 be used either to
 s 157 of the Act

It is not illegal to examine a police officer for the purpose of impeaching the credit of a witness who gives evidence in favour of an accused at his trial, to the police officer different from and not statement at the trial *Emperor v. Jogendra*.

used under s 155 (3) o

in the case *Emperor v*

16 C W N 431 = 13 Cr i

11 B 657 In a police investigation where the statement is not reduced to writing, the officer may be examined to impeach the credit of a witness who made such statement.

11 B H C 120 The re

investigation is not adm

may be proved either

witness in Court *Baba*

Section 155 only lays down that the credit of a witness may be impeached *inter alia* by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted

in which the former statement is to be

statement in writing when it is sought to

dictate a witness as provided in s 155

s. 145 and is not independent of it *Gopichand v Emperor*, A I R 1930 Lah

491, see also *Mahla v Emperor*, A I R 1931 Lah. 38 = 32 P L R 239

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Emperor v

1061 = 5 Bur L J 30 (1 B)

Previous depositions of witnesses examined for the prosecution in a criminal trial can not be used to contradict what the witnesses state in their cross examination in the present trial *Jamal v Emperor*, 86 Ind Cas 153 = 26 Cr L J 713 = A. I R 1925 Pat 381.

A recital as to the fact that a witness is not by itself admissible in evidence or cannot be found

If he is examined as a witness

same *Prohla v Bar*

to have strangled a person

that the eye witness at the spot immediately after the offence was

helped to strangle the deceased, their

(3) to impeach the credit of the eye witness

= A I R 1931 Lah. 189 = 32 = Cr L J

in

Preliminary warning To obviate the objection of unfair surprise, a

question of proof of a warning to any party to a trial who is called upon to give evidence or words
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So that if evidence of this sort could be adduced on the sudden and by surprise, without any previous intimation to the witness or to the party producing him, great injustice might be done. . . and one of the great objects of the course of proceeding established in our Courts is the prevention of surprise, as far as practicable, upon any person who may appear therein" *Wigmore* § 1025. If the previous deposition was intended to contradict the witness at the trial, it was contrary to principle to admit the evidence in the manner adopted without first drawing the attention of the witness to every point upon which it was to be used to contradict him. If the statement was intended to corroborate the witness as a whole it could not have been put in cross-examination *Emperor v Lalchuman Totram* 17 Bom L R 590-31 Ind Cas 351-16 Cr L J 751. If a Magistrate finds that a witness is rec-- different from statement attr

be given an opportunity of explaining why the contradiction has occurred. If he denies having made such a statement then the statement must be duly proved before it can be used to imp made in the committing Magistrate's C of that Court and brought on the proof because the deposition proves itself. Not so a statement attributed to a witness on police papers *Nga Pyn v Emperor*, 18 Cr L J 811-41 Ind. Cas 663-10 Bur L T. 259. Under this section, a witness cannot be contradicted by his previous statement if his attention has not been drawn to it as required by s 145 of the said Act *Mt Ann Begam v Mt Begam*, 9 P W R. 1914-127 P L R 1914-22 Ind Cas 831

Proviso (4) One of the relevant uses is that of the character of a rape-complainant for chastity. The non-consent of the complainant is here a material element; and the character of the woman as to chastity is of considerable probative value in judging of the likelihood of that consent. *Wigmore* § 62. In *R v Ryan*, 2 Cox Cr 115, *Platt B* said "It is important to consider whether a young person in such a state of incapacity was likely to consent to the embraces of this man, because if her habits, however irresponsible she might be, were loose and indecent, there might be a probability of consent being given and a } party" Gener woman be not cross examinat (*R v Clarke*) counsel for the defence cannot go further, and prove specific immoral acts with the prisoner, unless he has first given the prosecutrix an opportunity of denying or explaining them *R v Cockcroft*, 11 Cox 410, *R v Martin*, 6 C & P 562, *R v Robins*, 2 M & Rob 51. It further appears to be the law, that although the prosecutrix may be cross-examined as to particular acts of immorality with other men, she may decline to answer such questions, and if she answers th her *R v Cockcroft*, Taylor § 363. It character or trait for § 62. The reason in *People v Jackson* virtue, would ri from a that it Besides, if proof of particular instances should be admissible, reasons would be allowable, and thus there might be one or more collateral issues to I E. A.-181

occupy the time and divert the attention of the jury. Such would be the evils if the prosecution could require previous and timely notice of the particulars of the intended attack upon the conduct of the complainant but as no such notice can be enacted, there would be no means of meeting the evidence of the dissolute companions of the accused however mistaken or corrupt it might be.

the general ed in th is 439=9
 mined as to as to her
 having had connection with the prisoner previously to the alleged rape (R v Martin) 11 that she 3rd Ed 9 to such e she had the general reputation of giving about and committing immoral acts with a number of men. It is not enough to show that she ran away with a man once or twice or that she had on specific occasions done something immoral. Walsh v Lymmer, 36 C W N 356=A 1 R 1932 Cal 523

Explanation. In the examination in chief a witness cannot be asked the reasons for his belief that another witness is unworthy of credit. Such questions can only be asked in the cross examination. But it is very dangerous in for believing a witness to be led to state any unfavourable

Impeaching credit of one's own witnesses. A party is not obliged to receive as unimpeached truth every thing which a witness called by him may swear to. If his witness has been false or mistaken in his testimony he may prove the truth by others. Brown v Bellous 4 Pick 187, 191 (Am). Accord- ing to English law 'a party i discredit his own witness for tha if he spoke against him and

than to ask a jury to find truth upon the testimony of a witness notorious for not speaking the truth, all the while concealing from them the fact that he is or may be a false witness, and how can it be of importance to the main purpose of the trial how or by whom the fact that the witness is not to be relied upon is made known? If he betrays the party who calls him and falsifies in every statement which he makes the opposite party will of course accept the treason say nothing of impeachment and leave the jury no alternative but to find an unjust verdict upon evidence which both the parties know to be rank perjury. Certainly a rule which may produce such a result ought to be at once discarded unless it can be shown to be of some special use in the general purposes of legal controversy. That a Court of justice should permit such a miscarriage on the merits because it sees or fancies it sees a shadow of unfairness in one of the parties in a matter collateral to the suit and in no way touching the justice of the case is a reproach which ought to be done away with. No body can profit by the rule but the witness and the antagonist of the party who calls

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156. When a witness whom it is intended to corroborate gives evidence of any relevant fact, he may be questioned as to any other circumstances which he observed at or near to the time or place at which such relevant fact occurred, if the Court is of opinion that such circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact which he testifies

Illustration

A, an accomplice, gives an account of a robbery in which he took part. He described various incidents unconnected with the robbery which occurred on his way to and from the place where it was committed.

Independent evidence of these facts may be given in order to corroborate his evidence as to the robbery itself.

Scope of the section. This section provides for the admission of evidence given for the purpose, not of proving a relevant fact but of testing the witness's truthfulness. There is often no better way of doing this than by ascertaining the accuracy of his evidence as to surrounding circumstances, though there is no direct connection between the facts of the case as to

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Corroborate point calculated to produce the same results as facts already given in evidence. This distinction although or whether it is the same fact.

157. In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact may be proved.

English law
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although otherwise
date of the fact to be proved

7. But facts which are not more than the reverse are inadmissible by cross examination or otherwise in certain cases no verdict can be obtained without the production of such evidence. The corroborative facts and evidence must, however, be proved otherwise than by the testimony of the witness to be corroborated. Formerly the fact that a witness had made a previous statement similar to his testimony in Court could not be used to impeach his testimony. The rule has changed. It is now a direct examination to establish his credit, when impeached by proof of a previous contradictory statement (*Phipson v 140*). When the witness has merely testified on direct examination, without any impeachment, proof of consistent statements is unnecessary and valueless. The witness is not helped by it, for, even if it be an improbable or untrustworthy story, it is not made more probable or more trustworthy by a number of repetitions of it. Such evidence would be both irrelevant and cumbersome to the trial, and is rejected in all Courts. *Wigmore § 1124*

any statement made by a witness before he is sworn, or under oath, and in the absence of any other evidence, is not admissible for as

can scarcely be satisfactory to any mind to say that, if a witness testifies to a statement to day under oath, it strengthens the statement to prove that he said the same thing yesterday when not under oath. . . . The idea that the mere repetition of a story gives it any force or proves its truth is contrary to common observation and experience that a falsehood may be repeated as often as the truth. Indeed it has never been supposed by any writer or Judge that the repetition had any force as substantive evidence to prove the facts, but only to remove an imputation upon the witness. If he stood before the Court unimpeached, it was unnecessary and mischievous to encumber the Court and oppress the defendant with his garrulousness out of Court and when not on oath." *Wigmore § 1124*.

Whether this section violates the Hearsay Rule. "Though Hearsay may not be allowed as direct evidence, yet it may be in corroboration of a witness's testimony to show that he affirmed the same thing before on other occasions and that the witness is still consistent with himself." *Gilbert Evidence*, 68, 150. In this instance the utterance is used otherwise than as an assertion to be credited, and therefore the Hearsay rule is not applicable. *Wigmore § 1792*

Scope of the section. The section relates to the evidence corroborated by previous statements made by the witness only in connection with the facts about the condition of the witness, and the condition is, made to suit

the circumstances of the case. As independent evidence is not admissible, if they accompany the fact of a man having on

a previous occasion made the same a chance of its truthfulness; and Judges a corroborative evidence, *Cun v 157*. In *Namabhai Haridas J* said. "Section 157 that any former statements made by a witness at or about the time when the issue in issue took place, or before any witness borate his testimony; and according to *Mergia's* statements, made on different occasions, shortly after the murder suffices. It can scarcely be said advised by Judges to require the ev

From the position in which he stands it is considered unsafe to act upon his evidence alone Hence the rule requiring confirmation of it as to the prisoner's guilt by some independent reliable evidence But his statement, whether made at the trial or before the trial, and in whatever shape it comes before the Court is still only the statement of an accomplice, and does not at all improve in value by repetition The force of any corroboration by means of previous consistent statements must evidently depend upon it " " " " " " who is consistent deserves to be believed If true, what becomes of the virtue of previous persistently adhere to falsehood once uttered, there is a motive for it, and should the value of such a story ever come to be rated higher than that of now designing and unscrupulous persons to proceed by false accusations people at different times and

This section provides an exception to the general rule of excluding hearsay if it is cast in proximity to the statement.

Act 343 *Mathura v Emperor*, 10 Pat L T 117-8 Pat 625-A I R 1929 Pat
A statement by the father in the vaccination register made three years
after the birth of the child does not satisfy the terms of s 157 of the
Evidence Act and the same cannot be relied upon to prove the paternity of
the child. R-
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sole. It also
and asked my
me my one ninth share of our ancestral property, but they refused to give my
share. It was contended that the said shares were not admissible as
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Sections 157 to 167 of the Criminal Procedure Code, which entitle the Police Officer in charge of a Police Station to investigate the facts and circumstances of a case, and to arrest the accused, and to send him to the Magistrate for trial, are not in conflict with the provisions of the Evidence Act, which require the Magistrate to satisfy himself that the evidence is reliable, and that the accused is guilty, before he can convict him. The provisions of the Evidence Act are not in conflict with the provisions of the Criminal Procedure Code, which require the Magistrate to satisfy himself that the evidence is reliable, and that the accused is guilty, before he can convict him. The provisions of the Evidence Act are not in conflict with the provisions of the Criminal Procedure Code, which require the Magistrate to satisfy himself that the evidence is reliable, and that the accused is guilty, before he can convict him.

to contradict or corroborate him. *Ponnusami v Kalyan*, A I R 1930 Mad 770. Previous statements of witnesses are only ordinarily admissible to corroborate or contradict the witness who have made statements at the trial. As to corroborating a witness it is unnecessary for the prosecution to corroborate their witnesses by previous statements until the statement made at the trial has been in one way or another, challenged. *Abdul Jalil v Emperor*, A I R 1930 All 100. The same on statements which the

aconite was administered. *Held* that her statements were admissible in evidence. *Emperor v Amode Ali*, 58 C 1228=35 C W N 573=A I R 1931 Cal 757.

Absence of substantive evidence. In the absence of substantive evidence first information report and other reports by witness cannot be used as corroborative evidence consequently, where a prosecution witness has gone back on the original complaint made to the police the previous statement cannot be used as corroborative evidence. *Emperor v Nga Hlaing*, 4 R 481=A I R 1978 Rang 295. Earlier statements cannot be let in under section 157 of the Indian Evidence Act if there is present evidence in the trial which may be corroborative. *Emperor v Udlin v Laintant's substantive evidence*. *Girimalla v* ..

Time for giving corroborative evidence. Before corroborative evidence is admissible, the evidence sought to be corroborated must have been given. *Nistarine v Rai Nundo*, 5 C W N XVI. It is doubtful whether s 136 gives the Court power to admit evidence given by a witness to be given under s 5 L B T. Evidence given under s 136 is not admissible under s 136 and only he is ex

ments of the corroborating witness given by s 136 of the Evidence Act. =5 Cr L J 411.

Test identification. Any Magistrate is competent to hold a test identification and can prove the statements made before him under s 157 of the Evidence Act even though he is not empowered to deal with the matter under enquiry. Also s 164 Criminal Procedure Code, covers the case where a records a statement made to 109 Ind Cns 225=29 Cr L J. Fiction in the jail cannot be in the trial. Such identification made by certain persons whom they recognize as having been concerned in a particular crime. The statements

proceedings, then case but When obviously it is not a witness held by the police in the course of the investigation may be proved by oral evidence though the written record of the statement is not admissible. *Emperor v Wahnuddin*, A I R 1930 Bom 158=32 Bom L R 327.

against the accused prosecution case 17, *Chogalkar v* 179 Section first information

received to be recorded and not a statement made by a witness during investigation after the Sub-Inspector has actually arrived on the scene and himself seen what has happened. Technically speaking, it may be conceded that a first information report taken down by a police officer amounts to an entry in an official record, but it is not a statement made by a witness during investigation.

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632-58 M I
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information report although a document of
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to identify the author of it

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Statement - 162

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lure *Baladeo v Emperor*,
-22 Cr L J 433 State-
ment used to corroborate them
v Emperor, 4 Pat L W.
312

Whether this section is affected by s 162 Section 157 of the Evidence
Act is affected by s 162 of the Criminal Procedure Code so far as statements to
the Police taken under s 161 whether oral or recorded are concerned *Emperor*
v Ngu Tha Din, 4 Rang 72-96 Ind Cas 145-27 Cr L J 881-5 Bur L J
90-A 1 R 1926 Rang 116 (F B) The main object of the legislature in
enacting this section was to prohibit the use of the statements of prosecution
witnesses as evidence. *Emperor v. Jagan Dhanu*, 5
I R 1926 Pat
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Gun Pillai, 2
L J 351, *Rus*
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7. gating Police officer; that section, so far as oral statements of the witnesses conflict with s 157, Evidence Act, and those oral statements by calling him as a witness in order
Bhulai v K E, 13 C W N 197
n v King Emperor, 7 A L J 468
so Emperor v Hanmasuddi, 16 Bom
Hyblai 22 B 596, *Bhulai v King*
Imperor, 13 C L J 117

Deposit
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The effect of section 258 of a witness before the deposition in the s 157 of the Evidence Act and statements made by the witness before an investigating officer are admissible for the purpose of corroborating such 'testimony'. It is in the discretion of the Sessions Judge to believe and act upon the statements before the committing Magistrate in preference to contradictory statements made before himself on the ground that the former are corroborated by statements made before the investigating officer. *Velliah Kane, In re*, 45 M 766=13 M 1009=16 L W 239=31 M L T 175 (H C)

Where
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 Indian Evidence Act which prohibits such a course. *Nasar Chandra*, 44 C L J 582=99 Ind C 907=A I R 1927 Cal 230. The
 in a civil suit permitted an officer in charge of the Record of Right
 and to produce the statements
 notwithstanding
 statements, as
 they were exa
 sion of s 157
 209. A petition
 put in by a client for adjournment on the ground that the pleader could not
 appear on account of *hartal* is admissible in evidence in proceedings under the
 Legal Practitioner's Act, under s 157 of the Evidence Act in corroboration of
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Ali Hakim v
 put in by a client for adjournment on the ground that the pleader could not
 appear on account of *hartal* is admissible in evidence in proceedings under the
 Legal Practitioner's Act, under s 157 of the Evidence Act in corroboration of
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made the entries at the request of
 admissible in evidence under s 157 or s 159 of the Evidence Act or possibly
 under both sections. *Lama Koer v Gobordhan*, 1919 Pat 352=2 Pat L J 42
Roller v Abhay Ram, 12 A L J 945=24 Ind Cas 640

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Emperor v

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 surveyor, who maintains the register. But if such officer
 and gives evidence of the terms of the report from his own memory, then such

Pytpang is admissible in order to corroborate his testimony under s. 157. *Shwe S. Pan v Maung Po* 3 L R R 250

A statement made by a witness to a chief constable can only be used under s 157 if the witness is a police officer or a constable of the first witness at the trial. Such a statement can only be used if it is a statement which has no legal basis for a conviction. () 503

Previous statements might be used to corroborate or contradict statements made at the trial; not to corroborate statements made prior to trial. *Emperor, v Allar Badu*, 12 Bom L R 663-7 Ind Cas 933-11 Cr L J 512-34 B 509

A police inspector is an officer "legally competent to investigate the fact" him by the
 it v Emperor

... and the witness wrote another letter to which he got a reply containing a statement of what that person had said to such person, held that the reply was the evidence of the witness. Held if he was alive, may be admissible. Fact that a statement was made by a third person to the witness is admissible, but evidence of the terms of the statement.

trial is admissible under
N 1896, 257

A statement to contradict a

But when the witness had previously (at the agreement and partly in direct material na, 2 Weir 821

Under the general provision of law, any body who has seen a place may
be dep to inquiry may give his
to idence Act in order
da. 12 Cr L J 480

12th Ind Cas 83

It is doubtful whether a statement as to an event, made three days after its occurrence, is admissible under s 157 of the Evidence Act, to corroborate the witness.

witnesses during a police investigation
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2. Ambika Charan This section
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91. A letter written by the defendant on 11th March 1957, in which he stated that he had received a sum of money from the plaintiff, was produced in evidence. The letter was written on the letterhead of the defendant's firm, and was signed by him. The letter was dated 11th March 1957, and was addressed to the plaintiff. The letter stated that the defendant had received a sum of money from the plaintiff, and that he was enclosing a receipt for the same. The letter was produced in evidence to show that the defendant had received the money from the plaintiff, and that he was enclosing a receipt for the same.

Dom L R 818-28 L W 270-A I H 1928 P C 51-54 M L J 176 (P C)
Oral statements by witnesses in Police investigation which do not corroborate
their evidence at the trial are inadmissible *People v Sullivan & Imperor, 35 M*

A I R 1925 M 579-48 M L J 195 A statement made to a Police officer,
that the partial statement was made
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borness of his evidence. It must be

corroborate as regards every material particular and the identity of the accused must be proved by reliable independent testimony. *Peg v Malapa* 11 B L C A C 196. Although the mere repetition of a statement without contradiction of material discrepancy is under section 157 Evidence Act some corroboration of the truthfulness of that statement that section does not justify the use against accused persons of a previous statement by an approver relevant to contradict his retraction. *Pallua v Emperor*, 3 P R 1904 Cr. Where an entry in the vaccination register which includes a statement by a woman that a person bearing the name of the alleged father of her illegitimate child was the father of the illegitimate child is made three years after its birth the entry does not satisfy the terms of s 157 and is not admissible in evidence. *A. Nagappa v Kullammah*, A I R 1930 Mad 194-1929 M W N 696.

158 Whenever any statement relevant under section

What matters may be proved in connection with proved statement relevant under section 32 or 33

32 or 33, is proved, all matters may be proved either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved

if that person had been called as a witness and had denied upon cross-examination the truth of the matters suggested

Scope of the section. The statements admissible under sections 32 and 33 are exceptional cases and the evidence is only admitted from the improbability or great inconvenience of producing the authors of the statements. It is only just therefore that all the same safeguards for veracity should be provided as if the authors of the statements were themselves before the Court, and subjected to oath and cross examination.

A person whose statement has been admitted in evidence in one category is a witness actually by his statement by a previous statement which has been admitted in evidence in another category. *Imperial A I R 1926 L N* witness is entitled to credit or before it and not on what was said because there are no of the witness in *Bishiswar 5 Pat*

used as evidence under the provisions of ss 32 and 33 then any other statement made in another case to the credibility of the witness is not *Chandres car* previously made is used in Court and was cross-examined being asked had denied the *Imperial A I R 1930 L N 403*

159 A witness may, while under examination, refresh

his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory

The witness may also refer to any such writing made by any other person and read by the witness within the time allowed if when he read it he believed it to be correct

Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the Court refer to a copy of such document.

When a witness may refresh his memory by reference to a copy of document of the Court refer to a copy of such document.

Provided the Court be satisfied that there is sufficient reason S.
for the non-production of the original

An expert may refresh his memory by reference to professional treatises.

Principles When a witness's statement is offered as the basis of an evidential inference to the truth of his statement it is plain that at least three distinct elements are present, or put in another way there are three pre-conditions, in the absence of any one of which we cannot conceive of testimony. First, the witness must know something; to this element may be given the generic term *Observation*. Secondly, the witness must have a recollection of the impression he may be termed *Recollection*. Thirdly, to the tribunal, that is, the court must be shown the element of *Communication* or *(Narration)*.

It is in turn represented in many approachable by others. The general canon applicable to Recollection is simple, the Recollection should (as far as can be expected) correspond to and represent the impressions originally gained by observation or knowledge. Various situations are conceivable, in which this essential quality of Recollection may be lacking and various detailed requirements with reference to curing or avoiding these possible deficiencies are also conceivable. *Higmore* § 725. The cardinal principle of Narration is this, that it must correspond to the Recollection, the story told by the witness, whether orally or in writing, must represent his knowledge and recollection. *Higmore* § 734.

It is to-day generally understood that there are two sorts of recollection which are properly available for a witness,—past recollection and present recollection. In the latter and usual sort, the witness has either a sufficiently clear recollection, or can summon it and make it distinct and actual if he can stimulate and refresh it, and the chief question is as to the propriety of certain means of stimulating it,—in particular, of using written or printed notes, memoranda, or other things as representing it. In the former sort, the witness is totally lacking in present recollection, so that he cannot use it as sufficiently

This use of a past recollection depends of course on certain conditions, and it is through the stimulation of the memory that it is brought to the other that Section 159 deals

Recollection. The reason of the rule has been said to be that a witness should not suffer from a mistake, and may explain an inconsistency. *Per Moulton J* in *Smith J in Holiday v Holgate*, 17 L. J. 18

Present Recollection whether there should be any fixed rules of limitation. Here the witness is present, but he is unable to give it is under the circumstances improper to determine by fixed rules what things he may have not a potency to stimulate recollection. It can only act on the circumstances of each case, and the desired and only way for a witness of stimulating his truth he may refer to the paper may in fact, 2 Law Cr C 10, not be that the paper was not written by the witness himself is no objection. *Lee, supra; Laues v Reed, supra, Smith v Morgan* 2 M & R 17, R v Watson, 3 C & K 111, R v Williams, 6 Cox Cr 313, and it is therefore incorrect (confusing this with the Past recollection) to require that the paper be one written by the witness or under his direction or known to him to be

9. correct Nevertheless, papers prepared by others may under the circumstances of the case, be so suspicious or questionable as to make their use improper (*Noel's Motion*, 3 T R 752, *Alcock v Ins Co*, 13 Q B D 292, 305 *Lager v Wagstaff*, 11 B & W 463) (3) Further more it is not an objection that the paper is a copy, and not an original, provided it does in fact serve to revive the recollection *Turner v Taylor*, 3 T R 754, *Doe v Perkins* 3 T R 749 *Anon*, 1 Lew Cr 101, *R v Williams*, 6 Cox Cr 343 (4) Again, it is equally immaterial that the paper was not made at or about the time of the event for it is not used as a record of past memory, and its power to stimulate and revive the memory by the allusions which it contains must be precisely the same whether it was made at the time or not This is the necessary result of the principle involved and is maintained by a number of Courts (*Bank v Torn*, 14 S C 444, *Tolson v Logg Drilling Co*, 41 Wis 602), but many, misled by the limitation applicable to a record of past recollection require that the paper should be one contemporaneous with the event (*Stenkeller v Newton*, 1 C & 313 *Whitfield v Aland*, 2 C & K 1015) (5) Upon the erroneous view just referred to, it has recently been declared that, on being surprised by the testimony of one's own witness one may not refer to former testimony or a deposition by the same witness and endeavour to stimulate the memory to a correction, basing this result chiefly on the supposed principle that the reference for refreshing must always be to a contemporary writing That this supposed principle as applied to refreshing by deposition or former testimony is wholly unsound may be understood by noting the numerous decisions which have allowed (*R v Watson* 3 C & K *Smith v Morgan*, 2 Moo & R R 257), principle, there is no reason why refreshment by the counsel's oral reference to or reading from the deposition etc., as by the witness's own perusal of it and the precedents abundantly sustain this practice (*R v Edwards* 8 C & P 26 (31), *R v Burnett* 4 Cox Cr 269 *R v Ford*, 5 Cox Cr 184; *R v Williams* 8 Cox Cr 313, *R v Quan* 2 F & F 818) (6) As a matter of fairness and to prevent imposition the paper must be produced in Court, on demand, for inspection and cross examination by the opponent (*Hardy's Trial* 24 How St Tr 874, *R v Ramsden*, 2 C & P 603 *Lord v Colum* 2 Drewr 205) (7) But since in *Lord Ellenborough's* words 'it is not the memorandum that is the evidence, but the recollection of the witness,' (*Henry v Lee* 2 Chitty 124), the party whose witness uses it has no right to have it read to or handed to the jury (*Gregory Tatner*, 6 C & P 281), it is only the opponent who may do this in case he wishes to cast doubt on the reality of the refreshment of memory" *Greenl Ev* § 439 (c)

Scope of the section It is a well settled and undisputed principle of the law of evidence, that a witness, under certain legal restrictions, may refer to written or printed memoranda documents, papers or letters for the purpose of refreshing his recollection and memory with regard to any matter in dispute.

The rule requires that a witness should refresh his memory within his own knowledge and recollection, and that the rule is not violated by permitting him to refresh his memory in the manner above described.

It is not the memorandum that is the evidence, but the recollection of the witness. On the one hand, if you allow him time to consult notes, you partly lose the advantage of that lively and quick examination of the evidence.

of Judicial assistance is testimony, it is universal.

sally agreed equal, and that or writings in few witnesses and sums, as papers and writings which they knew to be correct at the time they were made. *Burr Jones* § 874 Mr Justice Strong in the United States Supreme Court said "How far papers, not evidence per se, but proved to have been true

statements of facts at the time they were made, are admissible in connection with the testimony of a witness who made them has been a frequent subject of inquiry, and it has many times been decided that they are to be received. And why they should not be? Quantities and values are retained in the memory with great difficulty. If at the time when an entry of aggregate quantity or value was made, and the witness knew it was correct, it is hard to see why it is not at least as reliable as in the memory of the witness. *Insurance Co v Wicks*, 14 Wall (S U S) 375. A witness, who has the means in his power can lawfully be required to look at such papers, to enable him to ascertain a fact with more precision to verify a date or to give more exact testimony than he otherwise could as to times, numbers quantities and the like. *Burr Jones* s 874. "Although in general" says *Mr Starkie* "leading questions are not to be put to a witness yet where his memory has failed, he may, even during examination, read or if necessary, hear the contents of a document read for the purpose of reviving his former recollection. And if by that means he obtains a recollection of the facts themselves as distinct from the memorandum, his statement is admissible in evidence. A witness is, of course, competent to testify as to his actual present recollection of a fact, although in the interval his memory may have failed, and although such defect, and the means of restoration, may be the subject of comment in cases to which any suspicion is attached." *Starkie on Evidence* p 209. "Generally speaking an instrument used for the purpose of refreshing memory, ought to be in the handwriting of the person using it, and as nearly as possible contemporaneous with the fact which it records, at the same time, neither of these conditions is absolutely indispensable. A witness may refresh his memory from a document made, he has seen correct -"

made up by him by it if he could swear that he examined it shortly after the time of the entry and that it was correct and that by looking at the entry he remembered that the circumstance it narrated had taken place are kept by time after memorandum that the weight to be attached. A man may state at which he was a report of the proceeding memory, and he has C 189. A Judge will attach much more weight to the evidence made by his own hand than to that of a memorandum made by a third party some time after it was made requires the production of the best evidence, the memorandum itself must be produced not a copy of it, unless, indeed, the Court is satisfied that the non production of the original has been sufficiently accounted for. It frequently happens that a witness makes an extract from his books, which would be themselves good sources for refreshing his memory, while the extract as a mere copy of such books is not receivable. *Starkie on Evidence* cited in *Nort* L v 338 339. A witness who being asked in reference to any particular transaction, if he had made any entry in a register or book at or about the time when an occurrence took place such as the posting of a letter of which an entry was made might refer to such entry or memorandum to refresh his memory, but beyond that he cannot go. *Queen Emrys v Sayad* *Suff* d l 20 s 11 Cr C 344

by his look 107-4 Cr L J 247. A most regularly kept book of facts contemporaneously made may be used for contradicting or corroborating a witness or refreshing his memory and the like under s 141 157 and 159 of the Act, but such user does not make the document itself evidence of his memory consequence of it to have a -10 C W N ining records

9 *Mulundaram v Dnyanam*, 10 N L R 11-23 Ind Cas 893, see also *Nuna Korr v Gobordhan* 3 P L J 42=37 Ind Cas 421 A certificate of age of a private patient is not relevant as a public record under s 35 of the Evidence Act but could only be used for the purpose of refreshing the memory when he is examined as a witness. *as regards* 72 Ind Cas 112 A reference can be made to the date of 985 1923 C1 over to him

for the purpose of exciting his recollections *Jaylor* § 1410 If the witness cannot read and write, the proper practice is, not to read the memorandum to him in the presence of the jury, but to allow him to retire with counsel on each side and to have the memorandum read in his presence without comment. *Commonwealth v Fox* 7 Gray (Mass) 595, *Burr Jones* § 880

The dying statement of a deceased person must be taken in the presence of the accused, if not so taken, the writing cannot be admitted to prove the statement made. The statement may be proved in the ordinary way by a person who heard it and the writing may be used for the purpose of refreshing the witness's memory. *Empress v Samiuddin*, 8 C 211 A medical expert can refer to his report to refresh his memory. *Rogham v Empress*, 9 C 355 (461) = 11 C L R 569, see also 2 W R Cr Let 14, 6 W R Cr Let 3, R v *Jadab Das*, 4 C W N 129 When a dead body is sent to the Civil Surgeon in order to the making of a *post mortem* examination, a printed form is sent therewith which the Civil Surgeon fills up on examining the body. This report is not itself legal evidence. Surgeon, who refreshes his memory.

Field Ev 7th Ed 531-532 the head constable cannot section 162 (1) of the Criminal Procedure Act be used by the Sub Inspector as a witness to what was said by the accused. A statement by a witness can be used in evidence to refresh his memory. *Keyarsook v Gorbad*, A I R 1930 Nag 441 see also *Mukundram v Dayaram*, 10 N L R 41=23 Ind Cas 893

Scope of sections 159 and 160 distinguished. If it is merely a question of a man refreshing his memory the document itself is not tendered in evidence and the witness merely gives evidence in the ordinary way after reading what has been written. To such a case s 159 applies. But where the witness says in so many words that he does not recollect the facts recorded by him in the statement but it is said that they were correctly recorded, then section 160 applies and the document itself may be tendered in evidence. In either case the fact

may also be used by law to refresh the memory of a witness where such statement. 348=1931 *Jan Nath v*

Any writing. This section entitles a witness to refresh his memory by any writing. So he is permitted to refresh and assist his memory by the use of a written instrument, memorandum or entry in a book. So a ledger, a log book, a workman's time book, previous deposition, letter, bill of articles furnished etc can be seen by a witness to refresh his memory. *Taylor* Ev § 1406-1410 The principal or out-foil of the revenue register of mutkhar may also be used for refreshing the memory of a witness. *Shue Pan v Mui* 3 L B R 250, see also *MaDun v Lee O*, 5 L B R 40=2 Ind Cas 531 For purposes of section 159, Indian Evidence Act, 1872, it is not requisite that the writing used to refresh the memory of a witness should have been admitted in evidence. Accordingly a document not produced in Court within the proper time and in consequence rejected as evidence under the provisions of Order XIII r 2, C P C may nevertheless be referred to by the party producing it or his witness to refresh his memory of the document and is otherwise within the purview of s 159 of the Evidence Act. The weight of evidence, the objection to the document upon the ground that it is not having been produced at the proper time renders its authenticity the subject of suspicion and all other grounds upon

which a document can be successfully impeached still remain open, but refusal to permit a man to refresh his memory by proper relevant contemporaneous document might lead to a grave injustice. *Juan Lal v Nilmont*, 55 I. A 107 = 7 Pat 305 = 30 Bom. L. R 305 = 107 Ind C 13 337 = 17 C. L. J 302 = 32 C. W. N 565 = A I R 1928 P C 80 = 26 A. L. J 121 The word "writing" used in this section also includes printed matter. *Ram Chandra v Emperor*, A I R 1930 Lah. 371

Made by himself The writing may have been made either by the witness himself, or by others, provided in the latter case, that it was read by him when the facts were fresh in his memory, and he knew the statement to be correct. *Phip P v 451* The witness must be able now to assert that the record accurately represents his knowledge and recollection at the time. The usual phrase requires the witness to affirm this. *Wigmore § 747* A witness may refresh his memory by looking at his papers when it was prepared. *Laya*, 10 C 248, *Aeraman v Bejoy*, 7 C 407, 403

At the time of the transaction The document must have been written either at the time of the transaction or afterwards that these facts were fresh in the witness's mind. *2 Camp 112, Whitefield v C L R 213* But so far as is concerned the fact that the paper was not drawn up about the time of the events should not be a fault. The recollection may be equally refreshed by a recent note or by some contemporaneous record. It might, in fact, be argued that there was less danger of reliance upon the record itself and more probability of actual refreshment where the paper was one confessedly having no value as a contemporaneous record of past recollection. There is adequate authority for the result thus required by principle. Yet the greater number of decisions, and most of the *obiter dicta*, announce as a requirement that the memorandum used must have been made contemporaneously or nearly so with the events, 'at or near the time' with the same varying phrases used in the rule for Past Recollection. *Wigmore § 761* The framers of the Indian Evidence Act, in this respect also, following the English rule did not make any discrimination between Present Recollection (s 159) and Past Recollection. So now the rule is that a witness may make use of notes taken at the time the fact happened. *Kinlock's Case*, 25 How St 1r 937. Where the witness goes back to a past recollection which can less easily be tested by cross examination, he may properly be asked for something more positive, — something of a quality satisfactory in itself and not merely the best available. This quality the law has attempted to define, and even to test by an arbitrary rule. There is found first, a general principle that the recollection, when recorded, should have been fairly fresh, — each instance being dealt with on its own circumstances, and, secondly, there is, more commonly, an arbitrary list defining the recollection as are recorded at or near the time of the events. *Wigmore § 745* In England it is not essential that it is enough if it has been read at the time when the facts were fresh in the witness's mind.

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Writings made by any other person But this testimonial guarantee of immaterial whether the witness or printed the record It may it from the moment when the

witness saw it and passed judgment upon its correctness, it became for him a correct record As the mere fact of his writing it would count for nothing in itself so the mere fact of his not having been the writer is immaterial *Wigmore* § 748 If the witness saw the writing soon after it was made, and the entry corresponded with what he had himself then observed, that was tantamount to an entry made by himself *Digby v Steelman* 1 Esp 328, see also *Jacob v Lindsay* 460, 1 East *Burton v Plumer*, 2 A & E 341, *Foyman v McGear* 1 C & K 390, *R v Philpots* 5 Cox Cr 329, *Anderson v Wallis*, 3 C & K 54, *R v Langton*, L R 2 Q B D 296 In *Burrough v Martin* 2 Camp 112 Lord Ellenborough said 'If a witness looked at the log book from time to time, while the occurrences mentioned were recent, and fresh in his memory, it is as good as if he had written the whole with his hand' Similarly in *Lord Talbot v Cusack*, 17 Ir C L R 213 O'Brien J said '(The use of memoranda made by the witness himself) has been extended to the case of entries which, though not in the witness's hand writing, were either made in his presence and read by him at the time of the transaction, or were read and examined by him shortly afterwards when the facts were fresh in his recollection and when he was enabled to ascertain that the facts stated in the entry were true' *Wigmore* § 748 When a witness wants to refresh his memory under this section, he is to do so by referring in Court to the document which he had read at or near the time of the transaction and it is the fact that he had known it to be correct when he read it that is the justification for his doing so It is quite immaterial that a document to which the witness refers in Court was not printed by the witness himself or in his presence It is essential only that he should have read it at or soon after the transaction to which it relates *Ram Chandra v Emperor*, A I R 1930 Lah 371

not be admissible in evidence
Fomlin 5 A & E 856) or
or an unstamped document
refer to, and user for this
Jek v Roy, 13 Q B D 297

Copies of documents Whether the witness can refresh his memory by referring to a mere copy of his original memorandum is a question of some difficulty and doubt in England *Taylor* § 1403 That the paper is a copy, not an original, is no essential fault The only question is whether in fact it is genuine copy or not
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Horne v
Taylor, 3 L R 751,
Prins 20 How St
ep 63, *Anon* 1 Lew
mer, 2 A & E 311,
re is no necessity of
accounting for the original in any way in the case of Present Recollection
Wigmore § 760 But as neither the English law nor the Indian Evidence Act makes any distinction between Present Recollection (s 159) and Past Recollection, use cannot be made of copies of a document unless the Court be satisfied that there is sufficient reason for the non production of the original Mr Starkie lays down the rule as follows In accordance with the rule which requires the production of the best evidence the memorandum itself must be produced

admitted under section 160 as a record of Past Recollection a great stringency should be observed in allowing the witness to use it 'It remains to make sure' says Prof Wigmore, 'that the record which the witness now puts forward as a record of his prior knowledge is in fact the genuine embodiment of his past recollection While the witness's guarantee of its correctness may be

on of his guaranteed paper, but also as insuring the on his veracity, as affording a means of testing him, and as the best proof of what was really recorded. In short, the original record itself must be used in testifying, if it is procurable. This rule is almost universally recognized, and of course, if the original is lost or otherwise unavailable, a copy may then be used. *Tanner v Taylor*, 3 T R 751; *Doc v Parling*, 3 T R 751, *Jones v Stroud*, 2 C & P 196; *R v Harvey* 11 Cox 516, *R v St Martins* 2 A & E 210, *Horne v Maclean*, 6 Cl & F 628, *Popham v Mc Gregor*, 1 C & K 320, *Lord Talbot v Cusack*, 17 Ir C L R 213. It is true that the use of a copy lacks certain advantage, but this defect is no greater than in the ordinary instance of a contract or a deed which cannot be produced, nor is the importance of using the original here any greater." *Higmore* § 719. This rule was allowed to be proved by a clerk who refreshed his memory from a ledger, copied under his supervision from a waste book kept by himself. *Burton v Plummer*, 2 A & E 311. A surveyor has been allowed to refer to a printed copy of a written report made by him to his employers which latter was substantially but not literally transcribed from rough notes taken by him at the time. *Horne v Mackenzie* 6 C & F 528, *contra*, *Murray v Mason*, 18 Ir 1 L R 8, *Phipps* 15. The question whether secondary evidence was in any given case rightly admitted in one which is proper to be decided by the Judge of the first instance and is treated as depending very much on his discretion. His conclusion should not be overruled except, in a very clear case of miscarriage. *Angawa v Ramappa*, 5 Bom L R 703-28 B 91. Where the plaints in suits upon bonds by the same plaintiff having been destroyed by fire, while under the Court's custody, were re-instituted upon duplicate copies containing particulars of the lost bonds, might not be secondary evidence of the content of the bonds, was a document that might be used for refreshing a witness's memory under s 159 of the Evidence Act. *Faruch Nath v Jeamat Nayya* 5 C 853. A copy of the statement of injuries recorded in the register of medico-legal cases may be used by the medical witness for the purpose of refreshing his memory but it cannot be treated as evidence. *Mahomed v Emperor*, A I R 1926 Lib 51.

Expert. In all cases where skilled witnesses are called to pronounce their opinions on some scientific question they may refresh their memory by referring to professional treatises, tables, calculations lists of prices and the like. For instance, an actuary might refer to the "Carlisle table" when called upon to refresh his memory. *So, a* *reason* *recall* *he should not be asked, after such a reference whether his memory is* *not thereby confirmed* *Taylor* § 143. Ss 159 to 161 permit a limited use being made his memory. *Emperor*,

Statement reduced to writing by police officer. A statement reduced to writing by a police officer under s 162 Criminal Procedure Code cannot have the effect of a deposition, but though it is not evidence the police officer to whom it was made, may use it to refresh his memory under s 159 of the Evidence Act, and may be cross-examined upon it by the counsel against whose case the testimony aided by it has been given. *Queen Empress v Satiram* 11 B 657, *see also* *Reg v Uttamchand* 11 B H C R 120, *Crown v Bullock* 4 S L R 38 Cr-7 Ind Cas 38-11 Cr L J 493 *R v Imrah*, 11 B 659, *Rophum v R* 9 C 155. Documents wherein statements of persons examined by police officer are reduced to writing and are then used under s 119 of the Criminal Procedure Code giving being.

9 C 455=11 C L R 569, *R v Stuart*, 31 C 1050 A witness is not entitled to insist upon a police officer refreshing his memory, during his examination in Court, by referring to certain notes prepared by such officer under s 119 of the Code In the matter of the petition of *Kali Churn Churnari*, 8 C 151=10 C L R 51

Confession A Magistrate who took down a confession, may while being examined as a witness, be allowed under s 159 or s 160 Evidence Act to refresh his memory by referring to his record of that confession *Emperor v Chaitu Gahera* 16 C P L R 122

Special diaries A criminal Court may permit the Police officer, who made the special diary, to look at it for the purpose of contradicting such police officer Where the Police officer does look at an entry in the diary for the purpose of contradicting such diary and to refresh his memory, it cannot be used to enable any witness other than the Police officer who made it to refresh his memory by looking at it, and it cannot be used to contradict any witness other than such Police officer It is the Court which is entitled to use the special diaries for the purpose of seeking for sources and times of enquiry, and for the names of persons who may be in a position to give material evidence Neither the accused nor his agent is entitled to see the special diary for any purpose unless it has been used by the Police officer who made it to refresh his memory for the purpose of contradicting any witness other than himself or any accused person or his agent part of it His right is limited to that of inspection in certain cases *Queen Empress v Mannu*, 19 A 590 (F B)=A W N 1897, 14

Arbitration proceeding A witness who was present at an arbitration, and had compared the draft and fair copy minutes made by the clerk and had found the latter to be correct, was allowed to refresh his memory as to what occurred at the arbitration, by reference to the fair copy minutes made by arbitrator's clerk *Nistarnnee Dasee v Nundo Lal Bose*, 5 C W N xvi

Police diary If, upon the question being asked of a witness there is a lapse of memory on his part and that failure of memory can be remedied by reference to any memorandum or other document made by the witness at the time, and the Court invites the witness to refer to the writing the witness is under an obligation to do so His duty to lay the whole truth before the Court *Harkiss v Emperor*, 19 A L J 76

160 A witness may also testify to facts mentioned in

Testimony to facts any such document as is mentioned in section 159, although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document mentioned in section 159

Illustration

A book keeper may testify to facts recorded by him in books regularly kept in the course of business, if he knows that the books were correctly kept although he has forgotten the particular transactions entered

record in
Jacob v
L R 2

that the witness may be able to do either by virtue of his general custom in making such records, or (as in the common case of an attesting witness) by his assurance

that he would not have made Pearson
 v Wrightman, 1 Mills Co 15; R v.
 St Marten 2 A & I 213 a copy
 (Doe v Parltins, 3 T R Popnam v
 Mc Gregor, 1 C & K 320, Lord Fulbot v Cusack, 17 Ir C L R 213); neverthe-
 less, a copy may be used if the original is lost or otherwise unavailable. Since
 the process of making a copy of it is a distinct thing from the process of making

same, except that the salesman, workman, etc, instead of handing to the book-
 keeper, clerk, etc, a written statement of the transaction, makes an oral statement
 which is transcribed, and in effect represents the first person's recollection as
 orally reported by him. The joint testimony of the two ought to be receivable
 on principle; and such is the result generally reached by the Courts, though
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 20 W R 720, though in Belts v Belts, 33 F. L R 200, Low J allowed a
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 d to by witness does not make
 (Gregory v Tavernor, 6 C &
 41) though it is otherwise with

cross examination upon independent parts Gregory v Tavernor, 6 C & P 280,
 Phip Ed 450. In a suit for damages for negligence in supervising a building,
 an Engineer's Report is admis
 Engineer makes the contents of
 refresh his memory Nagendran
 Cas 200-A I R. 1926 Cal 988.

Difference between section 159 and section 160 Under section 159 of the
 Indian Evidence Act, it is not necessary that the witness must be sure, that
 what was reduced to writing by him is a correct record. It is enough if, on
 reading it, the true facts are recalled to his memory. But if he does not actually
 recollect himself what the appellant said, if the words are not called to his
 memory, then the notes may be admitted under s 160 of the Evidence Act, if
 he is sure that the facts are co of those words
 not been correctly recorded, but of the Evidence
 are recorded, then the notes J 456=32 M
 Act. In re Mylapore Krishnaswami, 60 M L J 401-A I R
 331=2 Ind Cas 33, see also Krishnappa v Emperor, 60 M L J 172
 1931 Mad 430, Jagannath v Emperor, 32 Cr L J 172

161. Any writing referred to under the provisions of the
 Right of adverse party two last preceding sections must be produced
 as to writing used to and shown to the adverse party if he requires
 refresh memory it. such party may, if he pleases, cross-
 examine the witness thereupon.

examine the witness thereupon. the use of the
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a copy is permitted, there is still a need in fairness or fairness for the opponent, to see the document, in order to prepare, to test the witness upon its contents. Thus it is a necessary implication that the document used, whether an original or a copy, when produced in Court, shall be shown to the opponent on his request to inspect and to use in cross examination. In *R v St Martins*, 2 A & E 210, *Patteson J.* said "If he could not recollect the facts independently of the writing, the original writing ought to have been in Court in order that the other party might cross examine, not that such writing is to be made evidence itself, but that the other party is to have the benefit of the witness refreshing his memory in every part." "If the witness cannot be compelled to produce it, he might use documents made for him by the party calling him of the accuracy of which he knows nothing." The right of a party to protection against the introduction against him of false, forged, or manufactured evidence which he is not permitted to inspect, must not be invaded in his breadth. *Mullin J. Gibbels v Sterbery*, 66 Brib 201.

Scope of the section. In all cases where documents are used for the purpose of refreshing the memory of a witness, it is usual and reasonable—and if the witness has no independent recollection of the fact, it is necessary,—that they should be produced at the trial and that the opposite counsel should have an opportunity of inspecting them, in order that in cross or re examination he may have the benefit of the witness's refreshing his memory by every part. Neither is the adverse party, bound to put the document in, as part of his evidence, merely because he has looked at it, or examined the witness respecting such entries as have been previously referred to, but if he goes further than this, and asks questions as to other thereby makes it his own evidence the opposite party is permitted to

his oral testimony with the
ok at the writing to see what
of improper document, but it
is doubtful whether he is entitled, except for this particular purpose, to question
the witness as to or
the same writing
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Evidence Act and should be placed on the record. *Ans Dun v Lee* O, 5 L B
R 40-2 Ind Cas 535

The question sometimes arises whether memoranda, used to refresh the memory, are under discussion. Of course, the memoranda used with such writings as discussed, are competent as evidence, when the witness, after examining the memorandum finds his memory so refreshed that he can testify from recollection, independently of the memorandum, there is no reason or necessity for the introduction of the paper or writing itself, and it is not admissible. In such case the jury have no knowledge of the contents of the paper, unless opposing counsel calls for such contents for cross examination. Of course, the cross-examiner has the right to inspect and use the document in order that he may test the candour and credibility of the witness.

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dum, cannot testify to an existing knowledge of the fact, independently of the memorandum, but can testify that, at or about the time the writing was made, he knew of its contents and of its truth or accuracy. In such cases, both the testimony of the witness and the contents of the memorandum are held admissible. "The two are the equivalent of a present positive statement of the witness, affirming the truth of the contents of the memorandum." *Hancock v. Kelly*, 81 Al. 386. There are many every-day transactions in commercial

ment, and when their original entries and memoranda have been duly authenticated, and there is danger in allowing them to be
2 Hill (N. Y.) 531. But

er recollects
the facts
parry, and is
Burr Jones

No oral statements of witnesses should be recorded in the "special" diary kept by a police officer under s 172 of the Criminal Procedure Code. Whether incorporated or -
by the police
produced, but
accused may at the t
to refer to them, and th
furnish him with cop
credit of the witness

being allowable only with regard to the
kept under section 172 Criminal Proce

his memories. *Dadan Gazi v. Emperor*, 33 C 1023-10 C W N 830-4 Cr
L J 79

162. A witness summoned to produce a document shall, if it is in his possession or power, bring it to Court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court.

The Court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility.

If for such a purpose it is necessary to cause any document to be translated, the Court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence, and, if the interpreter disobeys such direction, he shall be held to have committed an offence under section 166 of the Indian Penal Code.

Scope of the section. If the person is required to produce a document, he is served with a subpoena duces tecum. A subpoena duces tecum ought to specify the documents required, and the Court will not enforce a subpoena which is too general, but if a person served with a subpoena duces tecum is required to produce documents required with him, he must produce them. *Re Gamma Silver Mining Co. Ltd.* [1908] 2 K. B. 333. A witness who is merely called to produce a document

and in that case he cannot be cross examined *Wood*
Cock 197 But he may be asked what does
 he answer the question without being

not the whole of the documents *Pouell* Lb 653; see also *Pickering v Noyes*, 1 Ha 299 If he does not attend the writing on any of will not be admissible, *Griffith v Ricketts*, 7 Ha 299 and refuses to produce evidence it is not called by

books they having been removed from him since the *R v Stuart*, 2 T L R 141; *Pouell* 654 *Stuart* all he deemed to have produced instead *Order XVI, rule 6*

An order cannot be made for the parties to the action [*Starker v Reynolds*, (1899) 22 Q B D 262] although such persons may be ordered to attend and produce them before the Court or Judge or examiner *Re Smith, Williams v Frere*, (1891) 1 Ch 323 Section 123 makes the production of evidence as to unpublished official records of affairs of State

in custody of whom with him to Court to there is no necessity on the grounds The Head of the fit Vide s 123 even inspecting

he must produce person But to justify

relating to the questions in issue any is not enforceable *Lee v Angus, L Mining Co*, L R 10 Ch 191, *Burchard* (247) The subpoena should not be oppressive This subpoena is incidental to the power of Courts and necessary to the *Loans* 9 East 473 It is a writ of compulsory

He has no ban whether with him the 1 273, For they should on, 3 Burr could be with

1687 Thus, the Court that they will deprive the witness object him to a penalty or a criminal charge 352, *Whitaker v Wood*, 2 Tan 115, or of a confidential communication to an *Opeland v Watts*, 1 Stark 95 *Illustrations*, 37 Ch D 1, vide ss 126 127 of whether his excuse for not producing the same is valid or reasonable *Bull v Loveland*, 10 Pick (Mass) 9, *Burr Jones* § 861

In a case where an attorney claimed the protection of his lien, the Court said 'The exception to the general rule of production seems to me a reasonable one That an attorney's lien on his client's papers should not be permutal

the papers by a subpoena duces tecum. The value of the lien often lessens when summoned by him to produce papers from use as evidence and by a subpoena duces tecum to seems to be unjust. Davis v

seems to me unjust. *Davis v*
Lewis, 30 Fed 791, see also *Hope v Lillie*, 7 De G M & L 331, *In re*
Cameron's Coolbrook, etc R Co, 2 Nev 1, *Brassington v Brassington*, 1 Sum
 & S 455, *Kemp v King* 2 Moody & R 437. So a Court will punish the witness
 for his failure or refusal to produce documents if properly subpoenaed in
 case he has no excuse for such failure or refusal. *Rule 17 of the Indian*
Penal Code, R v Dyer, (1908) 2 K B 333. A subpoena duces tecum is only
 to be employed to secure the production of books and papers that are to be
 introduced in evidence in the trial of an action, it is not to be used to secure
 papers to refresh the memory of a witness. It cannot be used for the production
 of them. *Burr Jones* § 501.

The fact that the documents are in the possession of a corporation does not prevent their production. A private individual would be able to produce them. Ambassador and consuls, their official papers Burr Jones § 802

Where the witness declines to produce an instrument on the ground of professional confidence, the Judge should not inspect it to see whether it was one which he ought to withhold (*Doc d Carter v James*, 2 M & Rob 47, *Volant v Soyer*, 13 C B 231=23 L J C P 83), and it seems that the mere assertion on oath by the solicitor that it is a title deed or other privileged document

It seems to be sufficient if one only of several interested parties objects. *Per Maule J* in *Newton v Chaplin* 19 L J C P 374, *Kearley v Phillips*, 10 Q B D 465. When the production is excused, secondary evidence is admissible. *Marston v Downes* 1 Ad & E 81, *Doe d Gilbert v Ross*, 7 M & W 102, *Roscoe N P* 158.

he production of
and once the
d on if the party
5 Ind Cas 393

Statements made before the Income Tax Collector do not relate to affairs of state and so are not governed by s 123 of the Evidence Act. The Income Tax Collector, summoned to produce, is bound to produce the books in his possession, in spite of the rules made under s 38 of the Income Tax Act forbidding disclosure. Under s 162 of the Evidence Act, a witness should not decline to bring documents into Court on the ground of privilege. Under the same section, the Court has power to inspect the documents for the purposes of deciding objections regarding production. The rules regarding non disclosure of information, do not apply to the production of documents.

4 M L 1 317 317=32 M 6-13 1 2 3 00
The privilege is claimed is entirely
his section and its refusal to inspect
Aigaraja v Lythianatha (1911)

Principle The production of papers upon notice, does not make them evidence in the cause, unless the party calling for them inspects them so as to become acquainted with their contents, in which case he is obliged to use them as his evidence (*Calvert v Fowler*, 7 C & B 386; *Wharam v Routledge* 5 Esp 235 per Lord Ellenborough) at least if they be in any way material to the issue *Wilson v Bouie* 1 C & P 10, *Sayer v Kitchen* 1 Esp 210 *Taylor* § 1817. The reason for this rule is that it would give an uncon-

notice to produce a paper in evidence must be supposed to know its contents. If he does not he ought not to be permitted to speculate through the forms of law and obtain from his adversary the inspection of any paper or document he may choose to demand. Such a privilege could be liable to abuse. *Laddiffe J in Laurence v Van Horne* 1 Cinnis 276, 285, *Wigmore* § 2125.

Scope of the section The mere calling for the documents from the opposite party is not enough to make them evidence. But when the party calling for the document inspects them he is bound to give it as evidence if the party producing it requires him to do so. *Burr Jones* § 226. If the party giving the notice declines to use the papers when produced, this though material of observation will not make them evidence for the adverse party. *Sayer v Kitchen* 1 Esp 210. But it is otherwise if the papers are used or inspected by the party calling for them, and are material to the issues. *Wilson v Bouie* 1 C & P 10, *Calvert v Fowler* 7 C & P 386, *Wharam v Routledge* 5 Esp 235, *Roscoe v P & L* 13. Inspection by a party includes inspection by an agent as well as personally. *Norey v Keep* (1909) 1 Ch 557, 560. This section is intended to prevent the somewhat indignant squabbling which frequently takes place in England as to whether a document which the other party has received notice to produce, should be put in. *Mark* Ev p 113. In *Calvert v Fowler* 7 C & P 386 the documents called for were books of account. In that case the plaintiff called for them and the paper was read upon the stand. You make it evidence for the other side, if he think fit to use it. In *Wilson v Bouie* 1 Carr p 10 the paper produced was a receipt which was not material to the case and *Park J* said 'If the plaintiff's counsel call for a paper and look at it, he must read it in evidence if it is at all material to the case, if it does not bear on the case he need not read it. This paper is of the latter

special provisions of this section must be deemed to be conclusive evidence against the party who has inspected the documents. There is certainly nothing in the language of the section itself to justify such a conclusion. All that happens is that the documents which the other party has produced become evidence in the case for what they are worth. *Ram Dhan v Ram Dajal* 23 O C 156-57 Ind Cas 973. In a pending trial the defendant produced certain account books and gave me the document. However did the document rebutting evidence if any, held that the procedure of the lower Court was not justified by s 163 of the Evidence Act. Section 163 does not render the proof of the document to be executed unnecessary or alter the normal incidence of that burden. It is doubtful whether section 163 of the Evidence Act is

applicable to accounts produced under the procedure for discovery or only to accounts produced after the trial has begun *Raj Gopala v Ramanuja*, 1923 M W N 292=72 Ind Cis 459=1923 Mad 607=18 L W 165 Application of this section is not restricted to civil proceedings only. It is applicable

Where departmental statements are produced, inspected and used for cross-examination of several witnesses the Crown is entitled to have the whole of the statement as evidence. Departmental enquiry by a Magistrate in his executive capacity is not judicial enquiry and such statements the applied to such statement. I R 1930 Cal 370

164 When a party refuses to produce a document which he has had notice to produce, he cannot afterward use the document as evidence without the consent of the other party or the order of the Court

Illustration

A sues B on an agreement and gives B notice to produce it. At the trial A calls for the document and B refuses to produce it. A gives secondary evidence of its contents. B seeks to produce the document itself to contradict the secondary evidence given by A, or in order to show that the agreement is not stamped. He cannot do so.

Principle Where an opponent in possession refuses to produce on demand, he is afterwards forbidden to produce the document in order to contradict the other party's copy or evidence of its contents. This is in one sense a proper penalty for unfair tactics, but the original refusal may also be regarded as a judicial admission in advance, of the correct extent of the document. *Wigmore* § 1210. In *Doe v Coe* B said "You must either produce a document or see also *Lewis v Harilev*, 7 C & P 405, *Doe*

Scope The section applies to a document in his possession

refused to produce at liberty *Hodgson*, to the intent that his refusal to comply with the effect of letting in secondary evidence, such notice is given. *Hills v 3rd E* 361. If he once insure the production of the document. *Hills v 3rd E* 361. He is not entitled to refuse, but he is about to have without the evidence B 413, 439, *Jackson v* he is permitted to put the document into the hands of the jury for the purpose of cross-examination. *Allen*, 3 St 527 528, or to produce and prove on, 12 A & E 135. He is not entitled to be called (*Jackson v Allen*, 131); or to refresh the memory of a witness (*Wille C J M S*), or it seems for any purpose (*Callins v Gordon*, 3 F & 47, *Byles J*). He is, in effect bound, by any legal and satisfactory evidence produced on the other side. *Ruscoe v* 219, *Port E* 252. This is for instruction. What he is to produce to produce his opponent's future of the

to produce the document and use it as evidence. *Callins v Gordon*, 3 F & 47, *Byles J*. He is, in effect bound, by any legal and satisfactory evidence produced on the other side. *Ruscoe v* 219, *Port E* 252. This is for instruction. What he is to produce to produce his opponent's future of the

accused to produce certain documents &c does not deprive him of the right to defence or to put them to the complainant
Kapur v Emperor, 36 C. W. N. 1127 "I am by no means convinced that it applies to criminal proceedings"—*Per Pankridge J in Ibid*

165. The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties

about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question:

Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved:

Provided also that this section shall not authorize any Judge to compel any witness to answer any question, or to produce any document which such witness would be entitled to refuse to answer or produce under sections 121 to 131, both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted.

Principle "Section 165 is intended to arm the Judge with the most extensive power possible for the purpose of getting at the truth. The effect of this section, is that in order to get to the bottom of the matter before it the Court will be able to look at and enquire into every fact whatever" *Steph Intro, L. Act* p 102 "We know of no limit" says *Lumkin J in Epps v State*, 19 Gr 118 (Am) "to the right which belongs to the Court of interrogating witnesses, either in civil or criminal cases, especially the latter. The life or death of a man may be tolerated for a ... which

ought to have been brought out. It is not only Judge to call the attention of the witness to the prosecution, his aim being neither to punish the innocent or screen the guilty, but to administer the law correctly."

English rule The sporting theory of the common law in which litigation was a game of skill to be conducted according to the specific rules and to be tended to place the me, whose duty it was les of the game hid the Judge's functions rds there has never of the proceedings and the judicial function, ver and duty to put ceivable to elicit the truth more fully. This just exercise of his function was never doubted at common law; the Judge could even call a new witness of his own motion and could seek evidence to inform himself judicially; much more could he ask additional questions of a witness already called but imperfectly examined. Fortunately, in spite of the strong but subtle tendency to force the purely judicial function into the back ground, the tradition of the common law has never

been lost; the right of the Judge to interrogate as he thinks best has always been pre-erred in theory. *Wigmore* § 781. So under the English law a Judge has always a discretionary power, with which the Court above is very unwilling to interfere (*Middleton v Barred*, 1 Ex R 213 *Per Parke B*), of recalling witnesses at any stage of the trial, and of putting such legal questions to them as the exigencies of justice require. *R v Watson*, 6 C & P 653. *Taylor* § 1477. So a judge may put all such questions to a witness as the interests of justice require (*R v Remnant*, R. & R 836; *R v Watson*, 6 C & P 653, *R v Jameson*, T. 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 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997, 998, 999, 1000).

Scope of the Section. It seems to be the general rule, well supported by the questions to w order that the t at a trial is no or officer charge maintain truth of rules of pract question the my *Per Dick* y v *State* so I lly neces- sary the facts and circumstances of the case on trial as possible, in order that he may instruct the jury, and correctly, to the extent his duty demands, shape the determination of the litig and doubtless it resi- ding Judge the not exigencies may warrant in exercise of the right here in capable of very precise statement, but it may be said that the right here in question is one which should be very sparingly exercised, and, generally, counsel for the parties should be relied on and allowed to manage and bring out their be such as to the one or the other party to the cause.

As regards the inch James Fitzjames Stephen in of English Barristers to which they practice I would appeal to every one who has any subject, whether the observations referred to are not strictly true, and whether the main provision founded upon them—the provision which empowers the Court to ask what question it pleases—is not essential to the administration of justice here. In saying that the Bench and the Bar in England are fully nothing India in ly neces- sers, but ind in s which ing that section

165, which has been "so much objected to has been framed" *Speech of the Hon'ble Fitzjames Stephen on the 12th March 1872, in submitting the Report of the*

ask
 elicit all the facts he
 may have some well
 dexterously avoids, or a defendant may
 answer given and allow it to pass uncriticized; in any such case it is highly
 be armed with full power enabling him to get
 subject to conditions to be immediately
 about any matter relating
 document or thing

however, is very clearly
 based on relevant facts, and those relevant

refuse to answer or produce at the instance of the opposite party
 Judge ask any of the questions as to credit which would be improper if asked by
 the adverse party, nor can he dispense with primary evidence of a document
 unless the facts of the case show that secondary evidence is admissible. A
 Judge, accordingly, cannot, by the exercise of the powers conferred by this
 section, impart into the evidence the character of relevant under
 the Act, nor can he in any mode of proof, or
 ask questions to credit, if asked by the
 parties. Thus restricted of obvious utility
 in a country like India, as no advocate is
 employed, but the Judge has to make out the truth as best he can from the
 false accounts of ignorant, excited

in any form at any stage of the
 cause, and to a certain extent even all
 This, however, does not mean that he can
 for if such be left to the jury, a new

from the section, "to secure indictive
 fixed by technicality, to secure indictive
 fixing the amount of punishment"
 of the Court to propound pertinent and
 properly framed questions to a witness. The exercise of the power, if the
 questions propounded by the Court are directed to crucial points of the case is
 of the one or the other of, the
 of great embarrassment if
 leading and suggestive in form
 or improper for any cause. It is believed the instances are rare and the
 conditions exceptional in a high degree which will justify the presiding Judge
 the oral examination of a witness and the

able
 the
 high
 effect
 his
 leading
 easily
 into,
 the Judge will at once
 fact he

Of course, the examination by the Judge must be done in a reasonable and impartial way, so as not to indicate his opinion of the facts, and thereby prejudice the rights of the parties. His questions should be propounded, not

proceed ;
manage as
the trial

ment it is necessary to elicit the truth, he may interpose with questions to the witness, either in direct or cross examination and he may put leading questions or suggest the form of a question, and it has even been held that a Judge may call a witness and examine him and permit or refuse either side to cross-examine such witness. *Coulson v Disborough*, (1894) 2 Q B 316. It is obvious that these privileges of the Court should be so exercised as not to prejudice the rights of the parties, or to unduly interfere with the presumption of the cause of action or defence. The discretion of the trial Court will not be interfered with except in a clear case of abuse. While the Judge may, of course, state the grounds of his rulings in receiving or rejecting testimony, comment upon the weight of the evidence at the time of its production should be avoided as an invasion upon the province of the jury. The Court may often with great propriety ask questions of a witness on the stand for the purpose of bringing out the facts of the case but should never indulge in remarks to witnesses or in comments upon their testimony, which may either magnify or diminish its effect upon the jury as to credibility or value. While the Judge may so interpose questions, his comments, if any should be so guarded as not to prejudice the parties, even though not directed against them. For example, when the Judge said "I don't think going over the same ground so much does any good. I suppose that the jury knows more about forest fires than any of the witnesses that are testifying or any of the attorneys in the case," the Court held

the remark
of forest fire
the witness
an improper
Beene 16 A
disregard ;

Jones § 815

judgment must be based upon facts

proved *Shah J in Ismail v Emp*

16 Cr L J 83=2 Bom Cr C 252

Indian Penal Code, the Sessions

Indian Evidence Act,
ing the years of his life previous to the
in a lunatic asylum, record medical
of the opinion formed as to his particular
or, Rat. Un Cr C 279

The provisions contained in this section and in Order XIII, r 10 of the Civil Procedure Code are intended to arm the Court with a power of initiative in getting at the truth. The essential duty of the judicial officer is not to decide what is possible, but to ascertain the truth. The act of sending a witness to the Court is not a mere formality. The Court has been empowered to put to a witness any question at any time and in any form. *Pratap v Emperor*, Inl Rul 1930 Nag 273.

Under this section a Magistrate is entitled to put to a witness any question at any time and in any form. *Pratap v Emperor*, Inl Rul 1930 Nag 273.

5. **Construction of the Section** This section is capable of two widely different interpretations (a) It may mean that the Judge may introduce into the case without any restrictions except those stated in the second proviso any irregular evidence he pleases that he might for example ask a witness what some respectable persons had told him about the matter in dispute evidence which though properly speaking is inadmissible, might be quite trustworthy. But then what is the meaning of the first proviso? How is the Judge to make use of the irregular evidence at all if he is not allowed to base his judgment upon it at least to some extent? Even if he uses it only to corroborate other evidence he still bases his judgment partly upon it (b) The other possible construction of the section is that it only empowers the Judge to ask irregular questions in order to discover or obtain proper, that is, regularly admissible evidence. For example in a case of murder when the weapon had not been found, a witness might state in answer to the Judge that he had heard that the accused had secreted it in a certain ditch. The statement being hearsay would be inadmissible but the Judge by means of it, might be able to direct an enquiry which would lead to the weapon being found. Upon the second of these two constructions of the section the first proviso would prevent less difficulty. But then it is not easy to see why the last clause of the second proviso was inserted. This clause would be quite intelligible if the section were intended as a general relaxation of the rules of evidence, but why should not a Judge who was merely hunting up evidence look to a copy in order to see whether it was worth while to endeavour to procure the original. It may further be observed that if that clause on the other hand refers to the evidence to be accepted in the case itself it appears to be mere surplusage as the first proviso has already declared that the facts must 'be duly proved' i.e. where the fact is contained in a document primary evidence of that document must as a general rule be given. In the first view it would modify the rules of evidence to a very considerable extent. In the second view the section would tell little if anything, to the already existing law. *Marlby Ev pp 111115* asking irrelevant questions to a proof of relevant facts, but if he asks being taken against him he is not bound to answer him and cannot be punished under s 179 I P Code. *In re Lalshman Cr Rg 14 10 1885*

Ask any question The ordinary practice in a properly constituted Court is that where a witness for the prosecution is not called on the part of the Crown he is placed in the witness box in order that the defence may have an opportunity of cross examining it necessary to call one of these witnesses which he thought material for allowed an opportunity of putting any question that he thought necessary cross examination. *Per Jackson J in Empress v Girish Chandra, 5 C 614* Under s 160 of the Evidence Act a Judge has power to ask any question he pleases about irrelevant facts if he does so in order to discover or obtain proof of relevant facts. *Queen Empress v Hari Lalshman 10 B 185, see also R v Afrit 2 I R 603* 'It is not the province of the Court to examine the witness unless the pleaders on either side have omitted to put some material question or questions, and the Court should as a general rule, leave the witness to the pleaders to be dealt with as laid down in s 138 of the Act. The Judge's power to put questions under s 160 is certainly not intended to be used in the manner in the present case. *Per Garth C J in*

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section 162
L J 528 = A
165 cannot be
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purpose of eliciting what the law expressly and deliberately forbids being admitted. For instance it should not be used for proving a confession made to the police which is shut out by s 25 of the Evidence Act or a confession made while in police custody except as mentioned in s 27. *Pillai v Emperor*, A I R 1932 Mad 625. The Court's decision must rest not upon suspicion but upon legal grounds established by legal testimony. *Luchini v Radha*, 34 C L J 107; *Bhagwan v Shamsher*, 33 P L R 1918=44 Ind Cas 433.

It is established that with a view to clear up obscure the bounds of the provisions of counsel engaged in the same justice. *Surendra Krishna*, 13 C L J 34=9 Ind Cas 811.

A Judge is justified in using his knowledge about the character of the parties in a suit to come to a decision upon the credit to be attached to their evidence on the case set up by them. *San Hla v Mi Khorou* 9 L B R 160=45 Ind Cas 724=12 Bur L R 98.

Cross examination on answers given to the Court. In *Sukharam v Muni*, 11 B H C R 569 at p 510. *West J* said: "When the counsel for the prisoner has examined or declined to cross-examine a witness, and the Court afterwards, of the permission of examination of him in hand, he is put under special procedure as the Judge is empowered to ask any question he pleases, in any form also (s 162, Indian Evidence Act), and he is the under the special protection of the Court, partly to cross-examine him, but it cannot be asked for as a matter of right to the witness for any effect, out an answer—upon every answer given to the Court—under his control." In *Coulson v Disborough*, (1894) 2 Q B 316, Lord Esher M R said: "If what the witness has said in answer to the questions put to him by the Judge is adverse to either of the parties, the Judge would no doubt allow, and he ought to allow, the party's counsel to cross-examine the witness upon his answer." A general fishing cross-examination ought not to be permitted.

This view was approved by *Farwell L J* in *re, Enoch and Zaretsky*, 79 L J K B 263=(1910) 1 K B 327 C A. The words "any witness" in this section include a Court witness. It is doubtful how far the right to cross-examine such a witness is an absolute right or requires the leave of the Court. *Malund Singh v Ali Ghafurunnissa*, 9 O & A L R 312=74 Ind Cas 108. The Court should not examine a witness without notice to the parties or their pleaders, and to cross-examine him or to rebut his statement does justify such procedure. When a witness, it acts with material irregularity in the meaning of s 115 of the Civil Procedure Code. *Pearlat v Pearson*, 1940 1 K B 407.

It follows that a Judge's questions may be leading in form. "Folly my lords," said Lord Ellenborough C J "has said that, in examining the witness, almost too object- reasons in I have leading

however, may put what questions he pleases, and it is

Construction of the Section This section is capable of two widely different interpretations (a) It may mean that the Judge may introduce into the case without any restrictions except those stated in the second proviso any irregular evidence he pleases, that he might for example ask a witness what some respectable persons had told him about the matter in dispute evidence which though properly speaking is inadmissible, might be quite trustworthy. But then what is the meaning of the first proviso? How is the Judge to make use of the irregular evidence at all if he is not allowed to base his judgment upon it at least to some extent? Even if he uses it only to corroborate other evidence he still bases his judgment partly upon it (b) The other possible construction of the section is that it only empowers the Judge to ask irregular questions in order to discover or obtain proper, that is, regularly admissible evidence. For example in a case of murder when the weapon had not been found, a witness might state in answer to the Judge that he had heard that the accused had secreted it in a certain ditch. The statement being hearsay would be inadmissible but the Judge by means of it, might be able to direct an enquiry which would lead to the weapon being found. Upon the second of these two constructions of the section the first proviso would prevent less difficulty. But then it is not easy to see why the last clause of the second proviso was inserted. This clause would be quite intelligible if the section were intended as a general relaxation of the rules of evidence but why should not a Judge who was merely hunting up evidence look to a copy in order to see whether it was worth while to endeavour to procure the original. It may further be observed that if that clause on the other hand refers to the evidence to be accepted in the case itself it appears to be mere surplusage as the first proviso has already declared that the facts must 'be duly proved' & where the fact is contained in a document primary evidence of that document must as a general rule be given. In the first view it would modify the rules of evidence to a very considerable extent. In the second view, the section would add little if anything to the already existing law. *Mirbaj* Ev pp 111-112. Under this section a Judge has the power of asking irrelevant questions to a witness, if he does so in order to obtain proof of relevant facts, but if he asks questions with a view to criminal proceedings being taken against him he is not bound to answer him and cannot be punished under s 179 I P Code. *In re Lal Shiman* Cr Rg 14 10 1885.

The ordinary practice in a properly constituted Court of the prosecution is not called on the part of the defence to have an opportunity of putting any question that he thought necessary in cross examination. *Per Jackson J in Empress v Gurish Chandra*, 5 C 614. Under s 115 of the Evidence Act a Judge has power to ask any question in order to discover or obtain proof.

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purpose of eliciting what the law expressly and deliberately forbids being admitted. For instance it should not be used for proving a confession made to the police which is shut out by s 25 of the Evidence Act or a confession made while in police custody except as mentioned in s 27. *Pullama v Emperor* A I R 1932 Mad 625. The Court's decision must rest not upon suspicion but upon legal grounds established by legal testimony. *Luchman v Nadha*, 34 C L J 107, *Bhagwan v Shamsher*, 33 P L R 1918=14 Ind Crs 433. A Court of appeal cannot set things right on appeal unless it is established that the intervention with questions of a trial Judge, with a view to clear up obscurities and generally to elicit the truth, exceeded the bounds of the provisions of s 165 and so impeded the legitimate work of counsel engaged in the same.

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the case set up by them. *San Hla v Mt Khorou* 9 L B R 160=45 Ind Crs 734=11 Bur L T 93

Cross examination on answers given to the Court. In *Sulharam v Mundji*, 11 B H C R 569 up 510, *West J* said. When the counsel for the prisoner has examined or declined to cross examine a witness, and the Court afterwards of its own motion

the permission of the Court, the examination of a witness by him in hand he is put under special pressure as the Judge is empowered to ask any question he pleases in any form about any fact relevant or irrelevant (s 160 Indian Evidence Act), and he is therefore at the same time placed under the special protection of the Court which may at its discretion allow a party to cross examine him but this cannot be asked for as a matter of right.

This principle the witness is any question effect of all but out an incorrect

answers—upon every answer given to the Court—and is subject to Court's control. In *Coulson v Disborough* (1894) 2 Q B 316 *Lord Esher M R* said. If what the witness has said in answer to the questions put to him by the Judge is adverse to either of the parties the Judge would no doubt allow, and he is right to allow the party's counsel to cross examine the witness upon his answer.

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Mahend Singh v Mt Ghafurunnissa, 9 O & A L R 542=74 Ind Crs 108. The Court should not examine a witness without notice to the parties or their pleaders, and without affording them an opportunity to cross examine him or to rebut his statements.

Section 160 of the Evidence Act does justify such procedure. When a Court examines a witness without notice to the pleaders and bases its decision upon the evidence of the witness it acts with material irregularity in the exercise of its jurisdiction within the meaning of s 110 of the Civil Procedure Code. *Pearilal v Pearilal*, 22 Ind Crs 407.

It follows that a Judge's questions may be leading in form. Folly and that in examining the witness is ridiculous. It is almost too leading the fact can it be objected to persons in leading questions? I have

the situation always understood that the meaning of a leading question was produces a witness interrogatories a favour the party however, may

purpose, because then the rule is changed; for there is no danger that the witness will be too complying. But even in a case where evidence is brought forward to support a particular fact, if the witness is obviously adverse to the not prevail, and the most leading that the Judge on the bench may not please can only originate in the age" 25 *Hansard Part Deb*

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Proviso (1) Having regard to the strength of evidence of this section judgment based

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Court must be based upon facts declared by the Act to be relevant and duly proved, and it would be intolerable that the Court should decide rights upon suspicions unsupported by testimony" *Per Jenkins C J in Sreemutty Mohan Bibi v Sarai Chand* 2 C W N 17 (27); see also *Ismael v Emperor*, 26 Ind Cr 995=16 Bom L R 931, *Luchiram v Rathi*, 31 C L J 107; *Bhiquan v Shamser*, 33 P L R 1918=44 Ind Cr 133; *Queen v Pitamber*, 7 W R Cr 25, *Emperor v Jalub Das*, 27 C 295=4 C W. N 129 Court ought not to comment adversely on witness's conduct relying on matters which are not evidence. *Amar Nath v Emperor*, 85 Ind Cr 144=26 Cr. L J 463=A I R 1925 Lrh 167. It is the duty of the Judge to record a *Baldeo v Sheoraj*, 56 Ind Cr 807

Proviso (2) Where the question is asked with a view to criminal proceedings being taken against the witness, the witness is not legally bound to answer it, and he cannot be punished under s 179 I P Code, for refusing to answer. *Queen Empress v Hari Lalshman*, 10 B 185. A witness should not be coerced to answer a question. *Queen Empress v Ishri*, 8 A 672 (675)

166. In cases tried by jury or with assessors, the jury or assessors may put any questions to the witnesses, through or by leave of the Judge, which the Judge himself might put and which he considers proper.

Scope The privilege to examine witnesses has long been extended to jurors, when exercised to draw out or clear up some uncertain point. *Schaefer v St Louis*, 128 Mo 64, *Burr Jones* § 815. *R v Lalluman*, (1906) 2 Q B 167 questions through the mal, 24 M 523. It is viewing the spot in controversy, since the knowledge derived by these means is far more satisfactory than any obtainable by the mere examination of maps or places which are often also, have been prepared with an express view to the purpose. *In the matter of petition of Lalji*, 19 Procedure Code. But the jurors and assessors can only view the scene of the alleged offence, and cannot examine any witnesses on the spot, because by sub section (2) of s 203 the officer conducting the jurors or assessors to the spot cannot suffer any other person to speak to them. *Queen v Chatterdhoree*, 5 W. R 59

CHAPTER XI.

OF IMPROPER ADMISSION AND REJECTION OF EVIDENCE

167. The improper admission or rejection of evidence shall

No new trial for improper admission or rejection of evidence. not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such

the ground that some evidence had been improperly received, when other evidence had been properly admitted that was of itself sufficient to support the conviction the Judges seemed to think must depend on the nature of the case and the weight of the evidence. If the case were clearly made out by proper evidence, in such a way as to satisfy the mind of any reasonable man, a conviction ought not to be set aside. But if the evidence had been given which ought not to have been received, and the improper evidence without such improper evidence would not clearly make out the case, such was the rule in the King's Bench.

R 133 *R v Teal*, 11 East 311, *R v Hul v Wynne*, 2 B & Ald 554 559. Mansfield C J in *Hartford v Wilson*, 1 Taunt 101, said that case the learned Chief Justice, said

"Neither will the Court set aside a verdict on account of the admission of evidence which ought not to have been received, provided there be sufficient evidence without it to authorize the finding of the jury." This rule was also explained approved in *Doe v Tyler*, 6 Bing 561. Such was equally the practice in Chancery, when issues had been sent to a jury in a Common Law Court. Wigmore § 21. In *Pemberton v Pemberton*, 11 Ves 50, 52, Lord Eldon L said "If upon the whole record he is satisfied that justice has been done, though he may think, that some evidence was improperly rejected at law, he is at liberty to refuse a new trial." Similarly in *Lorton v Kingston*, 5 Cl & F 263, 310 Lord Cottenham, L C said "The true consideration always is whether on the whole there appears to be such a case as enables the Judge in equity,

to set aside the verdict. In that decade of 1830. In that decade 1835) 1 C M & R 919, announced signified that an error of ruling against a party was right to a new trial created *per se* for the error. Langfield 16 M & W 497, 515. The new Wigmore § 21, see also *Doe v Langfield* 16 M & W 497, 515. The new Exchequer rule was speedily accepted in the other Courts. (See *Rutledge v Fair* 4 A & E 53, *Wright v Tatham* 7 A & E 313, 330), and for something more than a generation it remained the law of England until it was reformed away, for civil causes in 1875. Wigmore § 21. In *R v Gibson*, L R 18 Q B D 537, 540, Lord Coleridge C J said "Until the passing of the Judicature Acts, the rule was that if any bit of evidence not legally admissible, which might have affected the verdict, had gone to the jury, the party against whom it was given was entitled to a new trial. See also *Campbell v Looper*, 34 L J Ex 58.

Now the civil cases in England are governed by the Judicature Act, 1883 and Rules of the Supreme Court, Rule 6 of Order 39 of the same Acts as follows: "A new trial shall not be granted on the ground of misdirection or

Unless in the opinion of the Judge, the evidence is wrong or miscarriage of justice, or some legitimate effect is not obtained for when the evidence is admissible in the trial. And the same rule applies to other evidence which has occurred in the trial.

to sustain the verdict must stand. For example *MacLarn & Son v Tydfil Urban Council*, (1899) 1 Q B 411. In England the rule 6, is not applicable to the Divorce Court. *Allen v Allen* (1894) P 255. "I doubt the possibility of formulating a rule which would prevent the attempt (1896) A C 44 (W, 2)

illegal agreement. See *Hartley v Hartley* (1892) 2 Q B 501. See also *Allen v Allen* (1894) P 255. "I doubt the possibility of formulating a rule which would prevent the attempt (1896) A C 44 (W, 2)

refusal" *Wignmore* § 21 This section affirms a reasonable principle often before laid down authoritatively by the Privy Council. If, after setting aside what has been improperly rejected or omitted, the residue of the evidence is sufficient to support the finding of the original Court, no Appellate Court should set it aside. Thus, in *Ranee Surnamoyee v Maharaja Sulties Chunder Roy Bahadur*, 10 M I A. 125, the Court, by false evidence, the Court

"*Ioharajah Juggut v Bhupo Tarnee*, 14 W 6 B L R P C 495 In *Mohar Singh v Ghuriba*, 6 B L R P C 495, the Court said: "It seems to their Lordships

trial, it is shown that evidence improper to be admitted has been admitted before the jury. The Court in those cases are not Judges of fact, and are unable to say evidence that ought not to have

ought not to have been admitted, to support the decrees. Their Lordships, that the Court of first instance, in the case before them, had seen as it has been in

is always to be
See also *United R*
7 M I A 128; *Nort* 343

In cases of doubt, the Judge should decide in favour of admissibility of the evidence under consideration rather than of inadmissibility. *Collector of Gorakhpur v Palakdhari*, 12 A 1 (F B)

This section is equally applicable to civil and criminal cases. The section applies to criminal as well as to civil cases whether or not the trial has been had before a jury. *Imperatrix v Pitamber*, 2 B 61; *Queen v Hurriabola Chunder*, 1 C 207=25 W R Cr 36; *Reg v Navroji*, 9 B H C R 358. The words "in any case" in s 167, Evidence Act, are wide and include criminal trials by jury. *Queen Empress v Ramchandria*, 19 B 719

If it should appear to the Court that the evidence is such that the Court before Court *Impe*

and are, the Letters Patent, and sentence as *contra per Bayley* the High Court such judgment Straight C J nals by jury is

Effect of improper admission and rejection of Evidence in civil cases. The improper admission of the *ipso facto* ground for a new trial, decision independently of the *e. Narain*, 20 W. R 381. In civil principle as regards the working as criminal cases the Court is not a judge of facts. The jurors are judges of facts, and as such some difficulty may be felt by the Appellate Court to decide the effect of evidence improperly admitted in the minds of the jurors. So in India in civil cases, "it is the duty of their Lordships who are Judges of the fact to consider whether throwing aside the evidence which ought not to

have been admitted there still remains sufficient evidence to support the decree ■
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 Bommaran-e v Rangaswami, 6 M I A 232, Maharaja Jagadindra v Bhaba
 Tarinee, 5 B L R 497 ;
 In 1877, Abdul 20 W R 458

Lordships of the Privy Council have not strongly contended that the proper order to be made on this appeal is one remanding the case for retrial. We have rather insisted that on

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instance or with his consent. And the suspicion however probable, of the
Judge, that a party who had been a witness in a case, was a witness in an
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Objection in second appeal	An erroneous omission to object to inadmis-
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Ind Cis 731-A I R 10-5 C
C, Jagadis v Harihar, 40 C
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based on unproved and consequently is vitiated thereby and must be set aside; where an appellate Court has relied for its decision upon a document which is inadmissible in evidence a Court of second appeal will be justified in remanding the case for decision to the appellate Court with a direction to exclude that document from its consideration. *Hem Raj v Nihal Singh*, 7 Lah J 35-36, D.L.R. 22, 61, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909,

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or their based on second support the findings arrived at, s 167 is not a bar to such a case being remanded *Mussamat Sumitra v Ram Kuer Choubey* 5 P L J 410=37 Ind Cas 561

Where the lower Court has the High Court will not in the case is sufficient to support the findings arrived at, s 167 is not a bar to such a case being remanded *Mussamat Sumitra v Ram Kuer Choubey* 5 P L J 410=37 Ind Cas 561

On second appeal the High Court has generally speaking no right to look at the evidence to decide whether the remaining evidence in a case other than that which has been improperly admitted is sufficient to warrant the finding of the lower Court. The only cases which can be with propriety disposed of under such circumstances without a re-examination of the evidence admitted the lower Court upon other grounds. *Hoomesh Ch*

An objection as regards the modes of proving a document should be taken at the time when the document is tendered *Madhab v Gaganendra*, 9 C W N 11

When a subordinate Court has refused in the erroneous exercise of its discretion to receive documentary evidence which might have been accepted, the High Court has power to interfere in second appeal *Talewar v Bagawan Das*, 8 C L J 117=12 C W N 312

the (*Ram*) document in 1 appeal 2nd v The *Secretary of State* 11 C L J 678=34 C 1039 P C =9 Bom L R 1192, *Albar v Bheya Lal* 6 C 666

words include of new India held old the crimis India held old the trials India held old the Wher India held old the to be annuls ind, it is open to the High Court in appeal either to set aside the verdict upon the remaining evidence on the record, or to quash the verdict and order a new trial *Queen Empress v Ram Chandra* 19 B 749 Where no objection was raised to the reception of improper evidence in the lower Court

According to the court should 90 Though evidence is less it was the Criminal discretion to be taken by the party or not *Reg v Dayanand* 11 B H C 44 Improper admission of evidence of character of the accused goes to the very root of the administration of criminal justice and w Magistrate's consideration of be set aside *Phelan Singh* Pat L T 171=A I R 49=12 justify the conviction indep the lower Court should be as

When a case has been set aside on the ground of n retried by a jury, and as a matter of procedure and in justice to the accused the course should be adopted Acting on this principle the Court declined to exercise its powers under section 167 of the Evidence Act and sent back the case for retrial *Sheikh Hajur v King Emperor*, 11 C W N 593=11 Cr L J 301=5 Ind Cas 315

At the trial of a party of Hindus for rioting, the Magistrate, instead of examining the examination in previous trial the same riot examined by

instead of the or held at a Hind is in then cross-examined on the

prisoners' behalf The accused were convicted *Hell*, that although the procedure adopted by the Magistrate was irregular the irregularity was cured by the failure of justice matter elicited in cross examination *Jucen Empress v Nand Ram*, 9 A 609 783=32 B 111 F B *Dattar* 1 2 1 "Then again under s 167 of the Evidence Act all that we

adjudicated upon We are not a Court of appeal in the ordinary sense of the term I do not think it is open to us under the present circumstances to go behind the record of the case, scrutinize every piece of evidence and enter upon an elaborate investigation as to whether each particular piece of evidence recorded by the learned Judge and to which the accused's counsel now takes exception was or was not intended to be followed in s 167 of the Evidence

Where inadmissible evidence has been received the Court is to consider whether the reception of inadmissible evidence influenced the minds of the jury so seriously as to lead them to a conclusion which might have been different but for its reception and whether it has in fact occasioned a failure of justice *Harendia v Emperor*, 84 Ind Crs 451=26 Cr L J 307 Under section 165 of the Evidence Act the improper admission of evidence is not ground of appeal if it is shown that there is other evidence to support

relied upon by the Court below, there was ample regular evidence in the High Court in revision the p will interfere *Adhibat v Emperor*, 2 Pat J 374 Where a trial Court convicts an accused on the evidence part of which has been wrongly admitted and the Sessions Court excluding the wrongly admitted evidence upholds the conviction on the substantially different body of inadmissible evidence, and should

SCHEDULE

ENACTMENTS REPEALED.

(See section 2)

Number and year	Title	Extent of repeal
State 26 Geo III Chap, 57 *	For the further regulation of the trial of persons accused of certain offences committed in the East Indies, for repealing so much of an Act, made in the twenty fourth year of the reign of his present Majesty intitled (An Act for the better regulation and management of the affairs of the East India Company, and of the British possessions in India, and for establishing a Court of Judicature for the more speedy and effectual trial of persons accused of offences committed in the East Indies)," as requires the servants of the East India Company to deliver inventories of their estates and effects for rendering the laws more effectual against persons unlawfully resorting to the East Indies, and for the more easy proof in certain cases of deeds and writings executed in Great Britain or India	Section 38 so far as it relates to Courts of Justice in the East Indies
Stat 14 & 15 Vict, Chap 90 †	To amend the Law of Evidence	Section 11 and so much of section 19 as relates to British India ‡
§ •	• • •	

* The East India Company Act 1783

† Short title The Evidence Act 1851—see the Short Titles Act, 1896 (59 & 60 Vict., c 141)

‡ Certain entries after this repealed by Act IV of 1927 have been omitted

§ The entry relating to ss 7 and 8 of the General Clauses Act 1869 (1 of 1869), was repealed by the General Clauses Act, 1897 (10 of 1897)

APPENDIX A.

FIFTH REPORT OF HER MAJESTY'S COMMISSIONERS TO THE QUEEN'S MOST EXCELLENT MAJESTY.

We, your Majes- . . . of substan-
tive law for India, . . . of law which

upon the subject Within
force, modified by certain
in the most important

It extends the range of
nt, of foreign system of
competency to testify by

reason of interest or relationship, renders parties to suits liable to be called
as w- competent witnesses for or against
each lying declarations admissible though

may be cross examined by the party who called them, and that they shall not be
excused from answering questions because they may thereby criminate them
selves D - niary interest of the persons

who made course of business, both of
which kir its only in cases of death, are

under this Act admissible in the person who made the declaration or the entry
has become incapable of giving evidence or if his testimony cannot be procured

The Act also gives to k
ments the character
makes entries in such k

it extends the class
pedigree, and provides in effect that mistake committed in the reception of
reception of evidence shall not lead to a new trial or to the reversal of a decision

unless a substantial failure of justice has been caused thereby The Act,
however, bears reference in many places to the existing law, and it appears to
have been a body of rules, but as supplementary to,
and also of the customary law of evi-
dence in India where the English law is not

administered
The customary law has not assumed any definite form, the Mahomedan
law since the enactr
have any validity in th

Courts have in fact
of 1855 They are not required to follow it where they regard it as the most
equitable they are not debarred from following it where they regard it as the most

In laying down uniform rules for the guidance of the Indian Judges in
general, as well in the Courts
law of evidence has hitherto p-

advisable to adopt a system so arranged as to be
country . . .

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which
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safely
various

nounced inadmissible, a
dispassionately consider
excluded On the other
at that which is shut out
for or against each other

absolutely
as dangerous
r testimony
be asked a

question on the trial of her husband unless the trial be for an offence committed against herself. In matrimonial cases the inconsistencies of the law as to evidence cause frequent embarrass

of judicial investigation is attended with peculiar difficulties, and where it is the duty of the Judge in all civil and in some criminal cases to decide without a jury, there is a great danger of miscarriage from the jury being unduly influenced by the to afford every facility falsehood or error may be exclusion of falsehood, the channels by which truth is admitted. It is of course, impossible to admit all evidence that may be offered, for this would lead to excessive waste of time expressly excluded by a few cases where the law evidence, the Court shall

the early stage of a trial to show the exact bearing of each piece of evidence upon the issues. It is by no means our desire that our rules should be understood as imposing upon the Judges the use of excessive strictness in excluding evidence of which the applicability cannot be fully shown at the moment when the evidence is tendered. We have, however, inserted provisions intended to guard

limit the rules which evidence whole of the registration of assurances or of the Code of Criminal Procedure which recognise certain things as *prima facie* evidence that is to say, as conclusive unless met by counter evidence, yet we do not by our own rules attach this character to evidence of any class nor except where the testimony of a witness has been attacked,—do we receive evidence. We have provided for a single witness even in cases of perjury, or of evidence alone

An attempt to define all the cases in which and the purposes for which particular evidence may be received would in our opinion impede instead of aid the investigation of truth. We hope that the course which we have adopted will render it easier for those who are often committed in practice where a strict of supposing that whatever evidence is admitted to the Court

The exclusion of even of relevant evidence may be desirable, when the evidence is such that proof to it, when it is such as can be forgery, or when it is such without injury to interests investigation of truth

Although we have laid it down generally that all relevant evidence shall be admissible, we have thought it necessary to make certain exceptions from this rule. These exceptions relate chiefly to that kind of evidence which is described in the English law books under the title 'hearsay'. We have however, abstained from making use of the word 'hearsay' from the uncertainty and vagueness of its meaning as to what one sense of

statements by a witness of what he has heard another person say may be, in (as in cases of slander) the very matter in issue, or in other cases may be part of the circumstances which it is essential to ascertain. On the other hand 'hearsay' may be defined to be that which a witness does not say as of his own

knowledge, but says what another has said or signified to him. This is probably a more strict and accurate definition of the word "hearsay" as used in the English law than is known in that law as hearsay. We have thought that it would be of more practical use to exclude the word altogether. We define the word "hearsay", evidence of that class of evidence in the

cases in which we think it ought to be excluded, and for the admission of it in the cases in which we think it ought to be admitted. We have accordingly gone through the various classes of evidence in which arises the question of admissibility or exclusion what is called in the English law "hearsay" and have endeavored to make such class. Most of the rules for the admission of evidence are recognized by the English law, others of 1855, above referred to, or are intended to relax the English rule still further than was done by that enactment.

We have also made that which has been spoken, in person, or whose presence is kept in the ordinary course of business. We have also made admissible written acknowledgments of the receipts of money, goods, securities, or property of any kind, and documents used in commerce. Declarations which under the English law are only admitted because they have been made against interest will, by the effect of our rules, be excluded, unless they have been made in the ordinary course of business. The test of pecuniary interest is exceedingly difficult of application, and appears to us to be of little value as a test of truth. We have admitted statements as to matters of reputation and of pedigree whose presence cannot be at the person who made the statement. We have discarded the statement shall have

The indulgence afforded to witnesses by the existing law in permitting them to refer to contemporaneous memoranda appears to us to be carried too far when copies of such memoranda are allowed to be used for the purpose, and our rules do not permit the use of copies.

Another clause of exclusion applies to documentary evidence unless some degree of caution were observed with regard to the authentication of writings, great facilities would be afforded for the fabrication of documents. We have, therefore, laid down rules for the evidence to be required of the proper execution of documents, and, retaining the distinction between primary and secondary evidence, have not let against the admission of the latter where the evidence is not with

the evidence is not with a view to the production of the original document.

asked merely to produce their own evidence.

19 of Act title deeds—a provision becomes every day less from the production to the cause. We have on the subject evidence.

To those judgments which are admitted by the laws of all other countries as conclusive evidence not only between the parties but as against strangers, we

have affixed the same character in India, in all other cases we have provided

As regards strangers, we have provided evidence that such a judgment was pro-

We have left to draw of presumptions universally accepted of evidence the draft now submitted certainly border closely on Procedure. However, we have not found a place in either of the Codes of Procedure. We have therefore inserted them (with some modifications) as it appears to us that the law of evidence ought not to be left to be gleaned from many different enactments but that so much of it as it not to be found in the Codes of Procedure should be, as far as possible comprised in the rules of law now submitted by us and that the enactments which will thus be rendered unnecessary should be repealed.

as for the form, which does not

EVIDENCE

MEANING OF WORDS

1 In the following rules the word 'Court' shall be taken to comprise all Courts of justice, civil or criminal, and all persons having by law or consent of parties authority to take evidence, and the word 'cause' shall be taken to comprise all judicial proceedings civil or criminal

Admissibility

it is not meant that it if any, which the deci

admissible, unless it is excluded by the rules contained in this chapter

3 No statement by a witness of anything, or founded upon anything spoken or written, or otherwise intimated by another person, and no statement contained in any document is admissible in evidence, except in the cases specified in the rules hereafter contained

Illustrations

87W evidence that D told him that he

permissible inadmissible evidence that D, a deaf and dumb he saw B rob C. The evidence is

(c) A gives evidence that B robbed C. Being asked how he knows it he says that he knows it only because E told him so. The evidence which has been admitted must be struck out.

(d) A says that B was alive on the 1st January 1860. It appears that A does not speak to this fact of his own knowledge, but that he learnt it from a letter written to him by C, or from a newspaper or from a printed book or a picture. In each of these cases A's statement is not admissible as evidence that

Being asked how B whose handwriting alive on that day

Illustration

(2) Where the fact that a person by or to whom the thing was spoken, written, stated or otherwise intimated was acquainted with such thing is a question in issue

Illustration

A writes to B "I have just heard that C has failed". The letter is received by B. The letter is not admissible as evidence that C had failed, but when it is proved that C had then failed, the letter is a substantial evidence that the failure had then occurred. b the letter was written.

erwise intimated tends to

(a) A says on a trial of C for robbing D's house that he heard B say to C "Da house has been robbed," and that thereupon C fled. This evidence is admissible.

(b) On a trial of B for robbing C's house it is proved that B fled immediately after the robbery. A witness is produced who says that he heard A tell B before B fled that a warrant had been issued for his arrest under a decree of Civil Court. This is a defense.

ill him. It is alleged
of what A said at the

g him to be apprehended immediately after, in
n committed in Be
admissible
C told B that he saw A running away immediately after, in
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that
of w) 1000 rupees which
but it is evidence
produce evidence

(4) Where the thing was spoken written or stated or otherwise intimated by a party to the suit, or some one whom he represents in interest and it is sought to be used against him

Illustration* 1

(a) A t Evidence that

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(7) Where the thing spoken, written, stated or otherwise intimated was spoken, written, stated or otherwise intimated in the ordinary course of business by a person who has died or become incapable of giving evidence, or whose presence cannot be procured

Illustrations.

(a) A, the shipping agent of the firm of B and Co states in a letter to B and Co, that he has just seen a certain ship of theirs sail from the port of Calcutta. The letter is admissible as evidence of the sailing of the ship.

(b) A an attorney, prepares the draft of an intended deed to which B was to be a party, and endorses upon it a memorandum that a copy had been sent to another attorney on a certain day. The draft contains a statement that B was in insolvent circumstances. The draft and endorsement are admissible as evidence.

(c) A writes a letter to B, in which he mentions the state of the silk market, and in the same letter he mentions the state of the cotton market. The letter is admissible as evidence of the order given to him but not of the state of the silk market.

(8) Where the thing intimated consists in entries in books kept in the ordinary course of business, or consists in written acknowledgments of the receipt of money goods, securities of property of any kind, or in any document used in commerce

Illustrations

(a) Entries made by a clerk of a firm in the books of the firm to the effect that the firm has received a consignment of cotton from A and has purchased 50 chests of indigo from B. These are admissible in evidence against all the partners in the firm.

(b) A one of two partners makes an entry in the partnership books that he has lent his partner B £ 100. The entry is not admissible in evidence against B that A had lent him the £ 100.

(c) A clerk whose business it is to make entries in the books of the firm of all monies paid by him makes an entry in the books that he had paid away £ 100 for the firm. The entry is admissible in evidence that he had so paid away the money.

(d) The firm of A and Co, keeps a book in which the despatch and receipt of letters is entered. An entry in this book of the despatch of a letter by B and Co, is admissible in evidence against B and Co, by A and Co, to B and Co.

(e) A and Co are, according to the terms of a contract, to despatch a letter and afterwards despatched it. A and Co, on a certain day to B and Co, tenders in evidence an entry in their letter book purporting to be a copy of a letter addressed by them on that day to B and Co, and an entry of the fact that such letter was despatched. The entries are admissible.

(f) A guarantees the payment by C of a sum of money due from him to B. A pays the amount to B and sues C for repayment. A tenders in evidence a receipt given to himself by B for the amount due. The receipt is admissible in evidence.

(g) A sues B for the proceeds of a cargo of cotton consigned by A to B and sold through a broker. The account sales rendered by the broker are admissible in evidence.

(h) A a wharfinger, gives to B an acknowledgment that 100 tons of copper have been deposited at A's wharf. This acknowledgment is admissible in evidence of the fact that the deposit has been made.

(i) A effects a policy on his ship against all risks. The ship goes to sea and sustains injury. A institutes a suit to recover damages from the underwriters. The log book of the ship is admissible in evidence.

(9) Where the thing spoken, written, stated or otherwise intimated relates to the usages or tenets of any body of men, the constitution or government

of any religious or charitable foundation, or the meaning of any technical or conventional words or terms or of any words or terms used in particular districts, or to any matter of public or general interest, and was spoken, written, stated, or otherwise intimated by a person who has since died or become incapable of giving evidence, or whose presence cannot be procured

Illustrations.

(a) A, in order to show the religious tenets of a certain sect, tenders in evidence a manuscript treatise, proved to have been written by a deceased member of the sect. The treatise is admissible.

(b) It is a disputed fact in a suit whether a certain spot is or is not a public landing place. Statements made on the subject by A and B now deceased

intimated has
spoken written,

stated or otherwise intimated by a person who has since died or become incapable of giving evidence, or whose presence cannot be procured, provided that such person was a member of the family or had otherwise special means of knowledge

Illustrations

(a) It is a disputed fact in a suit whether A is the son of B. A statement made on the subject by C, who was a nurse in B's family about the time of A's birth, is admissible in evidence.

(b) A alleging that he is the son of B, deceased, produces the following documents in which he is mentioned as the son of B.

- 1 An entry made by B in a memorandum book stating A's birth
- 2 Letters which passed between two of B's brothers since deceased
- 3 A deed executed by B

A also produced witnesses who state that B told them that A was his son. The contents of the documents and the testimony of the witnesses are admissible in evidence.

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n of
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ship

(1c) Where the thing intimated is and there has been a public meeting or public proceeding and such intimation is contained in a report thereof published in any newspaper or journal.

Explanation Such report is not admissible in evidence of any fact reported to have occurred or of any statement reported to have been made at the meeting or proceeding.

EVIDENCE OF LAW OF FOREIGN COUNTRY

(13) Where the thing intimated purports to be the law of a foreign country printed or in re
to be
entry,

MAPS

5 Maps made under the authority of Government shall be admissible

RES JUDICATA

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9 The judgment of a Court of competent jurisdiction upon a matter directly in issue is admissible as evidence between the same parties, and those who represent them in interest upon the same matter, directly in issue in another cause, but not between any other parties, except as provided for in the next following section of the chapter

Illustrations

(a) A sues B for a horse, alleging that it was stolen from himself and that B brought it, knowing it to be stolen. Judgment is given in B's favour. B afterwards loses the horse, A finds it and B sues A for it. A in defence makes the same allegations as in the former suit. The judgment pronounced in the former suit is admissible as evidence in B's favour.

(b) A sues B for rent in the Court of the Collector, which has cognizance of such suits.

B retains the rent to prove the genuineness of A's suit. After

the mortgagee

such judgment was pronounced between the parties, but is not admissible as evidence against any person other than the parties thereto and those who represent them in interest, evidence of any other fact thereby appearing.

Illustrations

(a) A sues B for compensation for injury sustained through the negligence of C, who is B's agent. A obtains judgment. In a suit brought by B against C for compensation for loss sustained by B through C's negligence the amount which A has been adjudged

to pay is admissible as evidence in C's favour. In a subsequent suit B yields up to C certain lands prior suit, whereby B was directed to yield up possession to C as owner, is admissible in evidence.

(c) A is tried on the charge of having forged a deed of gift from B. He is acquitted. Afterwards C alleging the deed to be forged institutes a suit against A for certain lands of which B was the owner. The judgment pronounced in the session under it. The record of A's acquittal is admissible in evidence.

(d) A one of the brothers, B and C, who are co-owners of an estate, dies and his share is sold to D. D a portion of the land

E, claiming to be the adopted son and heir of A, sues for A's share of the land sold to D. E afterwards claiming as

heir
of A
sues
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to

in one of them for compensation were sustained. B sues the owners of the goods. The judgment is not admissible in evidence.

whom A alleges to be B's son at C is B's son and decrees payment by B of A's claims.

B dies, C alleging that he is B's son, sues the executor of D for a legacy of A 10000 rupees, D having by his will bequeathed that sum to every child of B. The judgment is not admissible in evidence that C is a son of B.

PROOF OF WRITINGS WHICH CONSTITUTE PRIMARY EVIDENCE

Apl

11 A writing which is not required by law to be attested, but which is alleged to have been written wholly or in part by a person, may be proved by the signature attached thereto, or so much of the same writing as is sought to be proved to be in the handwriting of the person by whom it is alleged to have been written or signed.

12 A written instrument which is required by law to be attested shall not (except in the cases provided for by section 20 of this chapter), be received as evidence unless the following rules are complied with —

(1) That execution of such instrument shall be proved by one attesting witness at the least, if there be an attesting witness alive and subject to the process of the Court by which the cause is tried and capable of bearing testimony.

(2) If no attesting witness is alive and subject to such process as aforesaid,

is alleged to have done so

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of and is produced from the proper custody, it shall be admissible in evidence
without proof of its execution or attestation

PROOF OF THE CONTENTS OF DOCUMENTS BY SECONDARY EVIDENCE

15 Evidence of the contents or purport of any written or printed document or of letters figures, or other mark not produced to the Court shall not be admissible except as provided by the rules next following —

(1) A copy of or extract from any proclamation, order or regulation issued by Her Majesty or by the Privy Council or any department of Her Majesty's Government

to be printed under the authority of
possession or to be certified to be true

(2) A copy of a record of any Court or of an entry in any public book or register which is proved to be a correct copy, or which purports to be under the seal of such Court or to be certified by the proper officer, shall be admissible as evidence of the existence and the contents of any such record or entry.

(3)
to have
being or
able character

(4) Evidence of the contents of a lost or when the person in whose custody the Court by which the cause is tried or is a document, or refuse, after due notice, to produce it, or when it is otherwise satisfactorily accounted for

EVIDENCE OF TERMS OF CONTRACT

16 Where a contract or grant or other disposition of property is in writing no evidence of the terms of such contract, grant, or disposition shall be received except the writing itself, or such evidence of its contents as may be admissible under the provisions of the last preceding section

Explanation The statement of a fact in any such document does not preclude the admission of oral evidence relating to the same fact, and where a suit is instituted for the purpose of setting aside or varying a document on the ground of a mistake in the writing thereof evidence may be received for the purpose of proving such mistake

PAPERS OF WHICH PROOF IS NOT REQUIRED

17 No proof shall be required of any paper purporting to be the order or possession of the British Crown, nor of any paper purporting to be a news paper or journal, or a copy of a private Act of Parliament printed by the King's printer.

18 No proof shall be required of any paper purporting to be a certificate certified by law made evidence of any particular fact, and to have been substantially in the form and purports to be executed in the manner directed by the law in that behalf.

19 No proof shall be required of the official position of any person certifying to the truth of any such paper as is mentioned in the last preceding rule, and to have been executed by a Court Judge, Magistrate, or the Majesty or of the Court.

20 An impression of any document made by a copying machine, or a representation of anything made by means of photography or of any other process which affords a reasonable assurance of correctness shall be admissible in evidence, wherever under these rules the production of the original may be dispensed with.

PERSONS WHO MAY TESTIFY

21 Those persons only shall be incompetent to testify who from tender years or for unsoundness of mind or from any other cause appear to the Judge to be incapable of understanding the questions addressed to them.

PRIVILEGE

22 A witness is not at liberty to disclose a communication—

(1) Where the communication is made to or by a person in a confidential relationship to the witness, and the witness has not been apprised of the confidential nature of the communication.

(2) Where the communication is made to or by a person in a confidential relationship to the witness, and the witness has not been apprised of the confidential nature of the communication.

(3) Where the communication is made to or by a person in a confidential relationship to the witness, and the witness has not been apprised of the confidential nature of the communication.

(4) Where the communication is made to or by a person in a confidential relationship to the witness, and the witness has not been apprised of the confidential nature of the communication.

(5) Where the communication is made to or by a person in a confidential relationship to the witness, and the witness has not been apprised of the confidential nature of the communication.

(6) Where the communication is made to or by a person in a confidential relationship to the witness, and the witness has not been apprised of the confidential nature of the communication.

(7) Where the communication is made to or by a person in a confidential relationship to the witness, and the witness has not been apprised of the confidential nature of the communication.

(8) Where the communication is made to or by a person in a confidential relationship to the witness, and the witness has not been apprised of the confidential nature of the communication.

(9) Where the communication is made to or by a person in a confidential relationship to the witness, and the witness has not been apprised of the confidential nature of the communication.

(10) Where the communication is made to or by a person in a confidential relationship to the witness, and the witness has not been apprised of the confidential nature of the communication.

(4) Where the disclosure demanded of the witness consisted in the production of documents belonging to another person who would not be bound to produce them if in his possession and who has not consented to their production.

24 A witness is not compellable to disclose to the Court any confidential communication which may have taken place between him and his legal professional adviser.

25 No communication made in furtherance of criminal purpose is protected from disclosure.

39 The foregoing Rules are to take effect subject to the provisions of the law for the time being in force regarding the registration of any document.

(Sd) ROMILLY (r s)
(Sd) EDWARD RYAN (r s)
(Sd) ROBERT LOWE (r s)
(Sd) ROBERT LUSH (L s)
(Sd) JOHN M MACLEOD (r s)
(Sd.) W. M JAMES (L s)

Date this 3rd day of August 1864

The Council met at Simla on Wednesday, the 23rd October, 1868

P1 EVENT

The Hon ble G N Taylor
The Hon ble H S Maine
The Hon ble John Strachey

The Hon'ble Sir Richard Temple, K C S I
The Hon'ble Col H W Norman, C D
The Hon'ble F R Cockerell

The Hon'ble Sir George Couper *Bar* C B

EVIDENCE BILL

[illegible]

The Hon'ble Mr. Mahto then introduced the Bill.

(5d) WHIRLLY SLOKS

Asst Secy to the Govt of India

Home Department (Legislature)

SIMILAR

The 25th October, 1868

ABSTRACT of Proceedings of the Council of the Governor General of India, assembled for the purpose of making Laws and Regulations under the Provisions of the Act of Parliament, 24 & 25 Vict. Cap 67

The Council met at Government House on Friday, the 4th December, 1868

PRESENT

His Excellency the Viceroy and Governor General of India, *presiding*

The Hon'ble G Noble Taylor	The Hon'ble Sir George Couper, <i>Bart</i> c n.
The Hon'ble H Summer Maine.	The Hon'ble Maharaja Sir Durg Bhoj
The Hon'ble John Strachey	Singh Bahadur, <i>K C S I</i> of
The Hon'ble Colonel H W. Norman	Balrampur
	The Hon'ble Gordon E Forbes
The Hon'ble F R Cockerell	The Hon'ble D Cowie.

The Hon'ble M J Shaw Stewart

The Hon'ble Shaw Stewart took the oath of allegiance, and the oath that he would faithfully discharge the duties of his office

EVIDENCE BILL

The Hon'ble Mr. law of Evidence be referred to a Select Committee, what was affirmed was the principle of the measure or the expediency of legislation within the general principles of the measure. This being understood, Mr Maine did not suppose that the council would ever seriously think of refusing to refer to a Select Committee a Bill prepared by the Indian Law Commissioners and therefore he should say very little in commending it to the council. The consideration of the measure was essentially a consideration of its detail and to that detail the Select Committee would doubtless give the most careful attention not, as Mr Maine hoped, for the purpose of way restriction or extension with regard to the special circumstances and facts of this country.

India where English law was not administered. "This customary law has not assumed any definite form, the Mahomedan Law, since the enactment of the new Code of Criminal Procedure has ceased to have any validity in the country Courts even in fact no fixed rules of evidence

"Has not assumed any definite form, the Mahomedan Law, since the enactment of the new Code of Criminal Procedure has ceased to have any validity in the country Courts even in fact no fixed rules of evidence

ould seem modified at ten or in force h, and the habit and No doubt English Courts could appeal to members of Council who had more experience in the Mofussil than he had, his honourable friends, Sir George Couper and Mr Cockerell, whether the Judges of

those Courts did not, as a matter of fact, believe that it was their duty to administer the English law of evidence as modified by the Evidence Acts. In particular, Mr. Maine would venture to state his impression that the fault of substance before a Maine Court was not that the Court was not in accordance with the English law, but that it was not in accordance with the Maine law.

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without fixed rules to go capricious administration of equal, or perhaps even a greater, be enforced as practically to leave the Court without the material for a decision. Mr. Maine would venture to state his impression that the fault of substance ordinarily committed in evidence, than in averting and in conjecturing the deration of what the circumstances. Another Judges were thus placed were excellent text books consisted more in refreshing knowledge which had been gained by forensic experience than in teaching knowledge. The commissioners would appear to be right in supposing that what was wanted for the greatest part of India was a liberalized version of the English law of evidence, enacted with authority and thus excluding caprice and superseding the use of text books by compactness and precision.

Another law, might be ascertained by the processes in use among men of science. There were certain continental systems of evidence which did make a pretension to include a process of the kind. And perhaps some such theory did pervade the rules of the English law with regard to presumptions which he was happy to see the Commissioners had discarded. But the English law of evidence as a whole made no claim to be such a system. It was justly regarded by English lawyers as a method of judicial administration,—the separation of fact, of the Judge from the Jury. It consisted mainly of rules of exclusion, that is, of rules for keeping certain kinds of evidence out of sight of the Judge of fact. Such a system, Mr. Maine apprehended could only be justified on two grounds. First of all, some evidence must be excluded. If all evidence were admitted, even if all relevant evidence were admitted, if everything were let in which tended to throw light on the matter, their furthest bearing on it. It being then, assumed that, in judicial enquiry, some sorts of evidence must necessarily be shut out, the English law excluded those descriptions of evidence which were found practical judgment the case not at a Maine Court to a mo

reject as absolutely inadmissible. But taking men, as you found them, and taking the average of judicial ability, it was really true that some kind of mind far deeper than was consistent with the English law had claim was own for distinguishing those kinds of would be presumptuous in Mr Maine to praise the Commissioners' proposals, but he ventured to say that, in his humble opinion, they had wisely availed themselves of the results of English experience but had wisely modified those results upon two considerations, which

a great degree by our social
: and much of it is admitted
different forms of property

in a country like India where the task of judicial investigation is attended with peculiar difficulties, and where it is the duty of the Judge in all civil and in some criminal cases to decide without a jury, there is greater danger of miscarriage from the mind of the Court being uninformed than from its being unduly influenced by the information laid before it."

Mr Maine had said that he would not comment on the details of the measure, but there was one point of detail which it was necessary to notice,

the omission in the Bill
Bill now in hands of Mr
Governor General before

last, it would control the present measure. But another reason must probably

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Now from the Commissioners' point of view, which was the purely judicial

interference from those papers. If effect were given to the Commissioners' suggestion either there would be an enormous evasion of the law, or that evasion would be prevented by recourse to the Criminal Courts for the enforcement of penalties to an extent which would itself be a greater evil than the sacrifice of any branch of revenue. Under these circumstances, the point has been considered by the Executive Government and Mr Maine had to state that, having regard to the fact that the stamp duties on commercial instruments were easily levied, and did not press hardly on the people, the Government was not prepared to give up that portion of the public receipts.

Cockerell, the Hon'ble Sir George Couper, and the Hon'ble Messrs Gordon Forbes, Shaw Stewart and the Mover

The council adjourned till the 11th December, 1868.

CALCUTTA,

The 11th December, 1868.

WHITLEY STOKES

Asst. Secy to the Govt of India.
Home Department (Legislative)

ABSTRACT of the Proceedings of the Council of the Governor-General of India, assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament, 21 & 25 Vict Cap 67.

The council met at Simla on Tuesday, the 6th September, 1870

PRESIDENT

His Excellency the Viceroy and Governor-General of India,
K P G C S I *Presiding*

His Excellency the Commander in Chief G C B G. C. S I

The Hon'ble John Strachey

The Hon'ble Sir Richard Temple

The Hon'ble J Fitzjames Stephen, Q C

The Hon'ble B H Ellis

Major General the Hon'ble H W Norman, C B

The Hon'ble F R Cockerell,

His Highness the Hon'ble Surajit Rajpal Hindustan Raja Rajendra
Sri Maharaja Dhuraj Siva Ram Singh Bahadur of Jaypur G C S I

EVIDENCE BILL

the Hon'ble Mr Strachey be added
and amend the Law of Evidence
an opportunity of saying a few words
The Evidence Act was drafted
two years ago. It
of the members
had in the Gazette
taken to it by
for general information. Objections of great weight were
many of the most distinguished lawyers in India, and no doubt, the subject
was one which required the most careful handling. It was impossible to
exaggerate the practical importance of the Bill, as it would regulate the most
important part of the procedure of every Court of Justice throughout the
Empire. Such a measure would of course require most careful consideration
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consequence was that the subject caused much trouble. As
a proof of this he (the mover) might observe that in Messrs Cowell and
Woodman's Indian Digest, which contained notes of cases decided in about
eight years, the title 'Evidence' filled no less than twenty-three royal octavo
pages in
five hundred
which the
which in
continue

The motion was put and agreed to

The Council then adjourned to the 20th September, 1870

WILLIAM STOKES

Secretary to the Council of the Governor-General
for making Laws and Regulations

SIMLA,

The 6th September, 1870

ABSTRACT of the Proceedings of the Council of the Governor General of India, assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament, 24 & 25 Vict Cap 67.

The Council met at Government House on Friday, the 18th November, 1870

PRESENT.

His Excellency the Viceroy and Governor General of India, A P G, C S I, <i>presiding</i>	
The Hon'ble John Strachey.	Major General, the Hon'ble H W
The Hon'ble Sir Richard Temple	Norman, C B
The Hon'ble J Fitzjames Stephen, Q C	The Hon'ble D Cowie
The Hon'ble B H Ellis	The Hon'ble Francis Stewart Chapman
	The Hon'ble F R Cockerell

EVIDENCE AND INSOLVENCY BILLS

The Hon'ble Mr Inglis be added to the

The Council adjourned to Friday, the 9th December, 1870

WHITLEY STOKES,

Secretary to the Government of India

CALCUTTA,

The 2nd December, 1870

ABSTRACT of the Proceedings of the Council of the Governor General of India, assembled for the purposes of making Laws and Regulations under the provisions of the Act of Parliament, 24 & 25 Vict Cap 67.

The Council met at Government House on Friday, the 9th December, 1870

PRESENT

His Excellency the Viceroy and Governor General of India,
A P G, C S I, *presiding.*

The Hon'ble John Strachey	The Hon'ble Francis Stewart
The Hon'ble Sir Richard Temple,	Chapman
The Hon'ble J Fitzjames Stephen,	
The Hon'ble B H Ellis	
Major Genl the Hon'ble W H	
Norman, C B	

SUNDRY BILLS

The Hon'ble Mr Robinson be added

For the Limitation of Suits

The motion was put and agreed to

The Council adjourned to Friday, the 16th December, 1870

WHITLEY STOKES,
Secretary to the Govt of India

CALCUTTA,

The 9th December, 1870

APPENDIX B.

DRAFT REPORT OF THE SELECT COMMITTEE

The Gazette of India, July 1, 1871, Part V, p 273

The following Draft Report of a Select Committee together with the Bill as settled by them, was presented to the Council of the Governor General of

India for the purpose of making Laws and Regulations on the 31st March, 1871 —

From Officiating Under Secretary, Home Department, No 423, dated 23rd October 1868, and enclosures.

From Assistant Secretary, Foreign Department, No 333, dated 12th December 1868, and enclosures

Remarks by the Hon'ble the Chief Justice of Bombay (no date)

Remarks by Hon'ble Justice Phear, dated 8th December, 1868

From Secretary to Chief Commissioner British Burma, No 525-1, dated 1st December 1868

From Assistant Secretary to Government of Bengal Legislative Department, No 37, dated 9th January 1869, and enclosure

From Deputy Judge Advocate General of the Army, dated 26th January, 1869, and enclosures

From Officiating under Secretary Home Department, No. 258 dated 17th February, 1869, forwarding memorial from Muk-tars and Revenue Agents, Howrah, dated 4th February 1869

From Secretary to Indian Law Commissioners, dated 6th February, 1869.

From Chief Secretary to Government Fort St George, No 120, dated 18th March 1869, and enclosures

From Secretary to Government of Bombay, No 2971, dated 7th September 1869, and enclosures

From Secretary to Government of Bombay, No 3188 dated 24th September 1869, and enclosures

Fifth Report of Her Majesty's Law Commissioners on the Bill

From Officiating Inspector-General of Police, Punjab, No 2657, dated the 28th September, 1870

From Secretary to Government of India Home Department, No 1892, dated 18th October 1870 forwarding letter from Chief Commissioner, British Burma, No 61, dated 15th August 1870, and enclosures

We the members of the Select Committee to which the Evidence Bill has been referred, have the honour to report that we have considered the Bill and the papers noted in the margin

After a very careful consideration of the draft prepared by the Indian Law Commissioners we have arrived at the conclusion that it is not suited to the wants of this country

We have recorded in a separate report the grounds on which this conclusion is based. They are in a few words that the Commissioners' draft is not sufficiently elementary for the officers for whose use it is designed, and that it assumes an acquaintance on their part with the law of England, which can scarcely be expected from them. Our draft, however, though arranged on a different principle from theirs, embodies most of its provisions. In general, it has been our object to reproduce the English Law of Evidence with certain modifications most of which have been suggested by the Commissioners though with some this is not the case

The English Law of Evidence appears to us to be totally destitute of arrangement. This arises partly from the circumstance that its leading terms are continually used in different sense, and partly from the circumstance that the Law of Evidence was formed by degrees out of various elements, and in particular out of the English system of pleading and the habitual practice of the Courts of Common Law. For instance, the rule that evidence must be confined to point in issue is founded on the system of pleading. The rule that hearsay is no evidence is part of the practice of the Courts but the two sets of rules run into each other in such an irregular way as to produce between them a result which no one can possibly understand systematically unless he is both acquainted with the principles of a system of pleading which is being rapidly abolished, and with the everyday practice of the Common Law of Courts, which can be acquired and understood only by those who habitually take part in it. This knowledge, moreover, must be qualified by study of text books which are seldom systematically arranged

3. Many other circumstances, to which we need not refer, have contributed largely to the general results, but we may illustrate the extreme intricacy of the law, and the total absence of anything like system which pervades every part of it, by a single instance. In Mr Pitt Jaylor's work on evidence it is stated that "ancient documents" when tendered in support of ancient possession, form the third exception to the rule which excludes hearsay. The question is whether A is entitled to a fishery. He produces a royal grant of the fishery to his ancestor. This fact the law describes as a peculiar kind of hearsay, admissible by special exception. Surely this is using language in a most un instructive manner.

This being the case, we have discarded altogether the phraseology in which the English text writers usually express themselves, and have attempted first to ascertain, and then to arrange in their natural order, the principles which underlie the numerous cases and fragmentary rules which they have collected together. The result is as follows:—

Every judicial proceeding is for some right or liability. If the liability to punishment of one party, and the liability of the other, to some form of relief

the object is to ascertain some right of property or of status, or to give examples. Of facts which cannot be perceived by the sense, intention,

which can, and those which cannot be perceived by the senses, it is superfluous to give examples. Of facts which cannot be perceived by the sense, intention, or by the senses, it is superfluous to give examples. But each class of facts is to be taken into the name of fact, and it is the intervention of the time, he had a certain time, he can testify that, at a certain time and place, he saw a particular person. He has, in each case, a present recollection of a past direct perception. Moreover it is equally necessary to ascertain facts of each class in judicial proceedings, and they must in each case be taken into account.

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the production of the original when the writing of the letter is a crime, there can be no reason why it should be satisfied with a copy when the writing of the letter is a motive for a crime. In short, the way in which a fact should be proved depends on the nature of the fact, and not on the relation of the fact to the proceedings.

Court is convinced of a fact is evidence. It is or circumstantial. We have not adopted

establishes a fact in issue whereas a collateral fact, evidence is classified not with reference to the use to which it is put but with reference to its component elements. We have shown that the mode in which a fact must be proved depends on its nature and not on the use to be made of it. Evidence, therefore, should be defined, not with reference to the use to which it is put, but with reference to its own nature.

Direct evidence is a statement of fact. Circumstantial evidence is something which tends to prove a fact. In the first, it means testimony.

In the second, it means a fact which is to serve as the foundation for an inference. It would indeed be quite correct, if this view is taken to say 'circumstantial evidence must be proved by direct evidence'. This would be a most clumsy mode of expression, but it shows the ambiguity of the word 'evidence' which means either

- (1) Words spoken or things produced in order to convince the Court of the existence of facts, or
- (2) facts of which the Court is so convinced and which suggest some inference as to other facts.

We use the word 'evidence' in the first of these senses only, and so used it may be reduced to three heads—(1) oral evidence, (2) documentary evidence, (3) material evidence.

Finally the evidence by which facts are to be proved must be brought to the notice of the Court and submitted to its judgment and the Court must form its mind.

to us to supply the ground work for the subject as follows—

1. Preliminary

to their nature by oral documentary or

2. The production of evidence

V Procedure

We have accordingly distributed the subject under these heads, in the manner which we now proceed to describe somewhat more fully.

1—PRELIMINARY

Under this head we have defined 'fact', 'facts in issue', 'collateral facts', 'documents', 'necessary inferences' and 'presumptions'.

Of oral evidence, we have defined it, and of documentary evidence, we have defined it, and of material evidence, we have defined it. We may now proceed to the principles already stated. We may now proceed to the principles already stated.

It will make perfectly clear several matters over which the ambiguity of the words as used in English law has thrown much confusion. The subject of circumstantial evidence will be distributed into its elements and I will be dealt with thus. The facts are—that he had a motive, he was in possession of the property, he wrote a letter indicating his guilt. I have found that all these are relevant facts, either as motive, incident of facts in issue, effects

of facts in issue or conduct influenced by facts in issue. On turning to Chapter III it will be seen that the statements displaying the possession of the property by the production of the property in Court, and by the direct oral evidence of some one who had seen it in the letter itself or seen

used
place in our draft, and we hope
in connection with it. Chapter
corresponds on the whole (though with some modifications) with the English
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So our definition does away with a confusion which arises out of the double meaning of the word evidence in the phrases "primary and secondary evidence". Primary evidence sometimes means a relevant fact, and at other times it means a copy or reproduction of a document by a copyist or by a photograph, or as spoken or written words.

to objection on the ground of obscurity or ambiguity but the word 'evidence' in it means not what we understood by evidence but a fact established by evidence from which a particular inference necessarily follows. Our phrase, therefore, harmonises with the rest of our draft whereas 'conclusive evidence' would not.

The definitions of proof proved and 'moral certainty' require some comment. The definition of proof is subordinate to that of 'proved' which is that a fact is said to be proved in two cases that is to say, when the Court after hearing the evidence respecting it—

- (2) thinks its existence so probable that a reasonable man ought under the circumstances of the particular case to act upon the supposition that it exists

This degree of probability we describe as 'moral certainty', and we prove that no fact shall be regarded as morally certain unless the evidence is such

pletely answered, for at bottom it is a question not of science but of prudence
and our definition of the word 'proved' is meant to make this plain. We
have however attached to it the negative condition that a reasonable man ought
to be convinced of other

which must have been committed either by him or by B unless a case exist which make it improbable that the offence was committed by B. We have not attempted to carry the matter further. We believe that in all countries and in this country more than in any other it is absolutely necessary to leave to judges a wide discretion as to the risk of error which they choose to incur in

coming to a decision, and that this is a matter of prudence and practice as to which rules ought to be laid down, rather with a view of guiding, than with a view of fettering discretion.

The last provision, in the preliminary part, to which we would call attention, defines in very general terms the duty of the Court in deciding questions of fact. Its generality appeared to us to render the preliminary rather than the concluding chapter, the proper place for it. This section declares that the duty of the Court is to determine question of fact by drawing inferences—

- (1) from the evidence given to the facts alleged to exist,
- (2) from facts proved to facts not proved,
- (3) from the absence of evidence which might have been given,
- (4) from the ad- and generally from

the duty of the Court. One of the many fallacies which owe their origin to the way in which it is used in the inference, whereas whatever is useful which the witness alleges to exist, do or did actually exist, is very often the most difficult to draw. The truth is, that to infer in one or other of the different shapes which we have stated is the great duty of the Judge in every case whatever and we have thought it desirable to point this out in the plainest and broadest way.

We have added two qualifications only to this general rule (1) that when the law declares an inference to be necessary the Court shall draw it, and shall not allow its truth to be contradicted, (2) that when the law directs the Court to presume a fact it shall infer its existence till the contrary appears. We have treated in detail of necessary inference and presumptions in other parts of the Bill.

II THE RELEVANCY OF FACTS

We have already pointed out the place which in our opinion belongs to this subject in the law of evidence. The question what facts you may prove obviously lies at the root of the whole matter and unless a plain and full answer is given to the question it is impossible to state the law systematically. The answer to the question is we think to be found in several of the wide exceptions which are made by English text writers to the wide exclusive rules—that evidence must be confined to the point in issue that hearsay is no evidence and that the best evidence must be given, though other parts of the same exceptions are to be found in different branches of the law. We think however that by a comparison and collection of these exceptions we have succeeded in forming a collection of positive rules as to the relevancy of facts to the issue which will be of great use to every man who has to have before him

- (2) facts in issue
- (a) all collateral facts which
- (b) form part of the same transaction,
- (c) are the immediate occasion cause or effect of fact in issue,
- (d) show motive, preparation or conduct affected by a fact in issue
- (e) are necessary to be known in order to introduce or explain a fact in issue
- (f) are necessary to be known in order to introduce or explain a fact in issue
- (g) are necessary to be known in order to introduce or explain a fact in issue
- (h) are necessary to be known in order to introduce or explain a fact in issue
- (i) are necessary to be known in order to introduce or explain a fact in issue
- (j) are necessary to be known in order to introduce or explain a fact in issue
- (k) are necessary to be known in order to introduce or explain a fact in issue
- (l) are necessary to be known in order to introduce or explain a fact in issue
- (m) are necessary to be known in order to introduce or explain a fact in issue
- (n) are necessary to be known in order to introduce or explain a fact in issue
- (o) are necessary to be known in order to introduce or explain a fact in issue
- (p) are necessary to be known in order to introduce or explain a fact in issue
- (q) are necessary to be known in order to introduce or explain a fact in issue
- (r) are necessary to be known in order to introduce or explain a fact in issue
- (s) are necessary to be known in order to introduce or explain a fact in issue
- (t) are necessary to be known in order to introduce or explain a fact in issue
- (u) are necessary to be known in order to introduce or explain a fact in issue
- (v) are necessary to be known in order to introduce or explain a fact in issue
- (w) are necessary to be known in order to introduce or explain a fact in issue
- (x) are necessary to be known in order to introduce or explain a fact in issue
- (y) are necessary to be known in order to introduce or explain a fact in issue
- (z) are necessary to be known in order to introduce or explain a fact in issue

- (i) show the existence of a relevant state of mind and body ,
 (j) show the existence of a series of which a relevant fact forms a part or
 (k) show (in certain cases) the existence of a given course of business

The remainder of the chapter throws into a positive shape what in English law forms the exceptions of the rule, excluding the various matters described as hearsay. They relate to—

- the conduct of the parties on previous occasions ,
 the statement of the parties on previous occasions ,
 previous judgments ,
 statements of third persons ,
 opinions of third persons

1 In reference to the conduct of the parties on previous occasions we embody in three sections the existing law of England as to evidence of character, with some modifications. We include, under the word character both reputation and disposition, and we permit evidence to be given of previous convictions against a prisoner for the purpose of prejudicing him. We do not see why he should not be prejudiced by such evidence, if it is true.

2 Under the head of the statement of the parties on other occasions we deal with the question of admissions, as to which we have not materially altered the existing law.

We have not thought it necessary to transfer from their present position

3 Previous judgments appear to follow naturally upon previous statements. Under this head we deal with the question of *res judicata*.

We have not attempted to deal with the question of the bar of suits by previous judgments between the same parties. This is a question of procedure rather than of evidence and will be properly dealt with whenever the Code of Civil and Criminal Procedure are re-enacted. We have on the other hand dealt is substantial accordance with the principles of the law of England with the question of the relevancy of judgment between strangers. For the sake of simplicity and in order to avoid the difficulty of defining or enumerating judgments in

in *Kunya*

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 alteration in the
 persons about
 or if they refer

then appears to the Court to have special means of knowledge. We have given several illustrations of this the strongest of which is suggested by Mr Pitt Taylor. A Captain about to sail on a voyage carefully examines the ship, declares his belief that she is seaworthy, and embarks on her with his family and property uninsured. Statements of this sort are surely most unlikely to be false. Evidence of such statements will be admissible under this section whether the person who makes them is living or dead, producible or not. Some of them would probably be admissible under the English rule which admits statements explanatory of conduct, but as the conduct explained must be relevant and as no clear definition of relevancy is given by the law of England it is very difficult to say how far his rule extends.

The next exception refers to statements made by a person who is dead or cannot be found or produced without unreasonable delay or expense. We

cause of the person's
 express an opinion
 of any relationship
 when they are made
 restrictions placed

by the law of England on the admission of dying declarations and statements about relationship, and as to the necessity that statements should be opposed to the pecuniary interest of the party making them, on the ground that they

statements in public or official
 previous judicial proceedings

■ The cases in which the opinion of third persons are relevant are dealt with in sections forty four to fifty

They declare to be relevant, the opinions of experts, opinion as to handwriting, opinion as to usages, and opinions as to relationship and the grounds of such opinions

This completes that part of the Bill which relates to the relevancy of minor importance, which modifies the law of England, part of the law which in the exceptions and the rules at the best evidence must in these rules include other

matters which we treat of under other heads

III—PROOF.

The second Chapter having decided what facts are relevant we proceed to show how a relevant fact is to be proved

In the first place, the fact to be proved may be one of so much notoriety that the Courts will take judicial notice of it, or it may be admitted by the parties. In either of these cases no evidence of its existence need be given Chapter III which relates to judicial notice, disposes of this subject. It is taken in part from Act II of 1855, in part from the commissioners' draft bill and in part from the law of England

If evidence has to be given of any fact that evidence must be either oral, documentary, or material, and we proceed in the following chapters to deal with the peculiarities of each of these three kinds of evidence. There is however, one topic which applies to all of them, of which we treat in Chapter IV. This is the distinction between primary and secondary evidence. As we have already shown, recognizing the obvious document is to secondary evidence document or to secondary evidence script-

We next I proof by the various kinds of evidence successively, namely oral, documentary and material. With regard to oral evidence, we provide, that it must in all cases whatever, whether it is primary or secondary, and whether the fact to be proved is a fact in issue or collateral, be direct. That is to say, if the fact to be proved is one that could be seen, it must be proved by some one who says he saw it. If it could be heard by some one who says he heard it and so with the other senses. We also provide that, if the fact to be proved is the opinion of a living and producible person, or the grounds on which such opinion is held, it must be proved by the person who holds that opinion on those grounds

We have, however, provided that if the fact to be proved is the opinion of an expert who cannot be called (which is the case in the majority of cases in this country) and if such opinion has been expressed in any published treatise, it may be proved

provisions of relevancy contained in a whole doctrine of hearsay in a

(1) the sayings and doings of third persons are, as a rule, irrelevant, so that no proof of them can be admitted,

(2) in some excepted cases they are relevant;

(3) every act done or words spoken which is relevant on any ground, must (if proved by oral evidence) be proved by some one who saw it with his own eyes or heard it with his own ears

With regard to the Chapters which relate to the proof of facts by documentary evidence, and in cases in which secondary evidence may be admitted, we have followed, with few alterations the existing law. We may observe that Chapter VII contains most of the presumptions which we have thought it right to introduce into the Bill. There are presumptions which in almost every

... of certified copies, gazettes, books
copies of depositions, etc

... evidence
... this
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IV THE PRODUCTION OF PROOF.

From the question of proof of facts, we pass to the question of the manner in which the proof is to be produced, and this we treat under the following heads —

The burden of proof (Chapter X)

Witness (Chapter XI)

... (Chapter XII)

XIII)

... we lay down the broad rules—the general burden of proof is on the party who, if no evidence at all were given, would fail, and that the burden of proving any particular fact is on the party who affirms it. These are the well established English rules, and appear to us reasonable in themselves. We have not followed the precedent of the New York Code in laying down a long list of presumptions, agreeing with the Indian Law Commissioners in the opinion that it is better not to fetter the discretion of the Judges. We have, ... such presumptions to a place in the code, as, ... the Judges might feel embarrassed. These ... from seven years' disappearance, and the presumption of partnership from the ... of acting as partners.

We may observe that which the laws of say arbitrary, provisions to common catastrophe of proof. The person

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... of witnesses, we have been careful ... practice of the Courts, which ... Procedure, is of necessity we have put into propositions on and cross examination of

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We have also considered it necessary, having regard to the peculiar ... of this country, to put into the hands of the Judge an amount of evidence which if it exists by law, is at in England. We expressly empower him to relevant or irrelevant, at any period of the ... if he thinks upon

... into the truth of the matter before him. The object of these provisions is to define simply and clearly the duties and the position of the Judges and those who practice before them. The English system under which the Bench and the Bar act together and play their respective parts independently, and the professional organization on which it rests, have no doubt great advantages; but in this country such a system does not as yet exist, and will not for a very long time. In most cases, generally speaking, the great ... and when a lawyer training as English

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we believe the existence of that power to be essential to the administration of justice, and we believe it to be liable to great abuses. The need for the power and danger of its abuse are proved by England's experience, but in this country—

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have according to the power of exposure as a means of gratifying malice. We

Such questions may relate either to matters relevant to the case, or to matters not relevant to the case. If they relate to matters relevant to the case, we think that the witness ought to be compellable to answer, but that his answer should not afterwards be used against him.

If they relate to matters not relevant to the case, except in so far as they affect the credit of the witness we think that the witness ought not to be compelled to answer. His refusal to do so would, in most cases, serve the purpose of discrediting him, as well as an express admission that the imputation conveyed by the question was true.

In order to protect witness against needless questions of this kind, we enact that any advocate who asks such questions without written instructions produced shall be guilty of a contempt of any such question, if asked by a party to the question of the written instructions are to publication of " " affected, and lions, or as fall

the India Penal Code, merely because they were made in the manner stated. Upon a trial for defamation it would of course be open to the person accused to show, either that the imputation was true or that it was for the public good that imputation should be made (Ex I, section 499, I P C), or that it was made in good faith for the protection of the interest of the person making it or of any other person (Ex 9). This is the only method which occurs to us of providing at once for the interests of a *bona fide* questioner and an innocent witness.

In the same spirit, we have empowered the Court, in general terms, to forbid indecent and scandalous inquiries unless they relate to facts in issue as defined above, or to matters absolutely necessary to be known in order to determine whether the facts in issue existed, and also to forbid questions intended to insult or annoy.

We prefer this general power to the sections drawn by the Commissioners, which forbid questions to marry inquiring whether that person her by the law to which he or she occurrence of sexual of Christians, where of bodily incapacity possible to imagine show that a married person was living with some one who was not her husband or his wife. A woman brings a false accusation against her servant. The motive is revenge for the discovery by the servant of an intrigue by the mistress. A married man comes to prove an able on behalf of his mistress. A woman sues a married man on a bond. He pleads that consideration was adultery. In all three cases, and so in many others which might be suggested, it appears to us that it would be absolutely necessary to admit such evidence as is referred to. As to questions relating to sexual intercourse between husband and wife, we think it better to forbid indecent and scandalous inquiries in

3. general terms, than to lay down a positive rule which in possible cases may produce hardship

Finally, we recommend that the Draft Bill, together with the report should be circulated for the opinion of the Local Governments.

J F STEPHEN
J STRACHEY
F S CHAPMAN
F R COCKFRELL
J F D INGLIS
W ROBINSON

The 31st March, 1871

ABSTRACT of the Proceedings of the Council of the Governor General of India assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament 24 & 25 Vict Cap 67.

The Council met at Government House on Friday, the 31st March, 1871

PRESENT

His Excellency the Viceroy and Governor General of India, K. P. G. V. S. I. Presiding
His Honour the Lieutenant Governor of Bengal

His Excellency the Commander-in-Chief, G. C. R., C. S. I.

The Hon'ble John Strachey	Colonel the Hon'ble R. Strachey, C. S.
The Hon'ble Sir Richard Temple	The Hon'ble F. S. Chapman
The Hon'ble J. Fitzjames Stephen, Q. C.	The Hon'ble J. R. Bullen Smith
The Hon'ble B. H. Ellis	The Hon'ble F. R. Cockrell
Major General The Hon'ble H. W. Norman, C. B.	The Hon'ble J. F. D. Inglis
	The Hon'ble W. Robinson, C. S.

INDIAN EVIDENCE BILL

The Hon'ble Mr Stephen in presenting the Report of the Select Committee on the Bill to define and amend the Law of Evidence said—

"My Lord,—I feel that I owe an apology to Your Lordship and the Council for requesting their attention to a second speech upon a purely legal subject after the one which I delivered a week ago, upon the Limitation Act. On this occasion, however, I have to explain the position of a measure perhaps as important as any that has been introduced by the Indian Legislature in its history. It affects the daily administration of both Civil and Criminal Justice in the whole country. Moreover, the subject itself is one of deep and wide general interest for a law of Evidence properly constructed would be nothing less than an answer to the problem, however, important."

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draw a draft Evidence Act which was sent out to this country and introduced and referred to a Select Committee by my friend and predecessor Mr. Maine. The Bill was circulated for opinion in the Local Governments and was pronounced by every legal authority to which it was submitted to be unsuitable to the wants of this country. In this view the committee were of persons which I need not state in detail on the present occasion as they are fully stated in the report which I present to-day. I may observe, however, that the principal reasons were, that the bill was not sufficiently clear, that it was in several respects incomplete, and that if it became law it would not supersede the necessity under which judicial officers in this country are at present placed of requiring themselves by means of English Law books with the English Law upon this subject.

The Commissioners' Draft, in fact, would hardly be intelligible to a person who did not enter upon the study of it with a considerable knowledge of the English Law. Under these circumstances a new draft was framed which we now propose to print and circulate, and on which I hope to receive the opinions of the Local Governments and High Courts, in the course of the summer, say, by next September, so that their criticisms may be deliberately weighed, and the measure may be finally disposed of by this time next year.

The report of the committee explains very fully the scheme of the Bill, and enters fully into the details of the proposed changes. I will not now enter upon a detailed discussion of the Bill, but I will confine myself to saying that I trust that those who will have to criticise the Bill will begin by studying the report, which has been drawn up with great care, and which, as well as the Bill itself, forms a connected and systematic whole.

The general object kept in view in framing the Bill has been to produce something from which a student might derive a clear, comprehensive, and distinct knowledge of the subject, without unneccessary labour, but not of course, without that degree of careful and sustained attention which is necessary in order to master any important and intricate matter. It is by this standard that the committee in general, and I in particular, as the member in charge of the Bill, desire that it may be tried.

With this reference to the Bill and the report of the committee, I proceed to discuss the general questions connected with the subject, and to mention a few of the leading features of the measure.

I suppose that the necessity which exists for the law upon the subject is certainly is. To some extent—it is far from being clear to what extent—and in some parts of the country—the English Law of Evidence appears to be in force in British India.

It is a very good system, but it is a very bad system in which a vast body of half-understood law, totally destitute of arrangement and of uncertain authority maintains a dead alive existence, is a state of things which it is by no means easy to praise.

Legislation being thus necessary, in what direction is legislation to proceed? A gentleman, for whose opinion I am much indebted to me the other day, has expressed his views upon all subjects connected with Indian Law and Legislation, I in consequence, said to me the other day, Bill would be very short one.

rules of evidence are hereby abolished. I venture to say that a system of evidence expressed is really held by a large number of persons who would not avow it so plainly. There is, in short, in the lay world, including in the expression the majority of Indian Civilians an impression that rules of evidence are technicalities invented by lawyers principally, for what Bentham called fee

Ap
 tical effect of these rules? I may perhaps be permitted to answer this by referring to a book which I published in 1851 on the Criminal Laws of England, and which contains, amongst other things, an analysis of several celebrated trials, English and French. One object of that analysis was to contrast the effect of the presence and absence of rules of evidence, and I think that any one who would take the trouble to compare those trials to their carefully, would agree with me in the conclusion, that the practical effect of the English rules of evidence in those cases, was to shorten the proceedings enormously and at the same time to consolidate and strengthen them. Keeping out nothing that a reasonable person would have wished to have before him as material for his judgment. The French system, on the other hand, which dispenses with all rules of evidence, got, at least in those cases, no other result from the want of them than floods of irrelevant gossip and collateral questions enough to confuse and bewilder the strongest hearer. Again, compare the proceedings of an ordinary Court of Criminal Justice with the proceedings of a Court of Criminal Justice in France. Evidence are far less strictly enforced, and the Criminal Court never gets very far from the wanders into questions far remote from the issues in the case. In some cases, the Court finds the offence. In a case affirmed, as letters of the nature, to he does not, an incalculable waste of time and energy, and a great weakening of the authority of his Court, is sure to follow. Active and zealous Advocates, who have no rules of evidence to restrain their zeal, would have it in their power to pervert the administration of justice to the basest purposes, and to inflict immense injury on every class connected with it, directly or remotely, that might be seen to scandals lost sight of, be excused for this Apperils int of perjury exceed in any country. In certain parts of the country, it was a point of honour for the friends of to swear f such case into which imputation and fema the popul evidence kept matters to a point appeared to me to till the very last rag of character had been man, and child, whose name was in any he French Courts display this evil, in an aggravated from. In the work to which I have already referred, will be found an account of the trial of a monk named Lecote for murder. If disposed of on the ground that it could hardly have taken more than an irrelevant explanation

"It is not however within reasonable limit pre eminent importance the discharge of his duty truth that even legislative evidence No doubt, it is of evidence shall have the and Judges to act upon

the system would grow up of all conceivable shapes of getting rid of the law of trial of justice by lawyers, and returning to the system of mere personal discretion

"It may be that some persons would like this policy, but I suppose it is one which I need not discuss.

So far, I have considered the rules of evidence merely as they conduce to the important practical objects of keeping proceedings to the point, and of protecting and supporting the Judges I must now say a few words on their value, as furnishing the Judge with solid tests of truth I fully admit that their value in

they are infallibly seen by the Courts in degrees,

and, but I think have a real, There are two things, all, and on admitted that

those problems are by far the most important of any, which a Judge has to

constantly present to the rules of evidence

that persons who are absolutely ignorant of these rules, may give a much better answer to each of these questions, than men to whom every rule of evidence is perfectly familiar I think, that a more or less distinct perception of this, coupled with impatience of the exaggerated pretensions which have sometimes been made on behalf of the rules of evidence, are the principal reasons for the distrust and dislike, with which they are regarded I think, is merely a particular instance which leads people to depreciate the value of the rules of evidence, and the opposition between them and the common sense of mankind depend upon nature.

nor will the best glasses make him see, and in just the same way, the best rules of evidence will not supply the place of natural sagacity, or of a taste for, and training in logic, but it no more follows that rules of evidence are useless as guides to truth than that shoes or glasses are useless as assistances to the feet and to the eyes The real use of rules of evidence in ascertaining the truth, consists in the fact that they supply tests warranted by very long and varied experience, as to two great facts, the relevancy of facts to the question to be decided by the Court, and the sort of evidence by which particular facts ought to be proved They may in the broadest and most popular form be stated thus:—"If you want to arrive at the truth as to any matter of fact of serious importance, observe the following maxims:—"First, if your belief in the principal fact which you wish to ascertain is to be, after all, an inference from the other facts, let those facts, at all events, be closely connected with the principal fact in some one of certain specific modes Secondly, never believe

in any fact whatever, whether it is the fact which you principally wish to determine, or whether it is a fact from which you propose to infer the existence of the principal fact, until you have before you the best evidence that is to be had, that is to say, if the fact is a thing done have before you some one who saw it done with his own eyes; if it was a thing said have before you some one who heard it said with his own ears; if it was a written paper, have the paper before you and read it for yourself.

"This exception—qualifications and explanations apart—is the true essence of the rules of evidence, and I think that no one will deny either that these rules are in themselves eminently wise, or that they are by no means so obvious and self-evident that the mere unassisted natural sagacity of judicial officers of every grade can be trusted to grasp their full meaning, and to apply them to the practical questions which arise in the administration of justice, with no assistance from any expert law. I do not wish to exaggerate, but I must add that I attach considerable moral and speculative value to these rules. If they are firmly grasped by Courts of Justice, and rigidly insisted upon in all practical matters which come before the Courts, they will gradually work their way amongst the people at large, and furnish them with tests by which to distinguish between credulity and rational belief, upon a great variety of matters which will be of vast importance. I ought to add that the good which they are calculated to effect, can be obtained only by erecting them into laws and rigorously enforcing them. When this is done I feel confident that experience will be continually adding to the proper proof of their value.

So far, I have tried to prove the proposition that the English rules of evidence are of real solid value and that they are not a mere collection of arbitrary subtleties which shackle, instead of guiding natural sagacity. I pass now to the next proposition, which is that these rules are expressed in a form so confused, intricate, and lengthy, that it is hardly possible for any one to learn their true meaning otherwise than by practice, an inconvenience which may be altogether avoided by a careful and systematic distribution. For the proof of this proposition, if indeed it is disputed I can only refer in general to the English text books on the subject. They form a mass of confusion which no one can understand until, by the aid of long practice he learns the intention of the different rules of which they heap together innumerable and often incoherent illustrations. I am familiar with the innumerable, and in many cases, like all other hand books, and are mere collections of purposes, and are more collections of generally relating to some very minute points they should be arranged rather with reference to vague catch words, with which the ears of lawyers are familiar, than with reference to theoretical principles which it has never been worth any lawyer's while to investigate.

"The condition of the law of evidence, as well as the condition of many other branches of the law of England, affords continual illustrations of the extraordinary intricacy and difficulty which arises from the combination of the very greatest practical sagacity with an absence of sound theory, or what is still worse, with the presence of unsound theory. No one who has not seen it could possibly imagine how obscure the meaning of a clever man may become when he is forced to squeeze it into the terms of a theory which does not fit it, and is not true. I will give one or two illustrations of my meaning. The expression 'he hears' in the English Court more is true, from which the obacure to the last degree. The objections to 'evidence' are words of the most uncertain kind, each of which may mean several different things. Thus 'hearsay' may mean what you have heard.

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"The word 'evidence' is also exceedingly ambiguous. It may mean that which a witness says in Court. It may mean, the fact to which he testifies, regarded as a ground work for further inference. Notwithstanding this, the phrase 'hearsay is no evidence,' being emphatic and easy to recollect stuck in the ears and in the minds of lawyers, and has been taken by many text-writers as the principle on which their statement of the most important branch of the law should be arranged. They accordingly took to describing as hearsay, every fact of which evidence was by law excluded, in short, they turned 'hearsay is no evidence' into, 'that which is not evidence is hearsay.' By describing evidence was an exception to follow me, a piece of other C bought E conveyed

the land to D and D conveyed it to C. Now, as D and E are not parties to the suit between A and B, and as A cannot of his own knowledge, know anything of the transaction between them, English text writers call the deeds between D and E 'hearsay' and according to Mr Pitt Taylor, the rule which permits such deeds to be given in evidence is the third exception to the rule which excludes hearsay. One of the Judges, if I am not mistaken, called such evidence 'written hearsay', and so indifferent are English lawyers in general, to the abuse of language for the sake of momentary convenience, that it probably never struck him, that this was a contradiction in terms. I think however, that it is hard to expect people to understand, bear in mind, and follow out in language in such a peculiar manner, To talk of hearing a document, is

"I now turn to the ambiguity of the word 'evidence', to which I have already referred. As I have said, and as I cannot mean a fact which suggests an inference. For of stolen goods is evidence of the inference of theft. At means what a witness actually says in Court or that which he produces in an instance we say 'the evidence which he gave was true'. I might occupy, I will not say the attention, but the time, of Your Lordship and the Council for hours, if I were to attempt to describe the amount of confusion and obscurity which the neglect of this simple and obvious distinction has thrown over the whole subject. I will content myself with observing that it produces the effect of giving a double meaning to every expression into which the word 'evidence' is introduced. Circumstantial evidence, 'hearsay evidence,' 'direct evidence,' 'primary evidence,' 'best evidence,' have each two sets of meanings, and the result is, that it is almost impossible to arrive at a clear and comprehensive knowledge of the whole subject, or to see how its various parts are related to each other without an amount of study, thought, and practical acquaintance with the actual working of the rules of evidence, which few people are in a position to bestow upon the subject.

"I may appear to be detuning the Council unduly upon merely verbal questions but I think that it is a common fault to under-rate the importance of accurate language particularly in regard to the fundamental terms of any particular branch of knowledge. In regard to law, I have not the least doubt that a very large proportion of the intricacy and difficulty which attach to it is due to the fact, that proper pains have never been bestowed on the definition of its fundamental terms. What could be made of Euclid, if we were not quite sure of our meaning when we spoke of a point, a line, a circle, parallel, and perpendicular? Such a defect would render geometry impossible, and the defect which I am alluding to in law, is not less fatal. It is a defect which measures believe as was strictly say, and in many cases attractive for its own sake; that its bulk might be diminished to a degree of which people in general have hardly any conception; that the expense of its administration, might be greatly diminished and that

comparative certainty might do away with a very large amount of needless and harassing litigation

"I shall now proceed to describe shortly, the principles on which the draft Bill of the committee has been framed. In the first place we thought it necessary to fix the sense in which the fundamental terms of the subject should be understood and for that purpose we define, 'fact', 'evidence', 'proof', 'proved' and some other words as to which I will content myself with a reference to the report. It seems to us that the remainder of the subject would fall under the following general heads —

- 1 The relevancy of fact to the issues to be proved
- 2 The proof of facts, according to their nature by oral, documentary, or material evidence
- 3 The production of evidence in Court
- 4 The duties of the Court, and the effect of mistaken admission or rejection of evidence

"These heads would we think be found to embrace and to arrange in their natural order all the subjects treated of by English text writers and Judges, under the general head of the Law of Evidence. I will say a few words on their relation to each other, and on each of them in turn

"The main feature of the Bill consists in the distinction drawn by it between the relevancy of facts and the mode of proving relevant facts. The neglect of this distinction by English text writers, no doubt, arises from the ambiguity in the word 'evidence' to which I have already referred and is the main cause of the extreme difficulty of understanding the English Law of Evidence systematically. I will shortly illustrate my meaning. A says 'Z committed murder'. First of all this is a fact—something which could be directly perceived by the sense of hearing and distinctly remembered afterwards. Now, whether this fact is or is not relevant in a particular case, depends upon a variety of circumstances. If the question is whether A was guilty of defaming Z by accusing him of murder? Or where Z had a motive for assaulting A because A said that he had committed murder or if Z is accused of murder and because A said that he had committed murder or if Z is accused of murder and the object is to show that, when A charged him with it he behaved as if he were guilty and in many other instances which might be put, the fact that A spoke those words is clearly relevant. But if the question is whether Z actually did commit murder the fact that A thought so or said so, generally speaking is not relevant. Supposing, however that the fact is relevant on some one of the grounds just mentioned or on any other ground whatever be the ground on which the words are relevant to the matter under inquiry, it is obvious that the words themselves ought to be satisfactorily proved, and the rule of English law—and we think it is a wise rule—is that they must be proved by the assertion of some witness, that he heard them said with his own ears. English text writers throw together with these two classes of rules under the head of Hearsay. They lay down the general rule that hearsay is no evidence, and that facts called hearsay are to be treated as necessary to look whether, in a particular case, it can be proved. One can find that it can be proved by this expression. Again you are told by which it is means not that the fact is improper. One can propose to prove the fact is improper. The English Law of Evidence is thrown into that the most important part of the English Law of Evidence is thrown into the most intricate and inconvenient of all possible forms that of a very wide negative, of most uncertain meaning qualified by a long string of exceedingly intricate exceptions.

"No one who has not gone through the process of learning the law by mere rule of difficulty up to almost any English text-writers, conscious of needless obscurity and of which he becomes gradually to almost any English text-writers, you tell me at enormous length, what is not evidence, but you nowhere tell

"The word 'evidence' is also exceedingly ambiguous. It may mean that which a witness says in Court. It may mean, the fact to which he testifies regarded as a ground work for further inference. Notwithstanding this, the phrase 'hearsay is no evidence,' being emphatic and easy to recollect, stuck in the ears and in the minds of lawyers, and has been taken by many text writers as the principle on which their statement of the most important branch of the law should be arranged. They accordingly took to describing as hearsay, every fact of which evidence was by law excluded, in short, they turned 'hearsay is no evidence' into 'that which is not evidence is hearsay.' They did not however, do this expressly. They did it by describing as exceptions to the rule excluding hearsay, all cases in which evidence was admitted of anything, which would have been excluded, but for such exceptions. This is so intricate a state—

and he produces the deeds by which E conveyed the land to D and D conveyed it to C. Now as D and E are not parties to the suit between A and B, and as A cannot of his own knowledge, know anything of the transaction between them, English text writers call the deeds between D and E 'hearsay' and according to Mr Pitt Taylor, the rule which permits such deeds to be given in evidence is the third exception to the rule which excludes hearsay. One of the Judges, if I am not mistaken, called such evidence 'written hearsay', and so indifferent are English lawyers in general, to the abuse of language for the sake of momentary convenience, that it probably never struck him, that this was a contradiction in terms. I think, however that it is hard to expect people to understand, bear in mind, and follow out in language in such a peculiar manner, 'To talk of hearing a document, is

'I now turn to the ambiguity of the word 'evidence', to which I have already referred. As I have just said, 'evidence' sometimes means a fact which suggests an inference. For instance, it is common to say,—Recent possession of stolen goods is evidence of theft, that is, the fact of such possession suggests the inference of theft. At other times and I think more frequently, 'evidence' means what a witness actually says in Court, or that which he produces. For instance we say 'the evidence which he gave was true.' I might occupy I will not say the attention, but the time, of Your Lordship and the Council for hours if I were to attempt to describe the amount of confusion and obscurity which the neglect of this simple and obvious distinction has thrown over the whole subject. I will content myself with observing that it produces the effect of giving a double meaning to every expression into which the word 'evidence' is introduced. Circumstantial evidence, 'hearsay evidence,' 'direct evidence,' 'primary evidence' 'best evidence,' have each two sets of meanings, and the result is, that it is almost impossible to arrive at a clear and comprehensive knowledge of the whole subject or to see how its various parts are related to each other without an amount of study, thought, and practical acquaintance with the actual working of the rules of evidence, which few people are in a position to bestow upon the subject.

"I may appear to be detaining the Council unduly upon merely verbal questions but I think that it is a common fault to under rate the importance of accurate language particularly in regard to the fundamental terms of any particular branch of knowledge. In regard to law I have not the least doubt that a very large proportion of the intricacy and difficulty which attach to it, is due to the fact, that proper pains have never been bestowed on the definition of its fundamental terms. What could be made of Euclid, if we were not quite sure of our meaning when we spoke of a point, a line, a circle, parallel, and perpendicular? Such a defect would render geometry impossible, and the defect

very, and in many cases attractive for its own sake, that its bulk might be diminished to a degree of which people in general have hardly any conception; that the expense of its administration, might be greatly diminished and that

comparative certainty might do away with a very large amount of needless and harassing litigation.

"I shall now proceed to describe shortly, the principles on which the draft Bill of the committee has been framed. In the first place we thought it necessary to fix the sense of the law, and for that purpose we have inserted in the first section the following general principle —

- 1 The relevancy of fact to the issues to be proved.
- 2 The proof of facts, according to their nature by oral, documentary, or material evidence
- 3 The production of evidence in Court
- 4 The duties of the Court, and the effect of mistaken admission or rejection of evidence

The e heels would we think be found to embrace and to arrange in their natural order all the subjects treated of by English text writers and Judges, under the general head of the law of evidence. I will say a few words on their relation to each other, and on each of them in turn.

The main feature of the Bill consists in the distinction drawn by it between the relevancy of facts and the mode of proving relevant facts. The neglect of this distinction by English text writers, no doubt, arises from the ambiguity in the word 'evidence' to which I have already referred and is the main cause of the extreme difficulty of understanding the English Law of Evidence systematically. I will shortly illustrate my meaning. A says 'Z committed murder'. First of all this is a fact—something which could be directly perceived by the sense of hearing and distinctly remembered afterwards. Now, whether this fact is or is not relevant in a particular case, depends upon a variety of circumstances. If the question is whether A was guilty of defaming Z by accusing him of murder? Or where Z had a motive for assaulting A because A said that he had committed murder or if Z is accused of murder, and the object is to show that, when A charged him with it, he behaved as if he were guilty, and in many other instances which might be put, the fact that A spoke those words is clearly relevant. But if the question is, whether Z actually did commit murder the fact that A thought so or said so, generally speaking is not relevant. Supposing, however that the fact is relevant on some one of the grounds just mentioned or on any other ground, whatever be the ground on which the words are relevant to the matter under inquiry, it is obvious that the words themselves ought to be satisfactorily proved, and the rule of English law—and we think it is a wise rule—is that they must be proved under the own eyes of the jury. It is not necessary to find that it can be proved by any other means. Again, you are told, means not that the fact proposed to prove the fact is improper. One of the most important parts of the English Law of Evidence is thrown into the most intricate and inconvenient of all possible forms that of a very wide negative, of most uncertain meaning qualified by a long string of exceedingly intricate exceptions.

"No one who has not gone through the process of learning the law by mere-
diffici- degree of needless obscurity and
conse- co of which he becomes gradually
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me what is evidence, except indeed in large compilations, which point out what has to be proved upon particular issues, and which it is impossible to read or remember, as it is to read or remember any other mere works of reference".

"I hope that we have been able to avoid this, and that the second chapter of the Bill will be found to state specifically, and in a positive form, what sorts of facts are relevant with the facts in issue to afford grounds for non-existence. I will not weary the referring to the fully illustrate them by reference to a passage from a trial in Scotland, which will relieve the dullness of which I refer is a short summary, by Mr. . . . believes that Mary, Queen of Scots, murdered her husband

"As Mr Froude was not a lawyer he certainly wrote, what I am about to read, without reference to the rules of evidence. I think the fact that he did, in fact, unconsciously observe them, illustrate very strongly the truth of my assertion, that they are nothing more than the result of experience and practical sagacity, thrown into a categorical shape. I need hardly say that I use the passage merely as an illustration, and without any notion of adopting Mr Froude's opinions or asserting the truth of his facts. I am concerned merely with their relevance.

"She (Mary) was known to have been weary of her husband, and anxious to get rid of him.

"(By our draft, facts which show motive are relevant)

'The difficulty and the means of disposing of him had been discussed in her presence, and she had herself suggested to Sir James Balfour to kill him

"(Facts which show preparation for a fact in issue, are relevant)"

"She brought him to the house where he was destroyed, she was with him two hours before his death

"(Facts so connected with the facts in issue as to form part of the same transaction, are relevant).

"And afterwards threw every difficulty in the way of any examination into the circumstances of his end"

"(Subsequent conduct, influenced by any fact in issue, is relevant)"

"The Earl of Bothwell was publicly accused of the murder

(Facts necessary to be known in order to introduce relevant facts, are relevant)

'She kept him close at her side; she would not allow him to be arrested; she went openly to Seton with him, before her widowhood was a fortnight old; he assented to his trial. Edinburgh was occupied by himself at the Tolbooth surrounded by the to the ground, because the Crown did not had been prevented from appearing"

"(Subsequent conduct influenced by any fact in issue is relevant)"

"A few weeks later, she married Bothwell, though he had a wife already, and when her subjects rose in arms against her and took her prisoner, she refused to allow herself to be divorced from him"

"(Subsequent conduct Motive)"

... letters which the Queen read, and to which she was present

'Finally Mr Froude observes 'In her own correspondence, though she denies the crime, there is nowhere the clear ring of innocence which makes its weight felt even when the evidence is weak which supports the words.'

The letters would be evidence under the section relating to admissions and Mr Froude's remark is in the nature of a criticism on them by a prosecuting counsel

"In English text books, so far as my of the same sort, are nowhere presented in come in for the most part, as exceptions to the points in issue. In fact they can be learned only by the practice of the Courts though they are as natural and lax as any rules need be, if they are properly stated

"From the rules which state what facts may be proved we pass to those which prescribe the manner in which a relevant fact must be proved. Passing over technical matters—such as the law relating to judicial notice, questions relating to public documents and the like—these rules may be said to be three in number, though, of course, numerous introductory rules are required to adopt for practice. They are these

'1 If a fact is proved by oral evidence, the oral evidence must be direct, that is to say, things seen must be deposed to by some one who says he saw them with his own eyes, things heard by some one who says he heard them with his own ears

'2 Original documents must be produced or accounted for, before any other evidence can be given of their contents

'3 When a contract has been reduced to writing it must not be varied by oral evidence

"These rules as I have said are subject to certain exceptions and require certain practical adjustments, but I do not think that any one who has had practical experience of the working of Courts of Justice will deny their substantial soundness or indeed the absolute practical necessity for enforcing them

Passing over certain matters which are explained at length in the Bill and report, I come to two points to which the committee attach the greatest importance as having peculiar reference to the administration of justice in India. The first of these rules refers to the part taken by the Judge in the examination of witnesses, the second to the effect of the improper admission or rejection of evidence upon the proceedings in case of appeal

"That part of which witnesses a Bar co operating duty than that of deciding questions which may arise between them. I hardly say that the state of things does not exist in India and that it would be a great mistake to legislate as if it did. In a great number of cases—probably the vast numerical majority—the Judge has to conduct the whole trial himself. In all cases he than he does it as he can, something re enquiry need accordingly questions upon any facts, of any witnesses at any stage of the proceedings respectively of the rules of evidence binding on the parties and their agents and we have Judges espe before him, not think th at the truth the light of suited to India and apathy in England

"With respect to the question of appeals, we have drawn a series of provisions, the object of which is to prevent mere mistakes in procedure from destroying the value of work properly done, as far as it goes. We have gone

through the various cases in which, as appears to us, the question of the improper admission or rejection or omission of evidence can arise; and have provided that, whenever any Appellate Court discovers the occurrence of any mistake, it shall not reverse the decision of the inferior Court, but shall either strike out what is redundant, or supply what is defective, as the case may be and give judgment accordingly.

I have addressed Your Lordship and the Council at great length, but not I think at greater length than the importance of the matter requires. I have only to add, that I propose to proceed with the Bill when the Government returns to Calcutta, and that I hope before that time, to receive the criticisms of the Local Governments upon the measure.

The council adjourned to Thursday, the 6th April, 1871

CALCUTTA,

The 31st March 1871

WHITELEY STOKES

Secy to the Govt of India

ABSTRACT of the Proceedings of the Council of the Governor General of India assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament 24 & 25 Vict Cap 67.

PRESENT

His Excellency the Viceroy and Governor General of India L R C M S I presiding

q c | The Hon'ble J F D English
The Hon'ble W Robinson c s r
The Hon'ble F S Chapman
The Hon'ble R Stewart

The Hon'ble J R Bullen Smith

SUNDRY BILLS

The Hon'ble Mr Stephen also moves that the Hon'ble Messrs Chapman Stewart and Bullen Smith, be added to Select Committees on the following Bills —

The next Bill, to which Mr Stephen had to refer, was the Evidence Bill. He need not say anything more about it than that it was under the consideration of the Committee. He however wished to make one or two remarks. In the first place, although the Bill had been sent for the opinion of the Local Governments some time in June last with a request that their opinion on the subject might be forwarded in the course of the autumn, many of the Local Governments had not yet sent in any opinions whatever on the subject. If

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attention in a
perfectly fair and friendly spirit, without the slightest notion of making any attack upon the independence or position generally of the honourable profession in question.

The Council adjourned to Friday, the 15th December, 1871,

CALCUTTA,

The 8th December, 1871

H S CUNNINGHAM,

Offy Secretary to the Council of the
Governor General for making
Laws and Regulations

SECOND REPORT OF THE SELECT COMMITTEE

Vide the Gazette of India, February 17th, 1872, Part V p. 91

The following: - - - - - It has settled
by them was prece - - - - - and for the
purpose of making L - - - - -

Petition from certain Barristers and Advocates of Bombay, dated the 8th August, 1871.

From Officiating Secretary
to Chief Commissioner of Coorg

No. 4, dated 4th October

1571, and enclosures

From certain pleadings of the High Court, Bombay, dated 4th October, 1971

From officiating Secretary to
Chief Commissioner of Cong.

No $\frac{409}{6}$, dated 9th October

1573, and enclosures

From the Chief Secretary
to Government of Fort Saint
George No 106, dated 21st
November 1871, and enclosures

From F J Ferguson Esq,
Barrister High Court, Calcutta,
dated 8th December, 1871
forwarding memorial from Pas-
teters and Advocates High
Court, Calcutta

From Secretary to Chief
Commissioner, Central Pro
2640

Prices, No $\frac{2640}{220}$, dated 6th

December 1871 and enclosures
From Officiating Secretary
to Government of Bengal
No 6326 I dated 13th Decem
ber, 1871, and enclosures

Memorial from certain mem
bers of the Madras Bar, dated
16th December, 1871

6 We have redrawn chapter VI, as to the exclusion of oral by documentary evidence so as to make the sections more distinct and complete. We believe that they now represent the English law on the subject, freed from certain refinements which would not be suitable for this country.

it de We have reconsi- follows —

Some presumptions have the effect of laying the burden of proof on particular persons, in particular cases. These we have dealt with in sections 103 to 111 of the new Bill. . . . that the existence of one

A conclusive presumption is a direction by law that the existence of one fact shall in all cases be inferred from proof of another. This we have provided for in sections 112 and 113.

We have substituted the term "conclusive proof" in these instances for that of "necessary inference," which was employed for the same purpose in the first draft of the Bill.

We the undersigned, the members of the select committee of the Council of the Governor General of India for the purpose of making Laws and Regulations, to which the Indian Evidence Bill was referred, have the honour to report that we have considered the Bill and the papers noted in the margin

I We have made some alterations in the arrangement of the Bill

2 We have omitted the definitions of 'proof' and 'moral certainty' and the sections relating to inferences to be drawn by the Court as being suitable rather for a treatise than an Act

3 We have omitted the provisions relating to material evidence, and have given a new and simpler definition of the difference between primary and secondary evidence

1 We have provided that the Act shall
apply to all judicial proceedings but not to
affidavits presented to any Court or officer,
nor to proceedings in arbitration

5 As to the effect of an admission by one of several persons jointly tried for an offence, we have omitted sections 120 and 121 of the original Bill. Instead of these we have provided on the time, of the admission, besides himself, it may be taken into consideration by the Court against all the persons whom it affects.

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the sections more distinct and complete. We
the English law on the subject, freed from
the English law for this country

not be suitable for this country
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I have addressed Your Lordship and the Council at great length, but not, I think at greater length than the importance of the matter requires. I have only to add, that I propose to proceed with the Bill when the Government returns to Calcutta, and that I hope before that time, to receive the criticisms of the Local Governments upon the measure.

The council adjourned to Thursday, the 6th April, 1871.

CALCUTTA,

The 31st March, 1871.

WHITELEY STOKES

Secy. to the Govt of India

ABSTRACT of the Proceedings of the Council of the Governor General of India, assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament, 24 & 25 Vict Cap 67.

PRESENT

His Excellency the Viceroy and Governor General of India *and* *present*

The Hon'ble John Strachey.

The Hon'ble J Fitzjames Stephen, Q C

The Hon'ble B H Ellis

The Hon'ble F R Cockerell

The Hon'ble J. F D English

The Hon'ble W Robinson, C S I

The Hon'ble F. S Chapman

The Hon'ble R Stewart

The Hon'ble J R Bullen Smith

SUNDRY BILLS

The Hon'ble Mr Stephen also moves that the Hon'ble Messrs Chapman Stewart and Bullen Smith, be added to Select Committees on the following Bills —

The next Bill, to which Mr Stephen had to refer, was the Evidence Bill. He need not say anything more about it than that it was under the consideration of the Committee. He however wished to make one or two remarks. In the first place, although the Bill had been sent for the opinion of the Local Governments some time in June last, with a request that their opinion on the subject might be forwarded in the course of the autumn, many of the Local Governments had not yet sent in any opinions whatever on the subject. He earnestly hoped that these opinions might be received in order that they might be fully considered. Some memorial had been received on the subject from individuals, specially from certain members of the Bar. He did not wish to discuss them. But he wished to say that he thought that the opinion of some persons, that the Council in General, and Mr Stephen in particular, were

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1107

make an attack upon the members of the Bar. Everything that

in question

The Council adjourned to Friday, the 15th December, 1871,

CALCUTTA,

The 8th December, 1871

H S CUNNINGHAM,

Offg. Secretary to the Council of the
Governor General for making
Laws and Regulations

SECOND REPORT OF THE SELECT COMMITTEE

Ap

Vide the Gazette of India, February 17th, 1872, Part V p 91

The following Report of a Select Committee together with the Bill as settled by them was presented to the Council of the Governor General of India for the purpose of making Laws and Regulations on the 30th January, 1872 —

Petition from certain Barristers and Advocates of Bombay, dated the 8th August, 1871.

From Officiating Secretary to Chief Commissioner of Coorg

3-C
No —, dated 4th October

1871, and enclosures

From certain pleaders of the High Court Bombay, dated 4th October, 1871

From Officiating Secretary to Chief Commissioner of Coorg.

403
No —, dated 9th October

1871, and enclosures

From the Chief Secretary to Government of Fort Saint George No 108 dated 21st November 1871, and enclosures

From F J Ferguson Esq Barrister High Court Calcutta dated 8th December, 1871 forwarding memorial from Barristers and Advocates High Court, Calcutta

From Secretary to Chief Commissioner, Central Pro

2840
vinces, No —, dated 6th

290
December 1871 and enclosures

From Officiating Secretary to Government of Bengal No 6326 J dated 13th December, 1871, and enclosures

Memorial from certain members of the Madras Bar, dated 16th December, 1871

6 We have redrawn chapter VI, as to the exclusion of oral by documentary evidence, so as to make the sections more distinct and complete. We believe that they now represent the English law on the subject, freed from certain refinements which would not be suitable for this country

7 Ex — on the ground that it did not — We have reconsidered this — follows —

Some presumptions have the effect of laying the burden of proof on particular persons, in particular cases. These we have dealt with in sections 103 to 111 of the new Bill

A conclusive presumption is a direction by law that the existence of one fact shall in all cases be inferred from proof of another. This we have provided for in sections 112 and 113

We have substituted the term "conclusive proof" in these instances for that of "necessary inference," which was employed for the same purpose in the first draft of the Bill

We the undersigned, the members of the select committee of the Council of the Governor General of India, for the purpose of making the Indian Bill and the papers noted in the margin

1 We have made some alterations in the arrangement of the Bill

2 We have omitted the definitions of "proof" and "moral certainty" and the sections relating to inferences to be drawn by the Court as being suitable rather for a treatise than an Act

3 We have omitted the provisions relating to material evidence, and have given a new and simpler definition of the difference between primary and secondary evidence

4 We have provided that the Act shall not to officer,

5 As to the effect of an admission by one of several persons jointly tried for an offence, we have omitted sections 120 and 121 of the old Act

whom it affects

on the ground that — We have reconsidered this — follows —

the burden of proof on particular persons, in particular cases. These we have dealt with in sections 103 to 111 of the new Bill

A conclusive presumption is a direction by law that the existence of one fact shall in all cases be inferred from proof of another. This we have provided for in sections 112 and 113

We have substituted the term "conclusive proof" in these instances for that of "necessary inference," which was employed for the same purpose in the first draft of the Bill

Other presumptions are in substance mere maxims by which the Court
 oug' Theoretically they are regarded
 in say, as artificial rules which
 the be drawn from facts Practi-
 cally, however so many exceptions are made that the difference between a
 presumption of law and a presumption of fact is hardly traceable The distinc-
 tion appears to us altogether unsuitable for this country and likely to produce
 great inconvenience if it were introduced We have accordingly, by section
 114 put all such presumptions in the position of mere presumptions of fact with
 which the Court can deal at its discretion

We have provided in the Chapter on the Burden of Proof that a Notifica-
 tion in the Gazette that a territory has been ceded to a Native State shall be
 conclusive proof of a valid cession at the date mentioned in the notification The
 object of this section is to set at rest questions which as we are informed have
 arisen on this subject

The subject of presumptions as to documents is a very special matter and
 appears to us to belong to the subject of documentary evidence under which
 head we have placed it in chapter V

Lastly many subjects are treated by English writers under the head of
 presumptions which appear to us to belong rather to different branches of the
 substantial law, e g the presumption that every one knows the law, is in reality
 a branch of substantive criminal law We have omitted such presumptions as
 these from the law of evidence, because they do not belong to the subject and
 because many of them are fictitious

8 The chapter on oaths has been omitted as they form the subject of a
 separate Bill now under discussion

9 We also recommend the omission of sections 141 to 145 of the old draft,
 as to questions to credit asked by barristers or pleaders and the substitution of
 provisions showing the principles by which the asking of such questions, should
 be regulated, and empowering the Court if any such question is improperly
 asked to report the circumstance to the authority to which the person asking it is
 subject

10 We have amended the words
 to ask questions The section as or
 authorize him to found his judgment
 rumours The intention of the section
 of inquiry for the discovery of relever
 makes this clear

11 We have omitted the chapter as to the duties of Judges, and Juries
 which will, we think be
 We have also omitted
 substituted for them
 in which the improper
 new trial or a reversal of a decision

Y. L. & C. POWER

and have
 the cases
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12 Subject to these amendments we recommend that the Bill be passed
 the Gazette, and
 1st from the date of

J F STEPHEN
 J STRACHEY
 J F D INGLIS
 W ROBINSON
 I S CHAPMAN
 H STEWART
 J R BULLFN SMITH
 F R COCKERELL

(1) Where the fact that a thing was spoken, stated or otherwise intimated is a question in issue

Illustration.

A says that he has been told by B that he saw C pick D's pocket. This is admissible in an action against B for slandering C.

(2) Where the fact that a person by or to whom the thing was spoken, written, stated or otherwise intimated was acquainted with such thing is a question in issue.

Illustration.

A writes to B "I have just heard that C has failed." The letter is received by B. The letter is not admissible as evidence that C had failed, but when it is proved that C had then failed, the letter is admissible as evidence that the failure was known to A at the place and time at which the letter was written and also that B was apprised of it.

(3) Where the thing spoken, written, stated or otherwise intimated tends to explain any act or conduct which is a question in issue.

Illustration.

(a) A says on a trial of C for robbing D's house that he heard B say to C "D's house has been robbed," and that thereupon C fled. This evidence is admissible.

(b) On a trial of B for robbing C's house it is proved that B fled immediately after the robbery. A witness is produced who says that he heard A tell B before B fled that a warrant had been issued for his arrest under a decree of Civil Court.

(c) A says on a trial of B for murdering C that he saw B with intent to kill him. It is alleged that B fled immediately after the murder. Evidence of what A said at the time is admissible.

(d) A sues B for compensation for maliciously causing him to be apprehended on a charge of theft. Evidence that a theft had been committed in B's house, and that C told B that he saw A running away immediately after, is admissible.

(e) A says that he has heard B say to C "Pay me the 1,000 rupees which you owe me." This is no evidence that C owed B 1,000 rupees, but it is evidence that B claimed 1,000 rupees, and it is admissible in order to introduce evidence of what C said or did with respect to the claim.

(f) A is charged with sedition, and is proved to have combined with B for seditious purposes. Evidence of words spoken by B, while taking part in a riot in furtherance of those purposes, is admissible against A.

(4) Where the thing was spoken, written or stated or otherwise intimated by a party to the suit, or some one whom he represents in interest, and it is sought to be used against him.

Illustration.

(a) A brings a suit against B to establish a right of way across B's field. Evidence that C from whom B derives his title to the land, had, while owner, admitted A's right of way is admissible.

(b) A writes to B "I have just heard that C will ship for him 100 bales of cotton in the direction from C to B." Evidence of what A said is admissible.

(c) In a suit between B and C, strangers to A, it is stated that A had become insolvent. This deed is admissible in evidence to show that A had become insolvent, but it is not admissible against A for that purpose.

(5) In the cases provided for by ss 368, 369, 370 and 371 of the Code of Criminal Procedure.

(6) Where the evidence tendered consists in a statement which was received in evidence in a former judicial proceeding relating to the same subject and between the same parties, or those whom they represent in interest, and where the person who made such statement has since died or become incapable of giving evidence, or where his presence cannot be procured, provided that if such person were present his evidence would be admissible.

have affixed the same character in India, in all other cases we have provided that the judgment of a Court of competent jurisdiction upon a matter directly in issue shall be admissible as evidence between the same parties upon the same matter directly in issue in another cause, but that it shall not be conclusive.

of presumption, which are in our

universally applicable. It may perhaps be made a question how far the subject of evidence falls under the head of substantive law and some of the sections of the draft now submitted certainly border closely on Procedure. Those sections, however, have not found a place in either of the Codes of Procedure. We have therefore inserted them (with some modifications), as it appears to us that the law of evidence ought not to be left to be gleaned from many different enactments but that so much of it as it not to be found in the Codes of Procedure should be, as far as possible comprised in the rules of law now submitted by us and that the enactments which will thus be rendered unnecessary should be repealed.

We recommend the repeal of so much of Acts II of 1855 and XIX of 1853 as remains unrepealed, except section 26 of the latter enactment, which does not form part of the law of evidence.

EVIDENCE.

MEANING OF WORDS

1 In the following rules the word "Court" shall be taken to comprise all Courts of justice, civil or criminal, and all persons having by law or consent of parties authority to take evidence; and the word "cause" shall be taken to comprise all judicial proceedings, civil or criminal.

Admissibility

2 Whenever any evidence is said to be admissible it is not meant that it is only that the weight, if any, which the decision is to be allowed to it, upon any question in issue in a cause, the material to the decision of the cause, is admissible, unless it is excluded by the rules contained in this chapter.

3 No statement by a witness of anything, or founded upon anything spoken or written, or otherwise intimated by another person, and no statement contained in any document, is admissible in evidence, except in the cases specified in the rules hereafter contained.

Illustrations

(a) B says that D told him that he had robbed C. The evidence is admissible, unless it is excluded by the rules contained in this chapter.

(b) A gives evidence that B robbed C. Being asked how he knows it he says that he knows it only because C told him so. The evidence which has been admitted must be struck out.

(c) A says that B was alive on the 1st January 1860. It appears that A does not speak to this fact of his own knowledge; but that he learnt it from a letter written to him by C, or from a newspaper or from a printed book, or a picture. In each of these cases A's statement is not admissible as evidence that B was alive on that day.

1860. Being asked how he knows it he says that he knows it only because C told him so. The evidence which has been admitted must be struck out.

of any religious or charitable foundation, or the meaning of any technical or conventional words or terms or of any words or terms used in particular districts, or to any matter of public or general interest, and was spoken, written, stated, or otherwise intimated by a person who has since died or become incapable of giving evidence, or whose presence cannot be procured

Illustrations.

(a) A, in order to show the religious tenets of a certain sect, tenders in evidence a manuscript treatise, proved to have been written by a deceased member of the sect. The treatise is admissible.

(b) It is a disputed fact in a suit whether a certain spot is or is not a public landing place. Statements made on the subject by A and B, now deceased, otherwise intimated by a person who has since died or become incapable of giving evidence or whose presence cannot be procured, provided that such person was a member of the family or had otherwise special means of knowledge.

Illustrations

(a) It is a disputed fact in a suit whether A is the son of B. A statement made on the subject by C, who was a nurse in B's family about the time of A's birth, is admissible in evidence.

(b) A alleging that he is the son of B deceased, produces the following book stating A's birth brothers since deceased

A deed executed by B

A also produced witnesses who state that B told them that A was his son. The contents of the documents and the testimony of the witnesses are admissible in evidence.

(1) Where the following recital contained in a after the passing of the Government appears to be the of British

(1) there has been a public meeting or published in any newspaper or journal

Explanation. Such report is not admissible in evidence of any fact reported to have occurred or of any statement reported to have been made at the meeting or proceeding.

EVIDENCE OF LAW OF FOREIGN COUNTRY

(13) Where the thing intimated purports to be the law of a foreign country, and appears to be contained in books or documents purporting to be printed on published under the authority of the Government of that country, or in reports of decisions of the Courts of such country

MAPS

5 Maps made under the authority of Government shall be admissible

RES JUDICATA

6 A ... shall have effect provided the parties never were dissolved is proof that the were such a of war is proof that

9 The judgment of a Court of competent jurisdiction upon a matter directly in issue is admissible as evidence between the same parties, and those who represent them in interest upon the same matter, directly in issue in another cause, but not between any other parties, except as provided for in the next following section of the chapter

Illustrations

(a) A sues B for a horse, alleging that it was stolen from himself and that B brought it, knowing it to be stolen. Judgment is given in B's favour. B afterwards loses the horse. A sues B for it. A in defence makes the same allegations as in the former suit. The judgment pronounced in the former suit is admissible as evidence in B's favour.

(b) A sues B for rent in the Court of the Collector, which has cognizance of such suits. B sets up in defence a mortgage under which he is entitled to retain the rent in satisfaction of the interest of his mortgage. A disputes the genuineness of the mortgage, but the Court pronounces it genuine and dismisses A's suit. Afterwards B sues A in the Zillah Court to recover the amount due to him upon the mortgage. A disputes the genuineness of the mortgage. The judgment of the Collector is admissible in evidence.

10 A decree of a Court of competent jurisdiction is admissible as evidence that such judgment was pronounced between the parties, but is not, as against any person other than the parties thereto and those who represent them in interest, evidence of any other fact thereby appearing.

Illustrations

(a) A sues B for compensation for injury sustained through the negligence of C who is B's agent. A obtains judgment. In a suit brought by B against C for compensation for loss sustained by B through C's negligence the judgment is admissible as evidence of the amount which A has been adjudged to pay, but not as evidence of B's negligence.

(b) A sues B for compensation, because B yielded up to C certain lands which B held as guardian of A who was then a minor. A decrees passed in a prior suit whereby B was directed to yield up possession to C as owner is admissible in evidence.

(c) A is tried on the charge of having forged a deed of gift from B. He is acquitted. Afterwards C alleging the deed to be forged institutes a suit against A for certain lands, of which A has obtained possession under it. The record of A's acquittal is not admissible in evidence.

(d) A one of the three Hindu brothers, undivided in estate, dies and his brothers, B and C alleging that they are his heirs sell to D a portion of the land which they possessed jointly with A.

E, claiming as the adopted son and heir of A, sues for A's share of the land sold to D and obtains a decree in his favour. He afterwards claiming as such adopted son of A, sues B and C for A's share of the land which remains in their possession. The decree in the former suit is not admissible in evidence.

(e) A alleging that he is the only brother and the heir of B deceased, sues C for possession of B's land. The Court declares A's title established and decrees that C shall yield up the land to him.

Afterwards B claims to be the son and heir of B, and sues A for possession of the lands. The decree in the former suit is admissible in evidence that A had obtained such a decree but not admissible as evidence that he was entitled to the land as the only brother and heir of B.

(f) Two ships come into collision whereby A, a passenger in one of them is injured and B's goods are destroyed. A obtains a decree for compensation from the owners of the other ship on the ground that the injuries were sustained by him through the negligence of their captain. B sues the owners of the same ship for compensation for the loss of his goods. The judgment is not admissible in B's suit as evidence of the captain's negligence.

(g) A sues B for maintenance of C a minor, whom A alleges to be B's son. B denies that C is his son. The Court decides that C is B's son and decrees payment by B of A's claims.

B dies, C alleging that he is B's son, sues the executor of B for a legacy of A 10,000 rupees, D having by his will bequeathed that sum to every child of B. The judgment is not admissible in evidence that C is a son of B.

PROOF OF WRITINGS WHICH CONSTITUTE PRIMARY EVIDENCE.

Ap

11 A writing which is required by law to be attested, but which is to have been written wholly in the cases provided for by the cases provided for by given as evidence, unless the signature attached thereto, or so much of the same writing as is sought to verify, be proved to be in the handwriting of the person by whom it is alleged to have been written or signed.

12 A written instrument which is required by law to be attested shall not (except in the cases provided for by section 20 of this chapter), be received as evidence unless the following rules are complied with —

(1) That execution of such instrument shall be proved by one attesting witness at the least, if there be an attesting witness alive and subject to the process of the Court by which the cause is tried and capable of bearing testimony.

(2) If no attesting witness is alive and subject to such process as aforesaid

is alleged to have done so

13 In order to ascertain, whether a signature writing or seal is genuine any signature or seal is genuine

14 If a writing is produced from the proper custody, it shall be admissible in evidence without proof of its execution or attestation

PROOF OF THE CONTENTS OF DOCUMENTS BY SECONDARY EVIDENCE

15 Evidence of the contents or purport of any written or printed document

16 A copy of a record of any Court or of an entry in any public book or register, which is proved to be a correct copy, or which purports to be under the authority of the proper officer, shall be admissible as such record or entry

(2) A copy of a record of any Court or of an entry in any public book or register, which is proved to be a correct copy, or which purports to be under the authority of the proper officer, shall be admissible as such record or entry

17 Evidence of the contents of a written or printed document shall be admissible, when it has been proved that the document had been destroyed or lost, or when the person in whose custody the document was, after due notice, to the Court by which the cause is tried or is to be tried, or refuses, after due notice, to produce the document, or otherwise satisfactorily accounted for

EVIDENCE OF TERMS OF CONTRACT

18 A contract shall be received in evidence if it is in writing and is proved to be a correct copy, or which purports to be under the authority of the proper officer, shall be admissible as such record or entry

19 The provisions of the last preceding section.

9 The judgment of a Court of competent jurisdiction upon a matter directly in issue is admissible as evidence between the same parties, and those who represent them in interest upon the same matter, directly in issue in another cause; but not between any other parties, except as provided for in the next following section of the chapter.

Illustrations.

(a) A sues B for a horse, alleging that it was stolen from himself and that B brought it, knowing it to be stolen. Judgment is given in B's favour for it. A in defence judgment pronounced

of such suits. B sets up in defence a mortgage under which he is entitled to retain the rent in satisfaction of the interest of his mortgage. A disputes the genuineness of the mortgage, but the Court pronounces it genuine and dismisses A's suit. Afterwards B sues A in the Zillah Court to recover the amount due the mortgage. The

that such judgment was pronounced between the parties, but is not, as against any person other than the parties thereto and those who represent them in interest, evidence of any other fact thereby appearing

Illustrations

(a) A sues B for compensation for injury sustained through the negligence of C, who is B's agent. A obtains judgment. In a suit brought by B against C for compensation for loss sustained by B through C's negligence, the amount which A has been adjudged

use B yielded up to C certain lands in minor. A decree passed in a old up possession to C as owner, is admissible in evidence

(a) A sues B on the account against record. from B. He institutes a suit under it. The

brother which dies and his ion of the land

land share of the ds claiming as hich remains e in evidence eceived, suc established and

or possession e that A had entitled to

one of them, for compensation were sustained owners of the lgment is not

nor, whom A alleges to be B's son that C is B's son and decrees for a legacy every child

PROOF OF WRITINGS WHICH CONSTITUTE PRIMARY EVIDENCE

11 A writing which is not required by law to be attested, but which is alleged to have been signed by a specified person or to have been written wholly or in part by a specified person, shall not, except in the cases provided for by sections 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, be produced as evidence unless the signature of the person by whom it is alleged to have been written or signed is proved to the satisfaction of the Court by the testimony of one or more persons who are alive and subject to the cross-examination, and capable of bearing

12 A writing which is required by law to be attested shall not be received in evidence unless it is proved to the satisfaction of the Court by the testimony of one or more persons who are alive and subject to the cross-examination, and capable of bearing

13 In order to ascertain, whether a signature writing or seal is genuine or not, it is necessary to produce evidence to the satisfaction of the Court that the person who executed the instrument was the same person who is alleged to have done so.

14 In order to ascertain, whether a signature writing or seal is genuine or not, it is necessary to produce evidence to the satisfaction of the Court that the person who executed the instrument was the same person who is alleged to have done so.

15 Evidence of the contents or purport of any written or printed document, or of letters, figures or other mark not produced to the Court shall not be admissible, except as provided by the rules next following —

PROOF OF THE CONTENTS OF DOCUMENTS BY SECONDARY EVIDENCE

(1) A copy of, or extract from any proclamation, order, or regulation issued by Her Majesty or by the Privy Council or any department of Her Majesty, or any other Gazette or paper provided that such copy purports to be printed by the Government printer or to be printed under the authority of the Legislature of any British Colony or possession or to be certified to be true by the proper officer.

(2) A copy of a record of any Court or of an entry in any public book or register, which is proved to be a correct copy or which purports to be under the seal of such Court or to be certified by the proper officer shall be admissible as evidence of the existence of the record or entry.

(3) A copy of a record of any Court or of an entry in any public book or register, which is proved to be a correct copy or which purports to be under the seal of such Court or to be certified by the proper officer shall be admissible as evidence of the existence of the record or entry.

(4) Evidence of the contents or purport of any written or printed document, or of letters, figures or other mark not produced to the Court shall not be admissible, except as provided by the rules next following —

EVIDENCE OF TERMS OF CONTRACT

If a contract is in writing
it shall be received
as evidence

Explanation The statement of a fact in any such document does not preclude the admission of oral evidence relating to the same fact, and where a suit is instituted for the purpose of setting aside or varying a document on the ground of a mistake in the writing thereof evidence may be received for the purpose of proving such mistake

PAPERS OF WHICH PROOF IS NOT REQUIRED

17 No proof shall be required of
to be the London Gazette or the Gazette
any Presidency or Lieutenant Governor
or possession of the British Crown, nor of any paper purporting to be a news
paper or journal, or a copy of a private Act of Parliament printed by the King's
printer.

18 No proof shall be required of any paper purporting
to be a certificate, certified
dence of any particular
form and purports to be
behalf
law made evi
stantially in the
the law in that

19 No proof shall be required of the official position of any person certifi-
fying to the truth of any such paper as is mentioned in the last preceding rule

exec
Mag
the

21 An impression of any document made by a copying machine, or a
representation of anything made by means of photography or of any other
process which affords a reasonable assurance of correctness shall be admissible in
evidence, wherever under these rules the production of the original may be
dispensed with

PERSONS WHO MAY TESTIFY

22 Those persons only shall be incompetent to testify who from tender
years or for unsoundness of mind or from any other cause appear to the Judge to
be incapable of understanding the questions addressed to them

PRIVILEGE

23 A witness is not at liberty to disclose a communication—

(1) When such communication relates to affairs of State and its disclosure

ried couple to the
in dispute in a
n who made it
est, has not been

obtained for such disclosure

(3) Where the witness is a barrister, attorney, or vakil, or an interpreter
or intermediate agent between the client and his legal adviser, and the commu-
nication was made by the client or principal to the witness in the course of his
professional employment or consists of any advice given or conveyed by the
witness to the client or principal, or of the contents of any docu-
ment which the witness has acquired
from the client or principal
to the disclosure of such

communication

(4) Where the disclosure demanded of the witness consisted in the pro-
duction of documents belonging to another person who would not be bound to
produce them if in his possession and who has not consented to their production

24 A witness is not compellable to disclose to the Court any confidential
communication which may have taken place between him and his legal pro-
fessional adviser

25 No communication made in furtherance of criminal purpose is
protected from disclosure.

26 A witness summoned to produce a document shall, if the same be in his custody possession of power be bound to bring it into Court, notwithstanding any objection to the right of the party calling for it to compel its production or to its being real, or being put in as evidence or to the disclosure of its contents

The validity of any such objection made by the person bringing the document shall be determined by the Court and for the better determination thereof it shall be lawful for the Court to receive any admissible evidence which such person may give respecting it and it shall also be lawful for the Court unless the document relates to affairs of State, to inspect it and, if necessary to employ any person to interpret it under the obligation of an oath, and not to disclose its contents except to the Court, unless the Court shall decide that the document is to be given in evidence

27 No question shall be put to a married person which substantially amounts to --

the knowledge of the fact inquired after is necessary to the determination of some question between the husband and wife according to the law to which they are subject

EXAMINATION OF WITNESSES.

29 The party at whose instance a witness is examined may, with the permission of the Court, cross examine such witness to test his veracity, in the same manner as if the witness had not been called at his instance, and may be allowed to show that the witness has varied from a previous statement made by him

30 In order to repel an attack on the testimony of a witness, any former statement made by such witness when the fact took place the fact shall be admissible in evidence

that it was made at the time and place at which it shall be stated in

31 It shall not be lawful to ask a witness, in order to test his credit, any question the answer to which might criminate or might tend directly or indirectly to criminate him or might expose or tend, directly or indirectly to expose him to a penalty or forfeiture of any kind But a witness shall not be excused from answering any question relevant to the matter in issue in any cause upon the ground that the answer to such question would or might criminate or tend to criminate him, or that it would or might expose, or tend to expose him to a penalty or forfeiture Provided that no answer which a witness shall be compelled to give shall, except for the purpose of punishing him for wilfully giving false evidence in such cause, be used as evidence against him in any criminal proceeding

32 No evidence is admissible to contradict the answers of a party or a witness as to matters affecting his character, but not otherwise bearing upon any question in issue in the cause Evidence of statements or conduct of a witness inconsistent with his evidence as to a question directly in issue in a cause is not excluded by this rule

Illustrations

(a) A claim against an underwriter is resisted on the ground of fraud The party claimant is asked whether in a former transaction he had not made a fraudulent claim He denies it Evidence is not admissible to show that he had made such fraudulent claim

(b) In a suit by A against B, a witness for A is asked whether he had not been dismissed from B's service for misconduct He denies it Evidence is tendered to contradict the witness's statement as to such dismissal The evidence is not admissible

26 A witness summoned to produce a document shall, if the same be in his custody possession or power, be bound to bring it into Court, notwithstanding any objection to the right of the party calling for it to compel its production or to its being read, or being put in as evidence or to the disclosure of its contents

The validity of any such objection made by the person bringing the document shall be determined by the Court and for the better determination thereof it shall be lawful for the Court to examine any admissible evidence which such

any person to interpret it under the obligation of an oath, and not to disclose its contents except to the Court, unless the Court shall decide that the document is to be given in evidence

27 No question shall be put to a married person which substantially amounts to imputing adultery to him or her

28 a husband or wife, when the knowledge of the fact inquired after is necessary to the determination of some question between the husband and wife according to the law to which they are subject

EXAMINATION OF WITNESSES.

29 The party at whose instance a witness is examined, may, with the permission of the Court, cross examine such witness to test his veracity, in the same manner as if the witness had not been called at his instance, and may be allowed to show that the witness has varied from a previous statement made by him

30 In order to repel an attack on the testimony of a witness, any former statement made by a witness when the fact took place shall be admissible in evidence

dence that such deposition or statement was made, and that it was made at the time and place, and under the circumstances, if any, which shall be stated in the certificate or on the face of the deposition or statement

31 It shall not be lawful to ask a witness, in order to test his credit, any question the answer to which might criminate, or might tend directly or indirectly, to criminate him, or might expose or tend, directly or indirectly to expose him to a penalty or forfeiture of any kind. But a witness shall not be excused from answering any question relevant to the matter in issue in any cause upon the ground that the answer to such question would or might criminate, or tend to criminate him, or that it would or might expose, or tend to expose him to a penalty or forfeiture. Provided that no answer which a witness shall be compelled to give shall, except for the purpose of punishing him for wilfully giving false evidence in such cause, be used as evidence against him in any other cause

32 A witness who answers a question which is inconsistent with his previous statement, shall not be excluded by this rule

of a party or a
bearing upon any
duct of a witness
in a cause

Illustrations.

(a) A claim against an underwriter is resisted on the ground of fraud. The party claimant is asked whether in a former transaction he had not made a fraudulent claim. He denies it. Evidence is not admissible to show that he had made such fraudulent claim.

(b) In a suit by A against B, a witness for A is asked whether he had not been dismissed from B's service for misconduct. He denies it. Evidence is not admissible to contradict the witness's statement as to such dismissal. The evidence is not admissible.

(c) In an action against A for goods sold to him by B, a witness for B deposes that he saw the goods sold and delivered. He is asked whether he has given a different account of the transaction. He denies it. Evidence is tendered to show that he had given such different account. This evidence is admissible. He is asked whether he dealt with B as the owner of the goods. He denies it. Evidence is tendered to show that he had so dealt with B. He is asked whether he had not given a false account of another transaction not in issue in the cause. He denies it. Evidence is tendered to show that he had given such false account. This evidence is not admissible.

(d) The witness is asked whether he had not received money or a promise of some favour from B to induce him to give his evidence. He denies it. Evidence is tendered to show that he had received such money or promise. This evidence is admissible.

33 A witness may be cross-examined as to previous statements made by him in the cause with respect to the subject matter of the case, but if it is intended to contradict such witness, before such contradicting proof can be given, he must be called to more parts of the writing which are to be used for the purpose of so contradicting him. The Court may, however, at any time during the trial, require the production of the writing for its inspection, and may thereupon make such use of it for the purpose of the trial as may seem fit.

34 A witness may while under examination refer to any writing made by himself at the time of the transaction concerning which he is questioned or so soon afterwards that it may be reasonably presumed that the transaction was fresh in his memory, and he may for the like purpose refer to a writing made by any other person and read at the time of such transaction, or so soon afterwards that it may be reasonably presumed that the transaction was fresh in his memory. Such evidence may be given by the adverse witness upon it.

NUMBER OF WITNESSES

35 A Court if satisfied by the evidence given may in any case act on such evidence although there may be only the testimony of one witness. This rule is not rendered inapplicable by the circumstance that the testimony is given in a trial for giving false evidence, or for any other offence against the law.

TAKEN

(1) The law in any part of British India.

(2) All public Acts of the Parliament of the United Kingdom of Great Britain and Ireland, and all local and personal Acts directed by Parliament to be judicially noticed;

(3) The names, titles and functions of the persons filling for the time being any police office in any part of India.

(4) All divisions of time, the geographical divisions of the world, the territories under the dominion of the British Crown, the commencement, continuation, and termination of hostilities between the British Crown and any other state and the existence, title and national flag of every sovereign or state.

of its own members, or assistants and of all Advocate is authorized by law

to act before it

SOURCES OF INFORMATION TO WHICH COURTS MAY REFER

36 A Court may, in order to inform itself in respect of any of the matters mentioned in sections 34 and 37 of these Rules and also on matters of Public History, Literature, Science, or Art refer, for the purposes of evidence, to such

consideration.

(Sd) ROMILLY (L. S.)
 (Sd.) EDWARD RYAN (I. S.)
 (Sd) ROBERT LOWE (L. S.)
 (Sd) ROBERT LUSH (L. S.)
 (Sd) JOHN M. MACLEOD (I. S.)
 (Sd.) W. M. JAMES (L. S.)

Date 1 this 3rd day of August 1864

ABSTRACTS of the Proceedings of the Council of the Governor General of India, assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament, 21 & 23 Vict. Cap. 67

The Council met at Simla on Wednesday, the 23rd October, 1863

PRESIDENT

His Excellency the Viceroy and Governor General of India, presiding,
 His Excellency the Commander-in-Chief, G. C. S. I., K. C. B.

The Hon'ble G. N. Taylor
 The Hon'ble H. S. Maine.
 The Hon'ble John Strachey

The Hon'ble Sir George Couper, Bart, C. B.

EVIDENCE BILL

The Hon'ble Mr. Maine moved for leave to introduce a Bill to define and amend the Law of Evidence. He said it would probably be sufficient to state that the Bill was no subject in which the Commission had received any suggestion. He said that the Commission had fully stated in the report which had been circulated to Hon'ble Members, the reasons for all the changes which the Bill proposed to introduce. If he got leave to introduce the Bill, he proposed to ask His Excellency the President to suspend the rules for the conduct of business, and on their suspension, to introduce the Bill with a view to its publication in the *Gazette*. There was no use in now dilating to any length on the technical subjects comprised in the Bill.

The motion was put and agreed to.
 The Hon'ble Mr. Maine then asked the President to suspend the Rules for the Conduct of Business.
 The President declared the Rules suspended.
 The Hon'ble Mr. Maine then introduced the Bill.

(Sd) WHITLEY STOKES,

Asst Secy to the Govt of India,
 Home Department (Legislative)

SIMLA,
 The 23rd October, 1864

ABSTRACT of Proceedings of the Council of the Governor General of India, assembled for the purpose of making Laws and Regulations under the Provisions of the Act of Parliament, 21 & 23 Vict Cap 67.

The Council met at Government House on Friday, the 4th December, 1863

PRESENT

His Excellency the Viceroy and Governor General of India, presiding

The Hon'ble G Noble Taylor					
The Hon'ble H Summer Maine.					
The Hon'ble John Strachey					
The Hon'ble Colonel H W. Norman					Bahrampur
	c n.				
The Hon'ble F R Cockerell				The Hon'ble Gordon E Forbes	
				The Hon'ble D Cowie	
				The Hon'ble M J Shaw Stewart.	

The Hon'ble Shaw Stewart took the oath of allegiance and the oath that he would faithfully

those Courts did not, as a matter of fact, believe that it was their duty to administer the English law of evidence as modified by the Evidence Acts. In the course of the argument, it was argued by a barrister that when a case was argued by a barrister, the evidence was pressed on the Court, and the Court was to decide whether to accept or reject evidence.

It appeared to Mr. Maine, by less in admitting evidence which under strict rules of evidence, like a case, should be an exception to the substance of the evidence, than in averting the mind from the admission of evidence, and in conjecturing the derivation of what the evidence was. Another objection lay in the necessity which the Missouri Judges were thus placed under of depending upon English text-books. They were excellent text books of the English law of evidence, but their usefulness consisted more in refreshing knowledge which had been gained by forensic experience than in teaching knowledge. The commissioners would appear to be right in supposing that what was wanted for the greatest part of India was a liberalized version of the English law of evidence, enacted with authority and thus excluding caprice and superseding the use of text books by compactness and precision.

the law of evidence is a whole regarded by English lawyers as never come into existence administration, the separation of the Judge from the Jury. It consisted mainly of rules of exclusion, that is, of rules for keeping certain kinds of evidence out of sight of the Judge of fact. Such a system, Mr. Maine apprehended could be justified on two grounds. First of all, some evidence was so irrelevant that it was not worth the trouble of bringing it before the Court. Secondly, some evidence was so irrelevant that it was not worth the trouble of bringing it before the Court.

the law of evidence is a whole regarded by English lawyers as never come into existence administration, the separation of the Judge from the Jury. It consisted mainly of rules of exclusion, that is, of rules for keeping certain kinds of evidence out of sight of the Judge of fact. Such a system, Mr. Maine apprehended could be justified on two grounds. First of all, some evidence was so irrelevant that it was not worth the trouble of bringing it before the Court. Secondly, some evidence was so irrelevant that it was not worth the trouble of bringing it before the Court.

reject as absolutely inadmissible. But taking men, as you found them and taking the average of judicial ability, it was really true that some kind of evidence did produce an impression on the mind far deeper than was consistent with their real weight. The good sense to which the English law laid claim was evidenced by the tests which it laid down for distinguishing those kinds of evidence from those which remained. It would be presumptuous in Mr Maine to praise the Commissioners' proposals, but he ventured to say that in his humble opinion, they had wisely availed themselves of the results of English experience but had wisely modified those results upon two considerations, which they stated as follows —

'The English practice has been moulded in a great degree by our social and legal institutions and our forms of procedure; and much of it is inimitable.'

in some criminal cases to decide without a jury, there is greater danger of miscarriage from the mind of the Court being uninformed than from its being unduly influenced by the information laid before it."

Mr Maine had said that he would not comment on the details of the measure, but there was one point of detail which it was necessary to notice.

But another reason must probably have appeared to be
Third Report on

stamp duty in
legal instruments

penalty in case of infringement would be more conducive to the public interest. For the present we have thought it our best course to frame our rules irrespective of the stamp law.

Now from the judicial point of view, there is the course proposed. But when we consider the course proposed, we find that Mr Cockerell had had a vast mass of papers before him relating to the operation of the Stamp law. Mr Maine appealed to him whether the following was not a fair inference from those papers: If effect were given to the Commissioners' suggestion, the Government would alter the law on stamp duty.

Executive Government and Mr Maine had to state that that was the fact that the stamp duties on commercial instruments were easily levied, and did not press hardly on the people, the Government was not prepared to give up that portion of the public receipts.

—The Hon ble Mr
Hon ble Messrs Gordon

CALCUTTA,
The 4th December, 1868

WHITLEY STOKES
Asst Secy to the Govt of India
Home Department (Legislative)

ABSTRACT of the Proceedings of the Council of the Governor General of India assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament, 21 & 25 Vict Cap 67

The council met at Simla on Tuesday, the 6th September, 1870

PRESENT

His Excellency the Viceroy and Governor-General of India,
K P G C S I Presiding

His Excellency the Commander in Chief G C B G C S I

The Hon'ble John Strachey

The Hon'ble Sir Richard Temple

K C S I

The Hon'ble J Fitzjames Stephen, Q C

The Hon'ble B H Ellis

Major General the Hon'ble H W Norman, C B

The Hon'ble P R Cockerell

His Highness the Hon'ble Surajmal Rajpal Hialistan Raja Rayandra
Sri Maharaja Dhury Sri Ram Singh Bahadur of Jajpur G C S I

EVIDENCE BILL

The Hon'ble Mr Strachey has had the opportunity of saying a few words on a measure of the very highest importance. The Evidence Act was drafted by the Indian Law Commissioners, and sent out to this country two years ago. It was introduced by Mr Maine, referred to a Committee several of the members of which had now ceased to belong to the Council and published in the Gazette for general information. Objections of great weight had been taken to it by many of the most distinguished lawyers in India and no doubt, the subject was one which required the most careful handling. It was impossible to exaggerate the practical importance of the Bill as it would regulate the most important part of the procedure of every Court of Justice throughout the Empire. Such a measure would of course require most careful consideration.

state of great uncertainty. No one knew of Evidence did, and how far the consequence was that the subject of proof of this he (the mover) mentioned Woodman's Indian Digest, which contained notes of cases decided in about eight years the title Evidence filled no less than twenty three royal octavo pages in the Digest. There was the state of things for which a remedy. It was one which ought not to be permitted to continue.

The motion was put and agreed to.

The Council then adjourned to the 20th September, 1870

WHITLEY STOKES

Secretary to the Council of the Governor General
for making Laws and Regulations

SIMLA,

The 6th September, 1870

L E A -191

ABSTRACT of the Proceedings of the Council of the Governor General of India assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament, 21 & 25 Vict Cap 67

The Council met at Government House on Friday, the 18th November, 1870

PRESENT

His Excellency the Viceroy and Governor General of India, K I O, C S I, <i>presiding</i>	
The Hon'ble John Strachey	Major General, the Hon'ble H W
The Hon'ble Sir Richard Temple	Norman, C B
The Hon'ble J Fitzjames Stephen, Q C	The Hon'ble D Cowie
The Hon'ble B H Ellis	The Hon'ble Francis Stewart Chapman
	The Hon'ble F R Cockerell

EVIDENCE AND INSOLVENCY BILLS

The Hon'ble Mr Stephen moved that the Hon'ble Mr Inglis be added to the Select Committee.

The Council adjourned to Friday, the 9th December, 1870

WHITLEY STOKES,

Secretary to the Government of India

CALCUTTA,

The 2nd December, 1870

ABSTRACT of the Proceedings of the Council of the Governor General of India, assembled for the purposes of making Laws and Regulations under the provisions of the Act of Parliament, 24 & 25 Vict Cap 67

The Council met at Government House on Friday, the 9th December, 1870

PRESENT

His Excellency the Viceroy and Governor General of India, K P O, C S I, *presiding*

The Hon'ble John Strachey	The Hon'ble Francis Stewart
The Hon'ble Sir Richard Temple, K C S I	Chapman
The Hon'ble J Fitzjames Stephen, Q C	
The Hon'ble B H Ellis	
Major Genl the Hon'ble W H Norman, C B	

SUNDRY BILLS

The Hon'ble Mr Robinson be added

The motion was put and agreed to

The Council adjourned to Friday, the 16th December, 1870

WHITLEY STOKES
Secretary to the Govt of India

CALCUTTA,

The 9th December, 1870

APPENDIX B

DRAFT REPORT OF THE SELECT COMMITTEE

The Gazette of India, July 1, 1871, Part V, p 273

The following Draft Report of a Select Committee together with the Bill as settled by them, was presented to the Council of the Governor General of

India for the purpose of making Laws and Regulations on the 31st March, 1871—

From Officiating Under Secretary, Home Department, No 423, dated 23rd October 1869, and enclosures

From Assistant Secretary, Foreign Department, No 337, dated 12th December 1869, and enclosures

Remarks by the Hon'ble the Chief Justice of Bombay (no date)

Remarks by Hon'ble Justice Phear, dated 8th December, 1869

From Secretary to Chief Commissioner British Burma, No 525—1, dated 1st December 1868

From Assistant Secretary to Government of Bengal Legislative Department, No 37, dated 9th January 1869, and enclosure

From Deputy Judge Advocate General of the Army dated 26th January, 1869, and enclosures

From Officiating under Secretary Home Department, No 258 dated 17th February 1869, forwarding memorial from Mukats and Revenue Agents, Howrah, dated 4th February 1869

From Secretary to Indian Law Commissioners, dated 6th February, 1869

From Chief Secretary to Government Fort St George, No 120 dated 18th March 1869 and enclosures

From Secretary to Government of Bombay No 2971 dated 7th September 1869 and enclosures

From Secretary to Government of Bombay, No 3188 dated 24th September 1869 and enclosures

Fifth Report of Her Majesty's Law Commissioners on the Bill

From Officiating Inspector General of Police Punjab No 2637 dated the 28th September, 1870

From Secretary to Government of India Home Department, No 1892, dated 18th October 1870 forwarding letter from Chief Commissioner, British Burma, No 61, dated 10th August 1870, and enclosures

We the members of the Select Committee to which the Evidence Bill has been referred, have the honour to report that we have considered the Bill and the papers noted in the margin

After a very careful consideration of the draft prepared by the Indian Law Commissioners we have arrived at the conclusion that it is not suited to the wants of this country

We have recorded in a separate report the grounds on which this conclusion is based. They are in a few words that the Commissioners' draft is not sufficiently elementary for the officers for whose use it is designed, and that it assumes an acquaintance on their part with the law of England, which can scarcely be expected from them. Our draft, however, though arranged on a different principle from theirs, embodies most of its provisions. In general it has been our object to reproduce the English Law of Evidence with certain modifications most of which have been suggested by the Commissioners though with some this is not the case

The English Law of Evidence appears to us to be totally destitute of arrangement

particular out of the usual practice of the pleading and the habitual practice of the Courts of Common Law. For instance, the rule that evidence must be confined to point in issue is founded on the system of pleading. The rule that hearsay is no evidence is part of the practice of the Courts but the two sets of rules run into each other in such an irregular way as to produce between them a result which no one can possibly understand systematically unless he is both acquainted with the principles of a system of pleading which is being rapidly abolished, and with the everyday practice of the Common Laws of Courts, which can be acquired and understood only by those who habitually take part in it. This knowledge moreover, must be qualified by study of text books which are seldom systematically arranged.

Many other circumstances, to which we need not refer, have contributed largely to the general results, but we may state that "ancient documents" when tendered in support of ancient possession, form the third exception to the rule which excludes hearsay. The question is whether A is entitled to a fishery. He produces a royal grant of the fishery to his ancestor. This fact the law describes as a peculiar kind of hearsay admissible by special exception. Surely this is using language in a most uninstructional manner.

This being the case, we have discarded altogether the phraseology in which the English text writers usually express themselves, and have attempted first to ascertain, and then to arrange in their natural order the principles which underlie the numerous cases and fragmentary rules which they have collected together. The result is as follows—

Every judicial proceeding whatever has some right or liability. If the proceeding is for the punishment of the person, the object is to ascertain some right of property or of status, or the right to some form of relief.

Some facts are upon and arise out of facts, and some are not. Those which cannot be perceived by the senses, it is superfluous to give.

Some facts are fraud, good or bad, of facts.

Some facts are such that they can be directly perceived by the senses. A man can testify to the fact that, at a certain time, he saw a certain person. On the same grounds as that on which he can testify that at a certain time and place, he saw a particular man. He has, in each case, a present recollection of a past direct perception. Moreover it is equally necessary to ascertain facts of each class in judicial proceedings, and they must in each case be proved in one of two different ways.

Some facts are such that they can be proved by themselves, and some by inference from other facts. For example, if it is proved that A is the eldest son of B, there arises of necessity the inference that A is by the law of England the heir-at-law of B, and that he has such rights as that status involves. From the fact that A caused the death of B under certain circumstances and with a certain intent, there arises of necessity the inference that A is guilty of murder by the law for murder. In all cases, the facts in issue unless they are proved by themselves, must be proved by inference from other facts.

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the production of the original when the writing of the letter is a crime, there can be no reason why it should be satisfied with a copy when the writing of the letter is a motive for a crime. In short, the way in which a fact should be proved depends on the nature of the fact, and not on the relation of the fact to the proceedings.

The instrument by which the Court is convinced of a fact is evidence. It is often classified as being either direct or circumstantial. We have not adopted this classification.

If a fact is established by direct evidence, evidence is classified, not as being direct or circumstantial, but as being used for writing or for proof.

but as being used for writing or for proof which a fact must be proved depends on the nature of it. Evidence, therefore, should be defined, not with reference to the nature of the fact which it is to prove, but as being used for writing or for proof.

the phrase is thus used, the word

clumsy mode of expression, which means either

(1) Words spoken or things produced in order to convince the Court of the existence of facts, or

(2) facts of which the Court is so convinced and which suggest some inference as to other facts.

We use the word 'evidence' in the first of these senses only and so used it may be reduced to three heads—(1) oral evidence, (2) documentary evidence; (3) material evidence.

Finally the evidence by which facts are to be proved must be brought to the notice of the Court and submitted to its judgment and the Court must form its own opinion.

to us to supply the ground work for a subject as follows —

issue

to their nature by oral, documentary or

The production of evidence

V Procedure

We have accordingly distributed the subject under these heads, in the manner which we now proceed to describe somewhat more fully.

1—PRELIMINARY

Under this head we have defined "fact" "facts in issue", "collateral facts", "document" "evidence" "proof" and "proved", "necessary inference" and "presume". We have also laid down in general terms the duty of the Court. Of our definitions of "fact" "facts in issue" "collateral facts", and "evidence", we need say no more than that they are framed in accordance with the principles already stated. We may however, shortly illustrate the effect of the definition of evidence.

It will make perfect sense the words as used in English of circumstantial evidence with thus. The question he had a motive displayed by statement of his feet, that he was a crime shows foot marks which correspond with it and that he wrote a letter indicating his guilt. On turning to Chapter II, it will be found that all these are relevant facts, either as motive, incident of facts in issue, effects

3. Many other circumstances to which we need not refer, have contributed largely to the general results but we may illustrate the extreme intricacy of the law and the total absence of anything like a system which pervades every part of it by a single instance. In Mr Pitt Taylor's work on evidence it is stated that ancient documents when tendered in support of ancient possession form the third exception to the rule which excludes hearsay. The question is whether A is entitled to a fishery. He produces a royal grant of the fishery to his ancestor. This fact the law describes as a peculiar kind of hearsay, inadmissible by special exception. Surely this is using language in a most unconstructive manner.

This being the case, we have discarded altogether the phraseology in which the English text writers usually express themselves and have attempted first to ascertain, and then to arrange in their natural order the principles which underlie the numerous cases and fragmentary rules which they have collected together.

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fraud good faith and knowledge may be given as examples. But each class of facts has in common one element which entitles them to the name of facts—they can be directly perceived either with or without the intervention of the senses. A man can testify to the fact that at a certain time he had a certain intention on the same grounds as that on which he can testify that at a certain time and place, he saw a particular man. He has in each case, present recollection of a past direct perception. Moreover it is equally necessary to ascertain facts of each class in judicial proceedings, and they must in most cases be ascertained in precisely the same way.

Facts may be related to rights and liabilities in one of two different ways.
1. They may by themselves or in connection with other facts constitute such a state of things that the existence of the disputed right or liability would be a legal inference from them. From the fact that A is the eldest son of B, there arises of necessity the inference that A is by the law of England the heir at law of B, and that he has such rights as that status involves. From the fact that A caused the death of B under certain circumstances and with a certain intention or knowledge there arises of necessity the inference that A murdered B and is liable to the punishment provided by the law for murder.

Facts thus related to a proceeding may be called facts in issue unless indeed their existence is undisputed.

2. Facts which are not themselves in issue in the sense above explained may affect the probability of the existence of facts in issue and these may be called collateral facts.

It appears to us that these two classes comprised all the facts with which it can in any event be necessary for Courts of justice to concern themselves so that this classification exhausts all facts considered in their relation to the proceeding in which they are to be proved.

This introduces the question of proof. It is obvious that whether an alleged fact is a fact in issue, or a collateral fact the Court can draw no inference from its existence till it believes it to exist, and it is also obvious that the belief of the Court in the existence of a given fact ought to proceed upon grounds altogether independent of the relation of the fact to the object and nature of the proceedings in which its existence is to be determined. The question is whether A wrote a letter. The letter may have contained the terms of a contract. It may have been a libel. It may have constituted the motive for the commission of a crime by B. It may supply proof of an alibi in favour of A. It may be an admission or a confession of a crime, but whatever may be the relation of the fact to the proceeding if a Court cannot act upon it unless it believes that A did write the letter and that belief must obviously be produced, in each of the cases mentioned by the same or similar means. If for instance, the Court required

the production of the original when the writing of the letter is a crime there can be no reason why it should be satisfied with a copy when the writing of the letter is a motive for a crime. In short, the way in which a fact should be proved depends on the nature of the fact, and not on the relation of the fact to the proceedings.

The instrument by which the Court is convinced of a fact is evidence. It is often classified as being either direct or circumstantial. We have not adopted this classification.

It is in issue whereas it is classified not use to which it is put, as if paper were to be defined not by reference to its component elements but as being used for writing or for printing. We have shown that the mode in which a fact must be proved depends on its nature and not on the use to be made of it. Evidence, therefore, should be defined not with reference to the use to which it is put, but to its own nature.

Evidence is a statement of fact, or something from which facts in issue are to be inferred. If the phrase is thus used the word evidence, in the two phrases (direct 'evidence' and circumstantial evidence opposed to each other) has two different meanings. In the first, it means testimony as to the facts in issue, and in the second, it means a statement of fact from which facts in issue are to be inferred.

The word evidence is a most clumsy mode of expression, but it shows the ambiguity of the word 'evidence' which means either

(1) Words spoken or things produced in order to convince the Court of the existence of facts, or

(2) facts of which the Court is so convinced and which suggest some inference as to other facts.

We use the word 'evidence' in the first of these senses only and so used it may be reduced to three heads—(1) oral evidence, (2) documentary evidence, (3) material evidence.

Finally the evidence by which facts are to be proved must be brought to the notice of the Court and submitted to its judgment and the Court must form its judgment respecting them.

These general considerations appear to us to supply the ground work for a systematic and complete distribution of the subject as follows—

- I Preliminary
- II The relevancy of facts to the issue
- III The proof of facts according to their nature by oral documentary or material evidence
- IV The production of evidence
- V Procedure

We have accordingly distributed the subject under these heads in the manner which we now proceed to describe somewhat more fully.

1—PRELIMINARY

Under a document 'pre-emptive' of the principle of the definition of evidence. It will make perfect sense as used in English of circumstantial evidence with this. The question is whether a motive disclosed by statement of his own that he was in possession and that he wrote a letter it will be found that facts in issue, effects

collateral facts' inference' and of the Court 'oral facts' and accordance with state the effect

of facts in issue, or conduct influenced by facts in issue. On turning to Chapter III, it will be seen how each of these facts must be proved, namely, the statements displaying motive by the direct oral evidence of some one who says he heard them; the foot marks, by the direct oral evidence of some one who says he saw them, the possession of the property by the production of the property in Court, and by the direct oral evidence of some one who had seen it in the prisoner's possession and the letter, by the production of the letter itself, or secondary evidence of it, if the case allows secondary evidence.

So the phrase "hearsay" evidence, which, as the commissioners observe is used by English writers in so vague and unsatisfactory a manner, finds no place in our draft, and in connection with it corresponds on the w law in what cases the facts shall and in what cases they shall not be themselves relevant, and Chapter V on proof by oral evidence, provides that oral evidence, shall in all cases be direct, on whatever ground the fact which it is to establish may be relevant to the issue, that is to say, if the fact is one which could be seen, it must be established by a witness who says he saw it, if it could be heard by a witness who says he heard it.

the other provisions

So our definition does away with a confusion which arises out of the double meaning of the word evidence in the phrases "primary" and "secondary" evidence. "Primary evidence" sometimes means a relevant fact, and at other times the proof of a document by its production as opposed to proof by a copy. In our draft "primary", and "secondary" are distinctly defined, and confined to evidence in each case means words spoken or written in the Court.

for the words "conclusive evidence" the phrase "necessary inference". The phrase "conclusive evidence" is not open to objection on the ground of obscurity or ambiguity, but the word "evidence" in it means not what we understood by evidence, but a fact established by evidence from which a particular inference necessarily follows. Our phrase therefore, harmonises with the rest of our draft whereas "conclusive evidence" would not.

and "moral certainty" require some coordinate to that of "proved" which is that is to say, when the Court after

the circumstances of the particular case, to act upon the supposition that it exists.

This degree of probability we describe as "moral certainty", and we provide that such a degree of probability is usually employed by English judges in leaving questions of fact to the jury.

state, without a prolonged abstract discussion, which would be out of place in illustrations in offence circumstances. We have in this country more than in any other it is absolutely necessary to leave to judges a wide discretion as to the risk of error which they choose to incur in

coming to a decision, and that this is a matter of prudence and practice, as to which rules ought to be laid down, rather with a view of guiding, than with a view of fettering discretion.

The last provision, in the preliminary part, to which we would call attention, defines in very general terms the duty of the Court in deciding questions of fact. Its generality appeared to us to render the preliminary rather than the concluding chapter, the proper place for it. This section declares that the duty of the Court is to determine question of fact by drawing inferences—

- (1) from the evidence given to the facts alleged to exist,
- (2) from facts proved to facts not proved,
- (3) from the absence of evidence which might have been given,
- (4) from the admissions and conduct of the parties, and generally from the circumstances.

It is to be observed that the subject-matter of the inference is not the fact itself, but the inference which it is used, in the for inference, whereas inference whatever is useful inference that the facts is very often the most or other of the different

cases which we have stated is the great duty of the Judge in every case whatever, and we have thought it desirable to point this out in the plainest and broadest way.

We have added two qualifications only to this general rule (1) that, when the law declares an inference to be necessary, the Court shall draw it, and shall not allow its truth to be contradicted, (2) that, when the law directs the Court to presume a fact, it shall infer its existence till the contrary appears. We have treated in detail of necessary inference and presumptions in other parts of the Bill.

II THE RELEVANCY OF FACTS

We have already pointed out the place which in our opinion, belongs to this subject in the law of evidence. The question, what facts you may prove obviously lies at the answer is given to the question. The answer to the question is that exceptions which are made by English text which to the law of evidence is no evidence and that the exceptions are to be made by a comparison of the facts with the facts. We have formed a collection of positive rules as to the relevancy of facts to the issue, which will admit every fact which a rational man could wish to have before him in investigating any question of fact.

These rules declare to be relevant—

- (1) all facts in issue,
- (2) all collateral facts, which
 - (a) form part of the same transaction,
 - (b) are the immediate occasion, cause or effect of fact in issue,
 - (c) show motive, preparation, or conduct affected by a fact in issue,
 - (d) are necessary to be known in order to introduce or explain relevant facts;
 - (e) are necessary to the establishment of a common design,
 - (f) are necessary to the establishment of a common design, or inconsistent with it, the other side, or render according to the definition of
- (g) affect the amount of damages in cases where damages are claimed,
- (h) show the origin or existence of a disputed right or custom,

- The remainder of the chapter throws into a positive shape what in English law forms the exceptions of the rule, excluding the various matters described as hearsay. They relate to—

the conduct of the parties on previous occasions ,
the statement of the parties on previous occasions ,
previous judgments ,
statements of third persons ,
opinions of third persons

1 In reference to the conduct of the parties on previous occasions we embody in three sections the existing law of England as to evidence of character, with some modifications. We include, under the word 'character, both reputation and disposition, and we permit evidence to be given of previous convictions against a prisoner for the purpose of prejudicing him. We do not see why he should not be prejudiced by such evidence, if it is true.

2 Under the head of the statement of the parties on other occasions we deal with the question of admissions, as to which we have not materially altered the existing law.

3 Previous judgments appear to follow naturally upon previous state
Under this head we deal with the question of *res judicata*

We have not attempted to deal with the question of the bar of suits by previous judgment, rather than the question of procedure, never the Code of Civil and other kind dealt with, is substantial accordance with the principles of the law of England with the question of the relevancy of judgment between strangers. For the sake of simplicity, and in order to avoid the difficulty of defining or enumerating judgments in *Kunya*, the law of Sir Barnes Peacock.

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statements explanatory of conduct, but as the conduct explained must be relevant and as no clear definition of relevancy is given by the law of England it is very difficult to say how far his rule extends.

The next exception refers to statements made by a person who is dead or cannot be found or produced without unreasonable delay or expense. We declare such statements to be relevant if they relate to the cause of the person's death or are made in the ordinary course of business or express an opinion as to the existence of the public right, or state the existence of any relationship as to which the party had special means of knowledge, or when they are made

...the party has special sitting or advantage, ... We have omitted the restrictions placed
statements
be opposed
id that they
at best to

statements in public or official
previous judicial proceedings³

5 The cases in which the opinion of third persons are relevant are dealt with in sections forty four to fifty

They declare to be relevant the opinions of experts, opinion as to handwriting, opinion as to usage, and opinions as to relationship and the grounds of such opinions

This completes that part of the Bill which relates to the relevancy of facts. In the particulars stated and in some others of minor importance, which for the sake of brevity we have not noticed it modifies the law of England, but we believe that substantially, it represents that part of the law which is contained in (amongst others) the rules, together with the exceptions of the rules that evidence must be confined to points in issue, that the best evidence must be given, and that hearsay is no evidence, though these rules include other matters which we treat of under other heads

III—PROOF

The second Chapter having decided what facts are relevant we proceed to show how a relevant fact is to be proved

In the first place, the fact to be proved may be one of so much notoriety that the Courts will take judicial notice of it or it may be admitted by the parties. In either of these cases no evidence of its existence need be given. Chapter III which relates to judicial notice, disposes of this subject. It is taken in part from Act II of 1835, in part from the commissioners draft bill and in part from the law of England

If evidence has to be given of any fact that evidence must be either oral documentary, or material, and we proceed in the following chapters to deal with the peculiarities of each of these three kinds of evidence. There is however, one topic which applies to all of them of which we treat in Chapter IV. This is the distinction between primary and secondary evidence. As we have already shown that the law is not a legal way of recognizing the object of a document is and secondary evidence is the document or its copy

We next proceed to deal with the various kinds of evidence successively namely oral documentary and material. With regard to oral evidence, we provide, that it must in all cases whatever, whether it is primary or secondary and whether the fact to be proved is a fact in issue or collateral be direct. That is to say, if the fact to be proved is one that could be seen it must be proved by some one who says he saw it. If it could be heard by some one who says he heard it and so with the other senses. We also provide that if the fact to be proved is the opinion of a living and producible person, or the grounds on which such opinion is held it must be proved by the person who holds that opinion on those grounds

We have however, provided that if the fact to be proved is the opinion of an expert who cannot be called (which is the case in the majority of cases in this country) and if such opinion has been expressed in any published treatise it may be proved by the production of the treatise

This provision taken in connection with the provisions of relevancy contained, in Chapter II will we hope set the whole doctrine of hearsay in a perfectly plain light, for their joint effect is this—

- (1) the sayings and doings of third persons are, as a rule irrelevant, so that no proof of them can be admitted,
- (2) in some excepted cases they are relevant,
- (3) every act done or words spoken which is relevant on any ground must (if proved by oral evidence) be proved by some one who saw it with his own eyes or

of facts by document may be admitted, we may observe that we thought it right to do in almost every

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On writing the Commissioners' draft

IV THE PRODUCTION OF PROOF.

From the question of proof of facts, we pass to the question of the manner in which the proof is to be produced, and this we treat under the following heads —

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we lay down the broad rules—that the general burden of proof is on the party who, if no evidence at all were given, would fail, and that the burden of proving any particular fact is on the party who affirms it. It is a rule, and appears to be a precedent of the New York Code in laying down the rules, and agreeing with the Indian Law Commissioners in the opinion that it is better not to fetter the discretion of the Judges. We have, however, admitted one or two such presumptions. In the seven years' acting as partners.

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B must prove it. Thi

Legitimacy being a necessary inference
we adopt one or two of the rules of

of witnesses, we have been careful
e existing practice of the Courts, which
e of Civil Procedure, is of necessity
very loose and much guided by circumstances, but we have put into propositions
the rules of English law as to the examination and cross examination of
witnesses

We have also considered it necessary, having regard to the peculiar circumstances of this country, to put into the hands of the Judge an amount of discretion as to the admission of evidence which, if it exists by law, is at all events rarely or never exercised in England. We expressly empower him to ask any questions upon any facts, relevant or irrelevant, at any period of the trial, and to receive any answers which he thinks proper.

into the truth of the matter before them. They define simply and clearly the duties and the position of the Judges and those who practice before them. The English system under which the Bench and the Bar act together and play their respective parts independently, and the processes and organisation on which it rests, have no doubt great advantages, and will not for a very speaking, the great, and when advocates, and have to appear training as English

Judges, and are liable to be intimidated by advocates whose technical knowledge of law is greater than their own, and to whom the extremely intricate system of appeal which prevails in his country gives a power over the Judges unlike

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In connection with this subject, we may refer to some provisions which we have inserted in order to prevent the abuse of the power of cross examination to credit. We believe the existence of that power to be essential to the administration of justice, and we believe it to be liable to great abuses. The need for the power and danger this country litigation are the great engines here than in England, prevent the use of the power of exposure as a means of gratifying malice. We have accordingly provided as follows:

Such questions may relate either to matters relevant to the case, or to matters not relevant to the case, except in so far as they affect the credit of the witness. His refusal to do so would in most cases, serve the purpose of discrediting him as well as an express admission that the imputation conveyed by the question was true.

If they relate to matters not relevant to the case, except in so far as they affect the credit of the witness, we think that the witness ought not to be compelled to answer. His refusal to do so would in most cases, serve the purpose of discrediting him as well as an express admission that the imputation conveyed by the question was true.

In order to protect witness against needless questions of this kind, we enact that any advocate who asks such questions without written instructions (which the Court may call upon him to produce, and may impound when produced) shall be liable to a fine not exceeding £100.

any such question shall be a question of publication of an imputation calculated to harm the reputation of the person

mauer stated. Upon a trial for defamation it would of course be open to a person accused to show, either that the imputation was true or that it was for the public good that imputation should be made (Ex I, section 199, I P C), or that it was made in good faith for the protection of the interest of the person making it or of any other person (Ex 9). This is the only method which occurs to us of providing at once for the interests of a bona fide questioner and an innocent witness.

In the same spirit we have empowered the Court, in general terms, to forbid indecent and scandalous questions to married persons, to determine whether the facts in question are relevant to the case, or to matters a married person is entitled to be asked, or to matters a married person is entitled to be asked.

We prefer this general power to the sections drawn by the Commissioners, which forbid questions to married persons "which substantially amount to inquiring whether that person has had sexual intercourse forbidden to him or her by the law to which he is a subject" and "questions regarding the occurrence of Christian

of bodily possibility to imagine him show that a married person or his wife. A woman whose motive is revenge for the discovery of adultery. A married man comes to prove adultery. In all cases it appears to us that as is referred to and wife, we think

B. general terms, than to lay down a positive rule which in possible cases might produce hardship

Finally was that of (Thomson XV) with the question of the improper admission

at in regular appeals each Court successively
hence it will have regard. As for special appeals

we provide that if evidence is said to be improperly admitted, the objection must be taken before

what its decisions

is improperly reject . . . to look into the

fa is and deliver final judgment, or to remand the case

Finally, we recommend that the Draft Bill, together with the report, should be circulated for the opinion of the Local Governments.

J F STEPHEN
J STRACHEY
F S CHAPMAN
F R COCKFREIL
J. F D INGLIS
W ROBINSON

The 31st March, 1871

ABSTRACT of the Proceedings of the Council of the Governor General of India assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament 24 & 25 Vict. Cap. 67

The Council met at Government House on Friday, the 31st March 1871

PRESENT

His Excellency the Viceroy and Governor General of India, L. R. G. M. S. T. Presiding

His Honour the Lieutenant Governor of Bengal

HIS EXCELLENCY THE COMMANDER IN CHIEF, C C N, C C S I

The Hon'ble John Strachey Colonel the Hon'ble R. Strachey, C^s

The Hon'ble Sir Richard Temple The Hon'ble P S Chapman

Norman C B

INDIAN EVIDENCE BILL

The Honble Mr Stephen in presenting the Report of the Select Committee

Lordship and the Council
on a purely legal subject
imitation Act On this

decision, however, I have to explain the position of a measure perhaps as important as any that has been passed of late years by the Indian Legislature in as much as, if it becomes law, it will affect the daily administration of both the Government of India and the Government of Madras. Moreover, the

Moreover, the general interest is less than in the problem of the power, imp-

the committee appended to their report, and which I am now to describe in a general way to your Lordship and the Council

"I will state, in the first place, the history of the measures down to the present time. So far back as the year 1868, the Indian Law Commissioners

draft Evidence Act, which was sent out to this country on 11/1/1902

stated in the report
over that the principal
that it was in several

that it was in several necessity under which judicial officers in this country are at present placed of acquainting themselves by means of English Law books with the English Law upon this subject

hardly be intelligible to a considerable knowledge of draft was framed, which

draft was framed, which opinions of the Local Governments and High Courts in the course of the summer, say, by next September, weighed, and the measure may be introduced. The report of the commission will be submitted to the Government.

The report of the com

the present occasion

Bill will begin by studying the report, which has been drawn up with great care, and which, as well as the Bill itself, forms a connected and systematic whole. The general object kept in view in framing the Bill has been to produce something from which a student might derive a clear, comprehensive, and distinct knowledge of the subject without unnecessary labour, but not of course, without that degree of careful and sustained attention which is necessary in order to master any important and intricate matter. It is by this standard that the committee in general and I in particular, as the member in charge of the Bill, desire that it may be tried.

to discuss the general questions connected with the subject and to mention a

mitigate the necessity which

British India. It would be

British India. It would be
 the subject certainly is. To some extent—it is far from being clear to what
 extent—and in some parts of
 to be in force in British India
 continues to be so in practice.
 introduced.

introduce it so in practice, have been conscientious and an improvement of the existing legal system said for unaided mother wit and natural shrewdness, but a half and half system in which a vast body of half understood law, totally destitute of arrangement and of uncertain authority maintains a dead thing existence as a state of things which it is by no means easy to praise.

"Legislation being thus necessary, in what direction is Legislation to proceed? A gentleman, for whose opinion upon all subjects connected with Indian Law and Legislation, I, in con-
respect, said to me the other day
Bill would be very short one
rules of evidence are hereby abo-
vigorously expressed is really
now it so plainly. There is, in
sion the majority of Indian
technicalities invented by law

3. general terms, than to lay down a positive rule which in possible cases might produce hardship

the question of the improper admission of regular appeals each Court successively will have regard. As for special appeals improperly admitted, the objection must be taken before the inferior Appellate Court, and the Court called upon to say what its decisions would be if the evidence objected to were rejected. If evidence is improperly rejected, we would permit the High Court either to look into the facts and deliver final judgment, or to remand the case.

Finally, we recommend that the Draft Bill, together with the report, should be circulated for the opinion of the Local Governments.

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His Honour the Lieutenant Governor of Bengal

His Excellency the Commander-in-Chief, G C B, GCSI

The Hon'ble John Strachey, GCSI

The Hon'ble Sir Richard Temple, GCSI

The Hon'ble J Fitzjames Stephen, QC

The Hon'ble H H Ellis

Major General The Hon'ble H W Norman, CB

INDIAN EVIDENCE BILL

The Hon'ble Mr Stephen in presenting the Report of the Select Committee

ship and the Council purely legal subject of the Evidence Act. On this occasion, however, I have to explain the position of a measure perhaps as important as any that has been passed of late years by the Indian Legislature, in as much as, if it becomes law, it will affect the daily administration of both Civil and Criminal Procedure throughout the whole country. Moreover, the subject matter to which the Bill refers is one of deep and wide general interest for a law of Evidence properly constructed would be nothing less than an application of the practical experience acquired in Courts of Law, to the problem of enquiring into the truth as to controverted questions of fact, however imperfectly it may have been attained.

This is the object which has been kept in view in framing the Bill which the committee appended to their report, and which I am now to describe in a general way to your Lordship and the Council.

"I will state, in the first place, the history of the measures down to the present time. So far back as the year 1868, the Indian Law Commissioners

herl effect of these rules? I may perhaps be permitted to answer this by referring to a book which I published in 1863 on the Criminal Laws of England, and which contains, amongst other things, an analysis of several celebrated trials, English and French. One object of that analysis was to contrast the effect of the presence and absence of rules of evidence; and I think that any one who would take the trouble to compare those trials together carefully, would agree with me in the conclusion, that the practical effect of the English rules of evidence is the

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evidence are far less strictly enforced, and less clearly understood. An ordinary Criminal Court never gets very far from the point, but a Court must continually wander into questions far remote from those which it was assembled to try. Nothing less than

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immense injury on every class connected with it, directly or remotely, that
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country. In certain parts of the country, it was a point of honour for the
friends of the putative father and of the mother respectively, to go to session
to swear for him or her, as they used to say. No one who did not take part in
such cases could imagine the strange ramifications of falsehood and contradiction,
into which a hotly contested case of this kind would spread, or the number of
imputations thrown on the honesty and chasity of the different witnesses, male
and female. If it had not been for the rules of evidence the reputations of half
the population of the village would have been torn in pieces. The rules of
evidence kept matters to a point, and so minimized the evil, but the parties,
the witnesses and the attorneys, all appeared to me to be one more anxious
than another, to fight the matter
stripped off the back of every man,
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aggravated from. In the work to which I have already referred, will be found
an account of a - - - - - for murder. If disposed of
under the - - - - - we taken more than a
day or - - - - - for, I think, about three
weeks, a - - - - - witness, in particular,

was discovered, to have seduced a girl seven years before, and letters from her
to him were read to throw light on his character. He naturally wished to give
his own account of the transactions but was stopped on the ground that a line
must be drawn some where, and that the Court chose to draw it between the point
at which an irrelevant slur had been thrown on his character, and the point
at which, had he been permitted to do so, he might have given an equally
irrelevant explanation.

gathering purposes, and of no real value in the investigation of truth. I cannot admit that this impression is in any degree correct. I believe that rules of evidence are of very great value in all enquiries into matters of fact, and in it is practically impossible

because the necessity for and in the fact
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fact was regarded as so needless and unimportant, in its rude arbitrary substitutes for any sort of rational procedure were provided, in the shape of ordeals and judicial combats. When people began to obtain glimpses of the true methods of investigation they seem to have in our days fall within the scope of The delighted wonder which was apropos of the story of Suramsh and the wonders, at what a friend of mine used to call that very feeble cross examination of Daniel's about the trees, is a good instance of this. At a later period, arbitrary rules of evidence began to be formed. Such a fact must be proved by two eye-witnesses, such another by four, such another by seven. To say nothing of European systems in which such rules were in force the Hedaya is full of them. These rules were never introduced in their full force into E rather which grew up by degrees character. Part of it consisted of it be incompetent. Part was intimate special pleading, which was so conf facts upon which the parties differed. Parts were the result of the practice by far the Most of the which at experience

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"The second is that I believe that no body of rules upon any important subject were ever expressed so loosely, in such an intricate manner, or at such intolerable length

It is necessary to prove the first of these propositions in order to justify the recommendations of the committee that the substance of the rules in question should be introduced in the form of express law into this country. It is necessary to prove the second proposition in order to justify the attempt made in the Bill to reduce the rules to order and system. For it then, as to the proposition that the rules in question are substantially sound and do far more

they are not, understood and acted upon. As a preliminary remark, I ought to observe that the knowledge of these rules possessed by English lawyers, is derived far more from the daily practice in the Courts, than from theoretical study. Many English

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trial effect of these rules? I may perhaps be permitted to answer this by referring to a book which I published in 1863 on the Criminal Laws of England, and which contain English and I the presence would take the with me in dence in those time to consol able person The French si

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he does not, an incalculable waste of time and energy, and a great weakening of the authority of his Court, is sure to follow. Active and zealous Advocates, who have no rules of evidence to restrain their zeal, would have it in their power to pervert the administration of justice to the basest purposes, and to inflict immense injury on every class connected with it, directly or remotely, that might, or often would, in such hands, be made the excuse for tearing open old quarrels and reviving questions laid at rest and giving fresh animus to scandals.

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country. In certain parts of the country, it was a point of honour for the friends of the putative father and of the mother respectively to go to session to swear for or against a man or woman. No one who did not take part in

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the witnesses and the attorneys, all appeared to me to be one more anxious
than another, to fight the matter out till the very last rag of character had been
stripped off the back of every man, woman, and child, whose name was in any
way brought into the discussion. The French Courts display this evil, in an
aggravated form. In the work to which I have already referred will be found
an account of the trial of a monk named Leotade for murder. If disposed of
under the English rules of evidence, it could hardly have taken more than a
day or two at the most. In the French Court, it lasted for, I think, about three
weeks, and branched
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"It is not however merely for the purpose of confining judicial proceedings within reasonable limits that rules of evidence are useful. They are also of pre eminent importance for the purpose of protecting and guiding the Judge in the discharge of his duty. There is a sense in which it may be said with perfect truth that even legislative power is unequal to the task of abolishing rules of

discretion

"It may be that some persons would like this policy, but I suppose it is one which I need not discuss.

'So far I have considered the rules of evidence merely as they conduce to the important practical objects of keeping proceedings to the point and of protecting and supporting the Judges. I must now say a few words on their value, as furnishing the Judge with solid tests of truth. I fully admit that their value is not so great as it is sometimes represented, but I think they have a real value. There are two

great problems on which the rules of evidence throw no light at all and on which they are not intended to throw any light, and it must be admitted that those problems are by far the most important of any, which a Judge has to solve. No rule of evidence that ever was framed, will assist a Judge in the very smallest degree in determining the master question of the whole subject—whether and how far, he ought to believe what the witnesses say? Again rules of evidence are not, and do not profess to be rules of logic. They throw no light at all on a further question of equal importance to the one just stated

from the facts in which, after considering

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is perfectly familiar: I think that a more or less of this, coupled with impatience of the exaggerated pretensions which have sometimes been made on behalf of the rules of evidence, are the principal reasons for the distrust and dislike with which they are at times regarded. This dislike I think is merely a particular instance of the vulgar error, which in so many instances leads people to deprecate art in comparison with nature as if there were an opposition between the two, and as if art in all cases did not presuppose and depend upon nature. The best shoes in the world will not make a man walk, nor will the best glass make him see, and in just the same way, the best rules of evidence will not supply the place of natural sagacity, or of a taste for and training in logic, but it no guides to truth than that shoes no and to the eyes. The real use consists in the fact that they sug

experience as to two great facts—the relevancy of facts to the question to be decided by the Court and the sort of evidence by which particular facts ought to be proved. They may in the broadest and most popular form be stated thus:—If you want to arrive at the truth as to any matter of fact of serious importance observe the following maxims—'First, if your belief in the principal fact which you wish to ascertain is to be, after all, an inference from the other facts let those facts at all events, be closely connected with the principal fact in some one of certain specific modes. Secondly, never believe

in any fact whatever, whether it is the fact which you principally wish to determine, or whether it is a fact from which you propose to infer the existence of the principal fact, until you have before you the best evidence that is to be had; that is to say, if the fact is a thing done, have before you some one who saw it done with his own eyes; if it was a thing said, have before you some one who heard it said with his own ears; if it was a written paper, have the paper before you and read it for yourself

"This exception—qualifications and explanations apart—is the true essence of the rules of evidence, and I think that no one will deny, either that these rules are in themselves eminently wise, or that they are by no means so obvious and self-evident that the mere unassisted natural sagacity of judicial officers of every grade can be trusted to grasp their full meaning, and to apply them to the practical questions which arise in the administration of justice, with no assistance from any express law. I do not wish to exaggerate, but I must add that I attach considerable moral and speculative value to these rules. If they are firmly grasped by Courts of Justice, and rigidly insisted upon in all practical matters which come before the Courts, they will gradually work their way amongst the people at large, and furnish them with tests by which to distinguish between credulity and rational belief, upon a great variety of matters which will be of vast importance. They are calculated to effect, and rigorously enforcing them, experience will be continually adding to the proper proof of their value.

So far, I have tried to prove the proposition that the English rules of evidence are of real solid value and that they are not a mere collection of arbitrary subtleties which shackle, instead of liberate, the mind. Now to the next proposition, which is so confused, intricate, and lengthy, that it is almost impossible to learn their true meaning otherwise than by a careful and systematic distribution of the rules. This may be altogether avoided by a careful and systematic distribution of the proof of this proposition, if indeed it is disputed, I can only refer in general to the English text books on the subject. They form a mass of confusion which no one can understand until he has read the whole of them. The intention of the different rules of which they consist is often incoherent illustrations. I am familiar with the industrious, and in many cases the illustrations. They, like all other hand books, are mere collections of purposes, and are mere collections of generally relating to some very minute point. They should be arranged, rather with reference to vague catch words, with which the ears of lawyers are familiar, than with reference to theoretical principles which it has never been worth any lawyer's while to investigate.

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very greatest practical sagacity with an absence of soundness,
still worse, with the presence of unsound theory No one who has not seen it
could be so stupid as to suppose that the saying of a clever man may become
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and is of my meaning The
expression 'hearsay is no evidence' early obtained considerable currency in the
English Courts In a general way its meaning is clear enough, and, but what is
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organs of perception, but this is not the natural sense of the meaning.
almost impossible in practice to divest a word of its natural meaning.

'The word "evidence" is also exceedingly ambiguous. It may mean that which a witness says in Court. It may mean the fact to which he testifies regarded as a ground work for further inference. Notwithstanding this the phrase 'hearsay is no evidence,' being emphatic and easy to recollect stuck in the ears and in the minds of lawyers and has been taken by many text writers as the principle on which their statement of the most important branch of the law should be arranged. They accordingly took to describing as hearsay, every fact of which evidence was by law excluded, in short they turned 'hearsay is no evidence' into 'that which is not evidence is hearsay.' They did not however, do this expressly. They did it by describing as exceptions to the rule excluding hearsay, all cases in which evidence was

and he
to C. Now as D and E are not parties to the
suit between A and B, unless A can get of his own knowledge, know anything
of the transaction, lawyers call the deeds between
D and E 'hearsay,' and they say that the rule which permits
such deeds to be proved is an exception to the rule which ex-
cludes hearsay. It is a mistaken, called such evidence
written hearsay. Lawyers in general, to the
abuse of language for the sake of momentary convenience, that it probably
never struck him that this was a contradiction in terms. I think however
that it is hard to expect people to understand bear a name and follow out in
language in such a peculiar manner,
to talk of hearing a document, is

I now turn to the ambiguity of the word 'evidence,' to which I have
already referred. As I have just said, evidence sometimes means a fact which
suggests an inference. For instance, it is a fact which suggests an inference
of stolen goods is evidence of theft, that is, the
the inference of theft. At other times and I
means what a witness actually says in Court, or that which he produces for
instance we say the evidence which he gave was true. I might occupy, I will
not say the attention, but the time, of Your Lordship and the Council for hours
if I were to attempt to describe the amount of confusion and obscurity which
the neglect of this simple and obvious distinction has thrown over the whole
subject. I will content myself with observing that it produces the effect of
giving a double meaning to every expression into which the word 'evidence,'
is introduced. Circumstantial evidence, hearsay evidence, direct evidence,
'primary evidence' but evidence, have each two sets of meanings, and the
result is, that it is almost impossible to arrive at a clear and comprehensive
knowledge of the whole subject or to see how its various parts are related to
each other without an amount of study, thought and practical acquaintance
with the actual working of the rules of evidence which few people are in a
position to bestow upon the subject.

'I may appear to be detaining the Council unduly upon merely verbal
questions but I think that it is a common fault to under rate the importance of
accurate language particularly in regard to the fundamental terms of any parti-
cular branch of knowledge. In regard to law I have not the least doubt that a
very large proportion of the intricacy and difficulty which attach to it is due to
the fact, that proper pains have never been bestowed on the definition of
its fundamental terms. What can we expect to be the result of the want
of our meaning when we speak of evidence?'

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defined by the late Mr Austin, the study of law would become comparatively
easy, and in many cases attractive for its own sake, that its bulk might be
diminished to a degree of which people in general have hardly any conception,
that the expense of its administration, might be greatly diminished and that

comparative certainty might do away with a very large amount of needless and harassing litigation

"I shall now proceed to describe shortly the principles on which the first place we thought it terms of the subject should 'evidence', 'proof', 'proved' report. It seemed to us that the remainder of the subject would fall under the following general heads —

- 1 The relevancy of fact to the issues to be proved
- 2 The proof of facts, according to their nature by oral, documentary, or material evidence
- 3 The production of evidence in Court
- 4 The duties of the Court, and the effect of mistaken admission or rejection of evidence

"These heads would we think be found to embrace and to arrange in their natural order all the subjects treated of by English text writers and Judges, under the general head of the law of evidence. I will say a few words on their relation to each other, and on each of them in turn

"The main feature of the Bill consists in the distinction drawn by it between the relevancy of facts and the mode of proving relevant facts. The neglect of this distinction by English text writers, no doubt arises from the ambiguity in the word 'evidence' to which I have already referred and is the main cause of the extreme difficulty of understanding the English Law of Evidence systematically. I will shortly illustrate my meaning. A says Z committed murder. First of all this is a fact—something which could be directly perceived by the sense of hearing and distinctly remembered afterwards. Now, whether this fact is or is not relevant in a particular case depends upon a variety of circumstances. If the question is whether A was guilty of defaming Z by accusing him of murder? Or where Z had a motive for assaulting A because A said that he had committed murder or if Z is accused of murder and the object is to show that when A charged him with it he behaved as if he were guilty and in many other instances which might be put the fact that A spoke those words is clearly relevant. But if the question is whether Z actually did commit murder the fact that A thought so or said so generally speaking is not relevant. Supposing however that the fact is relevant on some one of the grounds just mentioned or on any other ground whatever be the ground on which the words are relevant to the matter under inquiry it is obvious that the words themselves ought to be satisfactorily proved and the rule of English law—and we think it is a wise rule—is that they must be proved in their own ears under the no evidence meaning by it that certain classes of facts called hearsay are to be treated as irrelevant to the determination of particular questions and it is necessary to look through a long list of exceptions to that rule in order to see whether, in a particular case a statement may or may not be proved. If you find that it can be proved the question is how can it be proved? and you propose to prove it by a witness who says that B told him that he heard A say so. Again you are told hearsay is no evidence, but this time this expression means not that the fact is irrelevant but that the testimony by which it is proposed to prove the fact is improper. One extreme inconvenience of this is that the most important part of the English Law of Evidence is thrown into the most intricate and inconvenient of all possible forms that of a very wide negative of most uncertain meaning qualified by a long string of exceedingly intricate exceptions.

"No one who has not gone through the process of learning the law by mere rule of thumb practice can imagine the degree of needless obscurity and difficulty upon this point, of the existence of which he becomes gradually conscious. It would be perfectly fair to say to almost any English text-writer 'You tell me at enormous length, what is not evidence, but you do not where tell

me what is evidence, except indeed in large compilations, which point out what has to be proved upon particular issues, and which it is as impossible to read or remember, as it is to read or remember any other mere works of reference".

"I hope that we have been able to avoid this, and that the second chapter of the Bill will be found to state specifically, and in a positive form, what sorts of facts are relevant as being sufficiently connected with the facts in issue to afford grounds for an inference as to their existence or non existence. I will not weary the Council by specifying those rules, and I will content myself by referring to the Bill and to the report. But I may shortly illustrate them by reference to a passage from a modern historian, which will relieve the dullness of a very technical speech. The passage to which I refer is a short summary, by Mr Froude of the grounds on which he believes that Mary, Queen of Scots, murdered her husband.

"As Mr Froude was not a lawyer he certainly wrote, what I am about to read, without reference to the rules of evidence. I think the fact that he did, in fact, unconsciously observe them, illustrate very strongly the truth of my assertion, that they are nothing more than the result of experience and practical sagacity, thrown into a categorical shape. I need hardly say that I use the passage merely as an illustration and without any notion of adopting Mr Froude's opinions or asserting the truth of his facts. I am concerned merely with their relevance.

"She (Mary) was known to have been weary of her husband, and anxious to get rid of him.

"(By our draft, facts which show motive are relevant)

'The difficulty and the means of disposing of him had been discussed in her presence, and she had herself suggested to Sir James Balfour to kill him.

"(Facts which show preparation for a fact in issue, are relevant)"

"She brought him to the house where he was destroyed, she was with him two hours before his death.

"(Facts so connected with the facts in issue as to form part of the same transaction are relevant)

"And afterwards threw every difficulty in the way of any examination into the circumstances of his end."

"(Subsequent conduct, influenced by any fact in issue, is relevant)"

'The Earl of Bothwell was publicly accused of the murder.

'(Facts necessary to be known in order to introduce relevant facts, are relevant)

'She kept him close at her side, she would not allow him to be arrested, she went openly to Seton with him, before her widowhood was a fortnight old. When at last unwillingly, she consented to his trial. Edinburgh was occupied by his retainers. He presented himself at the Tolbooth surrounded by the Royal Guard, and the charge fell to the ground, because the Crown did not prosecute, and the Earl of Lennox had been prevented from appearing."

"(Subsequent conduct influenced by any fact in issue is relevant)"

"A few weeks later, she married Bothwell, though he had a wife already, and when her subjects rose in arms against her and took her prisoner, she refused to allow herself to be divorced from him."

'(Subsequent conduct \ Motive)"

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conduct meets the case of a person who destroys or conceals evidence."

'Finally Mr Froude observes. "In her own correspondence, though she denies the crime, there is nowhere the clear ring of innocence which makes its weight felt even when the evidence is weak which supports the words."

"The letters would be evidence under the section relating, to admissions, and Mr. Froude's remark is in the nature of a criticism on them by a prosecuting counsel).

"In English text books, so far as my experience goes, these rules and others of the same sort, are nowhere presented in a compact substantive form. They come in for the most part, as exceptions to the rule that evidence must be confined to the points in issue. In fact they can be learned only by the practice of the Courts though they are as natural and lax as any rules need be, if they are properly stated.

"From the rules which state what facts may be proved, we pass to those which prescribe technical rules of evidence. These rules are of a technical nature, and though, of course, numerous introductory rules are required to adopt for practice they are these:

"1. If a fact is proved by oral evidence, the oral evidence must be direct, that is to say, things seen must be deposed to by some one who says he saw them with his own eyes, things heard by some one who says he heard them with his own ears.

"2. Original documents must be produced or accounted for, before any other evidence can be given of their contents.

"3. When a contract has been reduced to writing it must not be varied by oral evidence.

"These rules, as I have said, are subject to certain exceptions, and require certain practical adjustments, but I do not think that any one who has had practical experience of the working of Courts of Justice will deny their substantial soundness, or indeed the absolute practical necessity for enforcing them.

"Passing over certain matters which are explained at length in the Bill and report, I come to two points to which the committee attach the greatest importance as having peculiar reference to the administration of justice in India. The first of these rules refers to the part taken by the Judge in the examination of witnesses; the second to the effect of the improper admission or rejection of evidence upon the proceedings in case of appeal.

"The first rule relates to the manner in which a well educated, educated man, who is not a prisoner, are at all times interested in arriving at the truth. I need not say that it is the duty of the Judge to put the question to the evidence put in to the matter. We do not interest in arriving at the truth, regarded mainly in the interest of the prisoner, are at all times interested in arriving at the truth.

"The second rule relates to the effect of the improper admission or rejection of evidence upon the proceedings in case of appeal. It is the duty of the Judge to put the question to the evidence put in to the matter. We do not interest in arriving at the truth, regarded mainly in the interest of the prisoner, are at all times interested in arriving at the truth.

and apathy in England

"With respect to the question of appeals, we have drawn a series of provisions, the object of which is to prevent mere mistakes in procedure from destroying the value of work properly done, as far as it goes. We have gone

through the various cases in which, as appears to us, the question of the improper admission or rejection or omission of evidence can arise, and have provided that, whenever any Appellate Court discovers the occurrence of any mistake, it shall not reverse the decision of the inferior Court, but shall either strike out what is redundant, or supply what is defective, as the case may be and give judgment accordingly

I have addressed Your Lordship and the Council at great length, but not I think at greater length than the importance of the matter requires. I have only to add, that I propose to proceed with the Bill when the Government returns to Calcutta, and that I hope before that time, to receive the criticisms of the Local Governments upon the measure.

The council adjourned to Thursday, the 6th April, 1871

CALCUTTA,
The 31st March 1871

WHITELEY STOKES
Secy to the Govt of India

ABSTRACT of the Proceedings of the Council of the Governor General of India assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament 24 & 25 Vict Cap 67

PRESENT

His Excellency the Viceroy and Governor General of India *and* *presenting*

The Hon'ble John Strachey		The Hon'ble J F D Inghish
The Hon'ble J Fitzjames Stephen QC		The Hon'ble W Robinson CSI
The Hon'ble B H Ellis		The Hon'ble F S Chapman
The Hon'ble F R Cockrell		The Hon'ble R Stewart

The Hon'ble J R Bullen Smith

SUNDRY BILLS

The Hon'ble Mr Stephen also moves that the Hon'ble Messrs Chapman Stewart and Bullen Smith, be added to Select Committees on the following Bills —

The next Bill, to which Mr Stephen had to refer, was the Evidence Bill. He need not say anything more about it than that it was under the consideration of the Committee. He however wished to make one or two remarks. In the first place, although the Bill had been sent for the opinion of the Local Governments some time in June last with a request that their opinion on the subject might be forwarded in the course of the autumn, many of the Local Governments had not yet sent in any opinions whatever on the subject. He earnestly hoped that these opinions might be received in order that they might be fully considered. Some memorial had been received on the subject from individuals, specially from certain members of the Bar. He did not wish to discuss them. But he wished to say that he thought that the opinion of some persons, that the Council in General and Mr Stephen in particular were

perfectly unfounded
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of making any

attack upon the independence or position generally of the honourable profession in question

The Council adjourned to Friday the 15th December, 1871,

CALCUTTA
The 8th December, 1871

H S CUNNINGHAM,
Offg Secretary to the Council of the
Governor General for making
Laws and Regulations

SECOND REPORT OF THE SELECT COMMITTEE

Vide the Gazette of India, February 17th 1872, Part V p 94

The following Bill was presented by them as proposed for the purpose of making L

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Petition from certain Barristers and Advocates of Bombay, dated the 8th August 1871

From Officiating Secretary to Chief Commissioner of Coorg 3rd

No —, dated 4th October 4

1871, and enclosures

From certain pleaders of the High Court Bombay, dated 4th October 1871

From officiating Secretary to Chief Commissioner of Coorg 400

No — dated 9th October 6

1871 and enclosures

From the Chief Secretary to Government of Fort Saint George No 166 dated 21st November 1871, and enclosures
From F J Ferguson Esq Barrister High Court Calcutta dated 8th December 1871 forwarding memorial from Barristers and Advocates High Court, Calcutta

From Secretary to Chief Commissioner Central Provinces No — dated 6th December 1871 and enclosures 299

From Officiating Secretary to Government of Bengal No 6326 J dated 13th December, 1871 and enclosures

Memorial from certain members of the Madras Bar, dated 16th December 1871

We the undersigned, the members of the — the Government of — purpose of which the have the

honour to report that we have considered the Bill and the papers noted in the margin

1 We have made some alterations in the arrangement of the Bill

2 We have omitted the definitions of "proof" and "moral certainty" and the sections relating to inferences to be drawn by the Court as being suitable rather for a treatise than an Act

3 We have omitted the provisions relating to material evidence and have given a new and simpler definition of the difference between primary and secondary evidence

4 We — apply affidavit nor to proceedings in arbitration

5 As to the effect of an admission by one of several persons jointly tried for an

time, and an admission is proved against one of them which affects others of the accused besides himself if may be taken into consideration by the Court against all the persons whom it affects

We — of oral by documents complete We reject, freed from

7 Exception was taken to the Bill in several quarters on the ground that it did not sufficiently dispose of the matter of presumptions. We have reconsidered this subject with attention and have provided for it as follows —

Some presumptions have the effect of laying the burden of proof on particular persons, in particular cases. These we have dealt with in sections 103 to 111 of the new Bill

— at the existence of one — This we have provided

We have substituted the term "conclusive proof" in these instances for that of "necessary inference," which was employed for the draft of the Bill.

3.

Other documents and evidence

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Theoretically they are regarded
to say, as artificial rules which

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have accordingly, by section
mere presumptions of fact with

We have provided in the Chapter on the Burden of Proof that a Notification in the Gazette that a territory has been ceded to a Native State shall be conclusive proof of a valid cession at the date mentioned in the notification. The object of this section is to set at rest questions which, as we are informed, have arisen on this subject.

The subject of presumptions as to documents is a very special matter, and appears to us to belong to the subject of documentary evidence, under which head we have placed it in chapter V.

Lastly many subjects are treated by English writers under the head of presumptions which appear to us to belong rather to different branches of the law, is in reality presumptions as to the subject and

because many of them are fictitious

8. The chapter on oaths has been omitted, as they form the subject of a separate Bill now under discussion

to 145 of the old draft,
and the substitution of
such questions, should
question is improperly

asked, to report the circumstance to the authority to which the person asking it is subject

10. We have amended the wording of section 166 as to the Judge's power to ask questions. The section as originally drawn might have been taken to authorize him to found his judgment upon irrelevant matter, such as loose rumours. The intention of the section was to give him the fullest possible power of inquiry for the discovery of relevant matter. Section 164 as now drawn makes this clear.

11. We have omitted the chapter as to the duties of Judges, and Juries, which will, we think, be more properly placed in the Code of Criminal Procedure. We have also omitted the provisions as to appeal in the first draft, and have substituted for them section 57 of Act II of 1853 which provides for the cases in which the improper admission or rejection of evidence shall be ground for a new trial or a reversal of a decision.

12. We have omitted the chapter as to the duties of witnesses, but we also omit that this its publication

be passed,
cite, and
be date of

J. F. STEPHEN.
J. STRACHEY.
J. F. D. INGLIS.
W. ROBINSON.
F. S. CHAPMAN.
R. STEWART.
J. R. BULLEN SMITH.
F. R. COCKERELL.

The 30th January, 1872.

Abstract of the Proceedings of the Council of the Governor General of India, assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament, 21 & 25 Vict. Cap 67.

The Council met at Government House on Tuesday, the 12th March, 1872.

PRESENT.

His Excellency the Viceroy and Governor General of India, K. T., *presiding.*

His Honour the Lieutenant Governor of Bengal.

His Excellency the Commander in Chief, G. C. B., G. C. S. I.

The Hon'ble J. F. D. Inglis.
The Hon'ble W. Robinson, G. C. S. I.
The Hon'ble F. S. Chapman.
The Hon'ble R. Stewart.
The Hon'ble J. R. Bullen Smith.

Maj Genl the Hon'ble H. W. Norman, C. B.

The Hon'ble F. R. Cockerell

The Hon'ble Mr. Stephen in moving that the Report of the Select Committee on the Bill to define and amend the Law of Evidence be taken into consideration, said "My Lord,—Just a year ago, in submitting the Report of the Committee to the Council, I explained at very considerable length the reasons which they proposed, and which is now I need not revert to what I then said. My best course I think will be to place in relation to the Bill since I last

consideration of its various details, the Bill for opinion. Government. h ago, with a made in it; Council. The

Committee has fully considered all the papers with which it was favoured, but with one or two exceptions, I cannot say that it has received any very considerable improvement.

prepared with the advice and assistance of the Government. We have received no public expression of opinion from the Courts, except the High Court of Bombay. The Local Governments, which is much needed, is intelligible to persons not

to do so. I have informed me that they approve generally of the Bill. The Local Governments, which is much needed, is intelligible to persons not

legally trained, and complete in essential respects. Upon this point, I would specially refer to the valuable papers already referred to, which have been received from Madras. It is impossible, in reading them, not to see that their authors do not like the Bill. They find every fault. I do not in the least more fully in the matter. I have pointed out the defects of the Bill.

last two highly competent, and have given the matter careful consideration.

form a complete Code, -
English text writers
in the first place, to no
Evidence 'arbitrarily c
about as much truth,
that the speech which I
out of the dictionary I
use, which is, or even pr
extracts from some
superfluous
one book
complete

This is before his time by Gilbert, Phillips, Starkie and others, and as analogous positions are seen in the Bill

of the Bill
of the Bill
arranged
arranged
text-book
in Mr.
distinction between the relevancy of facts and the proof of facts or any, even
the faintest perception of
showed in the observations
thrown over the whole subject
define with precision the
words 'fact' and 'evidence' As to the notion that bits of Taylor have been
'arbitrarily' put together in the Bill, I will only say that, at a proper time and
place, I would undertake to assign the reason why every section stands where it
does. Upon the question of completeness, however, I will make this remark
I assert that every principle applicable to
which is contained in the 1,598 royal
contained in the 167 sections of this Bill;
carefully compared, section by section, with the last edition of Mr Norton's
work upon evidence, and that it disposes fully of every subject of which Mr
Norton treats

"As to the specific instances of incompleteness which are alleged against
the Bill two only are of any importance, and upon each of them I will say a few
words.

The first is, that the Chapter on judgments is meagre. My answer is,
that it may appear meagre to those who take their notions of the law of
Evidence from works like Mr Taylor's, but that it contains every thing
which properly belongs to the subject. Its utter absence of arrangement
and classification on every subject is the great reproach of the law of
England, and one of the strongest instances of it is to be found in the
way in which provisions of an essentially different character are frequently
comprised under the same head, I might give many illustrations of this;
but the law of evidence, I think, supplies more glaring illustrations than any
other department of law. Many English writers have treated the subject in
such a manner as to make it comprise the whole body of the law. Thus, for
instance,
law and
rules about
the sort of
an action

such an action. It is obvious that the law of evidence thus comes to
include nearly the whole of the substantive law, and it follows, I think that
it is of great importance to draw the line distinctly between what properly
belongs to the subject and what does not. It is for this reason that the sections
about judgments are
connected with judgments
omitted from the Bill.
explain it in a few words.

"The second section of the Code of Civil Procedure enacts that —

"The civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties, or between parties under whom they claim".

"The Code of Criminal Procedure enacts that a man shall not be tried if he has been convicted of these provisions, and to arise Mr Broughton's large pages, in very small print of notes of the cases which have been given on the second section of the Criminal Procedure; and it is because of the two Codes in question were

It is a matter of great importance, and to arise Mr Broughton's large pages, in very small print of notes of the cases which have been given on the second section of the Criminal Procedure; and it is because of the two Codes in question were

It is a matter of great importance, and to arise Mr Broughton's large pages, in very small print of notes of the cases which have been given on the second section of the Criminal Procedure; and it is because of the two Codes in question were

judgment on a right to sue as part of the cases, it may be necessary to give evidence of the existence of a previous judgment

The only questions connected with judgments, which do appear to me to form part of the Law of Evidence properly so called, are dealt with in sections 40—44 of the Bill. These sections provide for the cases in which the fact that a Court has decided as to a given matter of fact relevant to the issue may be proved for the purpose of showing that that fact exists. This, no doubt, is a branch of the Law of Evidence, and the provisions referred to dispose of it fully.

"As to the subject of presumptions, my answer to the critics of the Bill is partly to the same effect, though their criticisms were perhaps better founded. I must admit that the Bill as introduced dealt less fully with the subject than was thought desirable on further consideration and some additions to it have accordingly been introduced, though the general principle on which the matter was dealt with is maintained. The subject of presumptions is one of some importance, and a favourite enterprise on the part of critics which

as to the value and import of a presumption is a variety of ways were irrebuttable, presumptions fact evidence; so much of, a little less was way into English ate effect, and give

law where they p

assumptions subjects inclusive necessary in dished for expressing of ds in- nected, to criminal law to which it properly belongs

'I will not say that I could
though I could
the remarks in
says—

details of the subject
answer specifically
That Government

'In general terms the answer is this, large parts of Mr Taylor's chapter
relate to topics which have nothing to do with the Law of Evidence Those
(a few
is —1st
shall be
conclusive proof of another, for various obvious reasons—the inference of
legitimacy from marriage in a good instance 2ndly—There are several cases in
which Courts would be at a loss as to the course which they ought to take under
certain circumstances without a distinct rule of guidance After what length
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this chapter, which deserves special notice Its substance was applied
in the original draft of the Bill, but it has been inserted in order to put the
matter beyond all possibility of doubt It is in the following words —

114 The Court may presume the existence of any fact which it thinks
likely to have happened regard being had to the common course of natural
events, human conduct and public and private business in their relation to the
facts of the particular case.

Illustrations

The Court may presume—

(a) that a man who is in possession of stolen goods soon after the theft in
either the thief or has received the goods knowing them to be stolen unless he
can account for his possession,

(b) that an accomplice is unworthy of credit unless he is corroborated in
material particulars,

resided, was accepted or endorsed

has been shown to be in existence
in such things or states of things

regularly performed
has been followed in particular

cases,
(g) that evidence which could be and is not produced would, if produced,
be unfavourable to the person who withholds it,

(h) that if a man refuses to answer a question which he is not compelled
to answer by law the answer would be unfavourable to him,
obligation is in the hands of the

obligation is in the hands of the
and to such facts as the following in
considering whether such maxims do or do not apply to the particular case
before them

As to "marked rupee soon
after it was specifically, but is

continually character, is tried for
As to certain machinery
causing a man in the arrangement
B, a person describes precisely what was done and admits and explains the common care-
lessness of A and himself

Universities The subject is one which reaches far beyond law; for the Law of Evidence is nothing unless it is founded upon a rational conception of the manner in which truth as to all matters of fact whatever ought to be investigated

question of degree.

Judges in some degree, masters in the

His principle

relevant

of degree,

It may be

to the issue

be occupied

and what

were, metaphysical If it were allowed to argue the question whether any piece

of evidence is, or is not admissible under such rules, the Lieutenant Governor

would fear that

regarding relevancy

for the guidance

can, but that they

it, the Lieutenant Governor has no doubt that the rules in the draft are admirably suited to the purpose, and would be extremely useful It does not

seem to him very clear in the draft whether or no counsels are to be entitled to

take objection to

any will be endless

"I cannot altogether agree

I do not feel that horror of then

think, abundantly clear that

vancy of evidence, and as to the propriety of proof, and I do not see how a law

can be laid down at all upon which counsels are never to argue No one, I think,

will seriously ass

tration of justice

but if they are to

subjects. I must, however, observe that every precaution has been taken to

prevent

to know

matter

the me

a new

in England in the great cause of the enormous intricacy and technicality of

English law on this point. If, in the Tichborne case, one single question had

been permitted after being objected to, and if the Court had afterwards been of

opinion that it had been wrongly permitted, then, however trifling the matter

might have been the party whose objection had been wrongly overruled would

have been

first trial will

will it be

useful principally as guides to the Judges and the parties, and, in particular,

rules

never, as it may, and taking a view, not merely of its practical, but more

immediately and obviously practical, I would make the following observations —

I am quite aware that relevancy is, as His Honour

As to illustration (b)—A crime is committed by several persons. A, B and C are in the spot and kept apart from each other. D is a crime implicating D, and the accounts as to render previous concert highly

As to illustration (c)—A, the drawer of a bill of exchange, was a man of business. B, the acceptor, was a young and ignorant person, completely under A's influence.

As to illustration (d)—It is proved that a river ran in a certain course five years ago, but it is known that there have been floods since that time which might change its course.

As to illustration (e)—A judicial act the regularity of which is in question was proved.

shown
disturbances

a letter was received. It is the post was interrupted by

As to illustration (g)—A man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family.

As to illustration (h)
compelled by law to answer
unconnected with the matter

As to illustration (i)—A bond is in possession of the obligor but the circumstances of the case are such that he may have stolen it.

The effect of this provision coupled with the general repealing clause at the beginning of the Bill is to make it perfectly clear that Courts of Justice are to use their own common sense and experience in judging of the effect of particular facts and that they are to be subject to no technical rules whatever.

the most important character of the Bill is the indefinite position in and frequent failure of justice is not illegal because it proceeds on the uncorroborated evidence of an accomplice, on the other hand, it seems to be also law that in cases tried by a jury the evidence of what in to the effect of bject, however to or to apply, but I am not quite sure whether of credit unless ough, according to a 1 events some of

the most important character of the Bill is the indefinite position in and frequent failure of justice is not illegal because it proceeds on the uncorroborated evidence of an accomplice, on the other hand, it seems to be also law that in cases tried by a jury the evidence of what in to the effect of bject, however to or to apply, but I am not quite sure whether of credit unless ough, according to a 1 events some of

it may not be corroborated or although the evidence by which it is itself suspicious.

As I have already observed, I do not wish to trouble the Council with technicalities but I hope this explanation will show that this part of the Bill at all events, is not incomplete.

I may observe that many topics closely connected with the subject of the Bill are dealt with by express law. It would be a whole subject rests and the ld be used in practice. I think the present occasion I have in these subjects and I propose to entary upon, or introduction to some use to the Civil Servants who are preparing for their Indian career and to the law students in Indian

Universities The subject is one which reaches far beyond law; for the Law of Evidence is nothing unless it is founded upon a rational conception of the manner in which truth as to all matters of fact whatever ought to be investigated.

His Honour the Lieutenant it dissatisfied with the manner icy, which, as he says is a question of degree.

that the law, clearing up the protecting our Courts from the applicable to and rendering the Judges in some degree masters in their own Courts, will be highly beneficial.

His Honour the Lieutenant Governor of evidence is, or is not admissible under such rules, the Lieutenant Governor

reg for can it, mir see take

think, abundantly clear that counsel will be permitted to argue as to the relevancy of evidence, and as to the propriety of proof, and I do not see how a law can be laid down at all upon which counsels are never to argue. No one, I think, will seriously

but if they are subjects. I prevent In the first place, if the Judge wishes which is under debate, he can cut the er section 105. In the second place, per evidence is not to be a ground for opposite is the rule and technicality of a single question had afterwards been of car trifling the matter

a new in Er Engl been opinion might I have t first tri will II usef

I am quite aware that relevancy is, as it is

and for that reason the Bill gives definitions of it so wide and various, that I think they will be assignable connections of relevancy are, under many conditions most facts which have any real connection with the matter to be proved would fulfil several of them. Take, for instance, this fact—A man is charged with theft, and it is proved that he was seen running away immediately after the theft with the stolen goods in his hand. This is (1) a fact so connected with the fact in issue as to form part of the same transaction, and is therefore relevant under section 6, (2) it is the effect of a fact in issue, and is therefore relevant under section 7, (3) it is the conduct of a party to the proceeding subsequent to a fact in issue, and is so relevant under section 8; (4) it is a fact which in itself renders a fact in issue highly probable, and is therefore relevant under section 11. This fact, therefore, is relevant under no less than four sections, each of which would admit a great number of facts which would not be admitted by the other sections. Indeed, the latitude of the definition of relevancy will be best appreciated by negating the conditions which the Act imposes. Suppose that you are able to assert of a fact that it is neither itself in issue, nor forms part of the same transaction, nor is its occasion, cause or effect, immediate or otherwise, that it shows no motive or preparation for it, that it is no part of the previous or subsequent conduct of any person connected with the matter in question, that it does not explain or introduce any fact which is so connected with the or establish of any relevant fact with other negatives can be affirmed I think we may say, without much risk of error, that the one fact has nothing to do with the other, and may be regarded as irrelevant.

1. I now come to a matter which has excited a good deal of discussion, though it relates to a subordinate and not very important part of the Bill—that which concerns the examination of witnesses by counsel. The Bill as originally drawn provided, in substance, that no person should be asked a question which reflected on his character, as to matters irrelevant to the case before the Court without written instructions, that if the Court considered the question improper, it might require the production of the instructions; and that the giving of such instruction should be an act of defamation, subject of course, to the various rules about defamation laid down in the Penal Code. To ask such questions without instructions was to be a contempt of Court in the person asking them but was not to be defamation.

and myself amongst the rest, that the sections proposed would be inexpedient, and others have accordingly been substituted for them which I think will in practice be found sufficient. The substituted sections are as follows—

Questions lawful in cross examination

146. When a witness is cross examined, he may, in addition to the questions hereinbefore referred to be asked any questions which tend—

(1) to test his veracity,

(2) to discover who he is and what is his position in life, or

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- (3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture

When witness to be compelled to answer

147 If any such question relates to a matter relevant to the suit or proceeding, the provisions of section 132 shall apply thereto

148 If any such question relates to a matter not relevant to the suit or proceeding except in so far as it affects the credit of the witness by injuring his character the Court shall decide whether or not the witness shall be compelled to answer it, and may if it think fit warn the witness that he is not obliged to answer it. In exercising its discretion, the Court shall have regard to the following considerations—

- (1) such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the creditability of the witness on the matter to which he testifies
- (2) such questions are improper if the imputation which they convey

- (3) such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence
- (4) the Court may, if it sees fit, draw from the witness's refusal to answer, the inference that the answer if given would be unfavourable

Question not to be asked without reasonable grounds

149 No such question as is referred to in section 138 ought to be asked, unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well founded

Illustrations.

(a) A barrister is instructed by an attorney or valuer that an important witness is a dabbler. This is a reasonable ground for asking the witness whether he is a dabbler

That an important witness the pleader, gives satisfactory ground for asking the witness

whether he is a dabbler

whether

to him may

150 If the Court is of opinion that any such question may be asked by any person on reasonable grounds it may, if it sees fit, ask the question

Procedure of Court in case of question being asked without reasonable grounds

151 The Court may forbid any question which is indecent or scandalous, unless the answer may be necessary to be known in order to determine whether or not the facts in issue existed

and for that reason the Bill gives definitions of it so wide and various, that I think they will be found to include every sort of fact which has any direct assignable connection with any matter in issue. The sections which define relevancy are, indeed enabling sections. Any fact which fulfils any one of the many conditions which they declare to constitute relevancy will be relevant and most facts which have any real connection with the matter to be proved would fulfil several of them. Take, for instance, this fact—A man is charged with theft, and it is proved that he was seen running away immediately after the theft with the stolen goods in his hand. This is (1) a fact so connected with a fact as to form part of the same transaction, and is therefore relevant under

other sections. Indeed, the latitude of the definition of relevancy will be best appreciated by negating the conditions which the Act imposes. Suppose that you are able to assert of a fact that it is neither itself in issue, nor forms part of the same transaction, nor is its occasion, cause or effect, immediate or otherwise, that it shows no motive or preparation for it, that it is no part of the

negatives can be affirmed I think we may say, without much risk of error, that the one fact has nothing to do with the other, and may be regarded as irrelevant.

it might require the production of the instructions; and that the giving of such instruction should be an act of defamation, subject of course, to the various rules about defamation laid down in the Penal Code. To ask such questions without instructions was to be a contempt of Court in the person asking them, but was not to be defamation.

the worst kind, that it is of the greatest importance that the characters of witnesses should be open to full inquiry. These reasons satisfied the committee, and myself amongst the rest, that the sections proposed would be inexpedient, and others have accordingly been substituted for them which I think will in practice be found sufficient. The substituted sections are as follows—

Questions lawful in cross examination 146 When a witness is cross examined, he may, in addition to the questions hereinbefore referred to be asked any questions which tend—

- (1) to test his veracity,
- (2) to discover who he is and what is his position in life, or

- (3) to shake his credit by injuring his character although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture

When witness to be compelled to answer

147 If any such question relates to a matter relevant to the suit or proceeding, the provisions of section 132 shall apply thereto

Court to decide when question shall be asked and when witness compelled to answer

148 If any such question relates to a matter not relevant to the suit or proceeding except in so far as it affects the credit of the witness by injuring his character the Court shall decide whether or not the witness shall be compelled to answer it, and may if it think fit warn the witness that he is not obliged to answer it. In exercising its discretion, the Court shall have regard to the following considerations:—

- (1) such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the creditability of the witness on the matter to which he testifies;
- (2) such questions are improper if the imputation which they convey relates to the witness's character for truthfulness on the matter to which he testifies;
- (3) such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence;
- (4) the Court may, if it sees fit, draw from the witness's refusal to answer, the inference that the answer if given would be unfavourable.

Question not to be asked without reasonable grounds

149 ought has reason tion which it conveys is well founded

Illustrations

- (a) A barrister is instructed by an attorney or vakil that an important witness is a dakait. This is a reasonable ground for asking the witness whether he is a dakait.
- (b) A pleader is informed by a person in Court that an important witness is a dakait, the informant, on being questioned by the pleader, gives satisfactory reasons for his statement. This is a reasonable ground for asking the witness whether he is a dakait.
- (c) A witness of whom nothing whatever is known, is asked at random whether he is a dakait.

150

Procedure in case of question being asked without reasonable grounds

it was asked by any y, report the circum- other authority or attorney

Indecent and scandalous questions

or to matters necessary to be known in order to determine whether or not the facts in issue existed

I. E. A.—195

151. The Court may forbid any questions which it regards as indecent or scandalous although such questions or inquiries may have some bearing on the questions before the Court, unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed

152 The Court shall forbid any question which appears to it to be intended to insult or annoy, or which, although proper in itself, appears to the Court needlessly offensive in form

Questions intended to insult or annoy
 — — — — — lay down, in the most distinct manner, and witnesses with a view to shaking
 I trust that this explicit statement of the principles according to which such questions ought or ought not to be asked will be found sufficient to prevent the growth in this country, of that which in England has — — — — — that the sections so far as their — — — — — that they will be admitted to — — — — — the public I can

— remarks on the memorials which the sections th from the Bar in various parts of the country have made any further remarks on the Bill — — — — — I have removed the main objection which those parts of their memorials which — — — — — from the sections which have been giv — — — — —

part proper, though it contains — — — — — been omitted The memorial of the Bombay Barristers contains similar passages, expressed more fully and less temperately, and I shall accordingly confine myself to noticing such of their remarks as appear to me to deserve notice

— — — — — in general, that I have read in the news an only mean that I individually the Bar, indeed, the Bombay — — — — — (meaning profession ment they ds from the

report of the Select Committee —

'The English system, under which the Bench and the Bar act together and play their respective parts independently and the professional organization on which it rests does not as yet exist in this country, and will not for a very long course of time be introduced'

'Before I made the remarks which this suggests let me ask your Lordship and the Council whether a charge that I, of all people wish for the extinction of the profession of Barristers at law in India, is not upon the face of it absurd? I am myself a Barrister of eighteen years' standing and a Queen's council of four years' standing I believe that there is no Barrister in British India of whom I should not be entitled to take precedence, professionally, if I chose to practising here, and so strong is my connection with my profession, that I am at this moment on the point of resigning one of the most respectable offices which a Barrister can hold for the purpose of returning to the ordinary routine of professional practice How is it possible to imagine

— — — — — power to good name ted as an have been appropriate remedy for a great and crying evil — — — — — which is likely to much impressed by my own observations in England and which extend in India as the habit of cross examination becomes more general and when the rights which a cross examining advocate has are explicitly defined The remedy, I will admit, was to some extent inappropriate, but for merely proposing it, for merely recognizing the existence of the evil against which it was directed I am charged with wishing to extinguish my own profession

— — — — — which I am fully stand how the memo- r they could never system, under which

the Bench and the Bar act together and play their respective parts independently, and the professional organization on which it rests, does not as yet exist in this country and will not for a very long course of time be introduced.

"Yes," say the memorialists, it does exist, to wit in the Presidency towns. This is as much as if the water works of Calcutta were referred to, to contradict a statement that India is wholly supplied with drinking water. I make a statement about an Empire as large as Europe without Russia, and am told that it is incorrect, because there are three English Courts, and three knots of, perhaps, a dozen or so English Barristers, to be found at towns which are in the nature of English settlements. The reason why the statement complained of was not qualified by excepting these towns and Courts was simply that the exception was not important enough to be stated. It would, indeed, have been a matter of great indifference to me personally, whether the Bill extended to the High Courts sitting on the original side or not. It is a mistake to make exceptions without a necessity for them, but the question, what rules of evidence should apply in the Presidency towns is one of very little real importance. The great and vital importance of the matter lies in the effect which it will have on the administration of justice throughout the country at large. It is framed in order to meet the wants, and lighten the labours, of district officers, by giving them a short and clear view of a subject which has been converted into a sort of professional mystery: the knowledge of which was confined to a knot of persons specially initiated in it. Now, as regards the Mofussil, I repeat the expressions complained of. I assert that they are absolutely true and state a fact notorious to every one. I say that, throughout India generally nothing like the English system under which the Bench and Bar act together and play their respective parts independently, does now exist, or can for a length of time be expected to exist. Let me just recall for a moment the nature of that system. In the first place the Bench and the Bar in England form substantially one body. The Judges have all been Barristers, and the great prize to which the Barristers look forward is to become Judges.

"That is not the case in India nor anything like it. The great mass of Indian Judges are not, and never have been, lawyers at all, the great mass of Indian lawyers have no chance or expectation of becoming Judges, and many of them have no wish to do so. The organization of the profession differs from that in England. I do not think it necessary to refer to the position of an English Barrister who practises in the Mofussil, whether he is habitually resident in the Presidency town or not, in all practice in Sessions, in rules which do not, and can not apply to practice in the Mofussil in this country. He acts under the eyes of a public which takes great interest in his proceedings, and presents before Judges, and to the public, the results of this. It is impossible to discuss the merits of this system, but it is formed upon a principle of little importance, and is not adapted to the case of pleaders. It is referred to are the questions it pleases—is not that the Bench and the only, what I mean is that, in England cases are fully prepared for trial before they come into Court so that the Judge has nothing to do but to sit still and weigh the evidence produced before him. In India in an enormous mass of cases, this neither can nor is it absolutely necessary that the Judge should not only hear what is put

Courts or of any Sudder Court or of any Court of Judicature hereafter to be constituted in the said territories to or in which the powers of any of Her Majesty's Supreme Courts may be transferred or vested

VI Any such Courts and persons aforesaid shall take judicial notices of all divisions of time of the geographical divisions of the world, of the territories under the dominions of the British Crown of the common element continuation, and termination of hostilities between the British Crown, and any other state and also of the existence title and national flag of every sovereign or state recognised by the British Crown In all the above cases, such Court or person may resort for its aid to appropriate books or documents of reference

VII Any Government Gazette of any country, colony, or dependency under the dominion of the British Crown, may be proved by the bare productions thereof before any of the Courts or persons aforesaid

VIII All proclamations, Acts of state, whether Legislative or Executive, nominations, appointments, and other official communications of the Government appearing in any such Gazette, may be proved by the production of such Gazette, and shall be *prima facie* proof of any fact of a public nature which they were intended to notify

IX Any recital contained in any Act of the Governor General of India in council, constituted for the purpose of making Laws and Regulations, hereafter to be passed, of any fact of a public nature, shall be deemed, before all such Courts and persons, to be *prima facie* evidence of the truth of the fact recited

X The Gazette or Newspaper containing any advertisement purporting to be published by virtue of any public Statute, Act, Regulation, or Ordinance or of any Rule or order of a Court of Justice or of any Board or Office of Revenue, may be received by any such Courts or persons as aforesaid as *prima facie* evidence that such advertisement was published duly under the authority from which it purports to proceed

XI All Books, maps, or charts, as to be of authority

XII Books printed or published under the authority of the Government of a foreign country, and purporting to contain the Statutes, Code, or other written Law of such country, and also printed and published books or reports of decisions of the Courts of such country, and books proved to be commonly admitted in such Courts as evidence of the law of such country, shall be admissible before any such Courts or persons as aforesaid as evidence of the law of such foreign country

XIII All maps made under the authority of Government or of any public municipal body and not made for the purpose of any litigated question, shall *prima facie* be deemed to be correct, and shall be admitted in evidence without further proof

XIV The following persons only shall be incompetent to testify —

1 Children under seven years of age who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly

XXIII. Every witness summoned to produce a document shall, if the

Witness summoned to produce a document must bring it into Court

of the contents thereof

Mole of determining objection to production

evidence which the person producing the document may give respecting it, and it shall also be lawful for the Court except in the case of any document relating to the affairs

Documents relating to affairs of state

Court alone, and not to disclose the contents thereof except to the Court, unless the Court shall order the document to be given in evidence

same be in his custody possession or power, be bound to bring it, or cause it to be brought into Court although there be a valid objection to the right of the party calling for it to compel its production, or to the reading or putting it in as evidence or to the disclosure The validity of any such objection made by the person producing the document shall be determined by the Court, and for the better determination thereof, it shall be lawful for the Court to receive any admissible evidence which the person producing the document may give respecting it, and it shall also be lawful for the Court except in the case of any document relating to the affairs of state to inspect the document, and if necessary to call to its assistance any person whom it may appoint to interpret the same Such person however shall be previously sworn truly to interpret the same to the Court alone, and not to disclose the contents thereof except to the Court, unless the Court shall order the document to be given in evidence

XXIV A Barrister, Attorney, or Vakeel shall not without the consent

Professional communications,

client, nor shall he shall have privilege, he evidence the his privilege or Vakeel, of Barrister, A. privilege of upon exami

of his client, disclose any communication made by the client to him in the course of his professional employment, or of which he shall give evidence The privilege of a Barrister, Attorney, or Vakeel, shall be waived in any case in which the Court shall order that he shall be bound to give evidence

XXV Any person present in Court whether a party or not may be called

Person present in Court to give evidence, etc, though not summoned

upon and compelled by the Court to give evidence and produce any document then and there in his possession or power

document, and may be called in the order of the Court

XXVI Any person whether a party to the suit, or not, may be summoned

Person summoned to produce a document not bound to attend personally the same,

to produce a document without being summoned to give evidence, and any person summoned merely to produce a document, shall be deemed to have complied with the summons if he cause such document to be produced instead of attending personally to produce

Rules of evidence in Supreme Courts on Ecclesiastical sides and Admiralty

XXVII The rules of evidence in Her Majesty's supreme Courts as to matters of Ecclesiastical or Admiralty (civil jurisdiction, shall be the same as they are on the Plea side of the Courts

XXVIII Except in

Evidence of one witness sufficient proof Proviso

the testimony of one witness, shall be sufficient for the purpose of proving any fact before any such Court, and shall not affect any rule of practice of any Court that requires corroborative evidence in support of the testimony of an accomplice or of a single witness in the case of perjury

XXIX Where dying declarations are evidence, they shall be received,

Dying declarations when admissible

if it be proved that the deceased was, at the time of making the declaration and then thought himself to be, in danger of approaching death, though he entertained at the time of making it hope of recovery.

XXX. The party at whose instance a witness is examined may with the permission of such Court or person, cross-examine such witness to test his veracity, in the same manner as if he had not been called at his instance, and may be allowed to show that the witness has varied from his previous statement made by him.

XXXI. In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, shall be admissible, and for that purpose a copy of any deposition or statement taken before any Court, Judge, Justice of the Peace, Magistrate, or person lawfully exercising the powers of a Magistrate or before a Commissioner or Superintendent for the suppression of Thuggee or Dacoity, in the discharge of his duty, shall, if certified by such Court, Judge or other officer above mentioned, under his hand or the official seal of the Court or under the hand or official Seal of such Judge, to be a true copy of such deposition or statement without further proof, be received as *prima facie* evidence that such deposition or statement was made, and that it was made at the time and place, and under the circumstances, if any, which shall be stated in the certificate or on the face of deposition or statement.

XXXII. A witness shall not be excused from answering any question relevant to the matter at issue in any suit, or in any Civil or Criminal proceeding, upon the ground that the answer to such question will criminate, or may tend, directly or indirectly, to incriminate any witness, or that it will expose, or tend to expose, the witness to a penalty or forfeiture of property.

Proviso. Nothing in this section shall be deemed to require a witness to answer any question the answer to which would tend to criminate him, if he is not satisfied that the answer is necessary in the interests of justice. Nothing in this section shall be deemed to require a witness to answer any question the answer to which would tend to incriminate any witness, or that it will expose, or tend to expose, the witness to a penalty or forfeiture of property, if he is not satisfied that the answer is necessary in the interests of justice.

XXXIII. A witness in any cause may be questioned as to whether he has been convicted of any felony or misdemeanour, and upon being so questioned, if he either denies the fact or refuses to answer, it shall be lawful for the opposite party to prove such conviction.

XXXIV. A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relating to the subject matter of the cause, without such statements being shown to him, but if it is intended to contradict him by such statements, the attention must first be called to them, and he must be allowed to explain, amplify, or qualify them, or to show that they are true, or that they are not material, or that they are not relevant, or that they are not to be taken into consideration, and he must be allowed to make such statement as he may think fit for the purposes of the cross-examination.

Proviso.

the trial as he shall think fit.

Copy of a document made by a copying machine to be deemed correct.

XXXV. An impression of a document made by a copying machine shall be taken without further proof to be a correct copy.

XXXVI.

Admission of secondary evidence when the original document is not available.

When a document is not available, the court may, on application, admit secondary evidence of its contents, if the party offering it satisfies the court that the original is not available, and that the secondary evidence is a true and correct copy of the original.

When attested document may be proved as if unattested.

XXXVII An attested document may be proved as if unattested unless it be a document to the validity of which attestation is requisite

XXXVIII The admission *prima facie* proof of an attested document

a admission of a party to unattested instrument of its execution by himself shall be as against him sufficient *prima facie* proof of such execution of it, though it be an instrument which is required by law to be attested

XXXIX An entry made against interest, or in course of business when admissible in life time of person making it

entry or statement which would be admissible in evidence after the death of the person who made it, on the ground of its having been made against the interest of the person making it, or on the ground of its having been made in the ordinary course of business, shall be admissible, though the person who made it be not dead, if he is incapable of giving evidence by reason of his illness at the time of the trial or hearing

XL Entry in course of business when admissible for purpose of identification

Any entry in any books proved to have been regularly kept in the course of business or in any public office, so far as such entry merely refers to and tends to identify by name, description, number, or otherwise, any bank-notes or other securities for the payment of money, or other property and the payer in or receiver of them, shall, in any case where such identification is necessary to be proved, be admissible in evidence for a limited purpose if it shall appear to have been made at or about the time of the transaction to which it relates, though the person who made it, or he on whose information it was made, is alive and capable of being produced as a witness

XLI Receipt when evidence against person other than the giver

Any receipt in writing, acknowledging the receipt of any money, valuable securities or goods, shall, on proof of the execution thereof, be admissible in evidence before such Court or person aforesaid, not only against the party giving it, but also against any person in whose favour such receipt would operate as a discharge, or to whom it would render the person giving it, liable for the money, security, or goods acknowledged to have been received

XLII Receipt of Agent

Whenever a receipt would be admissible under the preceding section agent or be evidence receipt

XLIII Books kept in the course of business or in a public office admissible as corroborative evidence

Books proved to have been regularly kept in the course of business or in any public office, shall be admissible as corroborative but not as independent proof of the facts stated therein

XLIV Document as evidence be proved

Document as evidence be proved

XLV Refreshing memory

Refreshment of memory made by time when the or at any time

LV. The 33rd section of Act No VI of 1851 which applies only to proof of accounts on the Equity side of the said Supreme Courts shall extend to and embrace all accounts directed to be taken on any side of the said Court

LVI. Whenever by any Statute or Act, Regulation or Ordinance now in force, or any Statute or Act to be hereafter in force, any certificate, certified copy, or other document, shall be receivable in evidence of any particular in any Court of Justice, the same if it is substantially in form and purports to be executed in the manner directed by the Statute, Act, Regulation, or Ordinance which makes it evidence shall be *prima facie* evidence, where it is rendered admissible without proof of any stamp, signature character, or authority, which it is directed to have, or from which it is directed to proceed.

LVII. The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case in which such objection to the evidence only is taken. No new trial for rejection or improper reception of evidence or insufficient evidence to justify the decision, or otherwise, if received, it ought not to have varied the decision.

LVIII. Nothing in this Act contained shall be construed as to render inadmissible in any Court any evidence which but for the passing of the Act, would have been admissible in such Court.

APPENDIX D.

LIABILITY TO DAMAGES FOR REFUSING TO GIVE EVIDENCE

The following section appears alike in Act XIX of 1853 applying to Bengal, and in Act X of 1855 applying to Madras and Bombay.

Act XIX of 1853, Section 26.

26 Any person, whether a party to the suit or not, to whom a summons to attend and give evidence or produce a document, shall be personally delivered, and who shall, without lawful excuse, neglect or refuse to obey such summons, or who shall be proved to have absconded, or kept out of the way to avoid being produced, or who shall be proved to have given evidence at which he may sustain in consequence of such neglect, or refusal, or of such absconding, or keeping out of the way as aforesaid, to be recovered in a civil action

APPENDIX E.

AMENDING ACTS

Act XVIII of 1872

OBJECTS AND REASONS

"The primary object of this Bill is to continue certain rules which it is believed have been inadvertently repealed by the Indian Evidence Act, 1872.

E. At the same time opportunity is taken to correct some clerical and other accidental errors to which attention has been drawn

"Section 32 clause (5) renders admissible certain statements as to the existence of relationship' As there are many relations other than those intended by the Act the Bill makes the clause precise by adding the words 'by blood marriage or adoption'

"In sections 41 and 45, some words which should have been repeated have been repeated. It is the same thing 92 to clear

"rules of the road' It must have been intended to include the rules of navigation. The Bill therefore adds the words 'on land or at sea'

"Section 66 contains rules as to notice to produce documents. It only mentions notice to the party in whose possession or power a document is. To refuse the Bill inserts the words

Wills under the Indian Succession Act may be proved by the probate. But other Wills are admitted to probate, and the same mode of proof is made applicable to all such, and doubtless was intended

"Of sections 107 and 108, the latter was clearly intended to be a qualification of the former. The language is altered to produce this effect

"Section 126 relates to professional communications and provides that when made "in furtherance of any criminal purpose they shall not be protected from disclosure. As every fraud though illegal is not 'criminal' the Bill inserts the word for the latter, thus the same principle for the

offer of a witness may be impeached by proof that he has had the offer of a bribe. The Bill, for obvious reasons, for 'had' substitutes 'accepted'. In India still more than in England the mere offer of a bribe if unaccepted, should not prejudice the character of the person to whom it is made

"Act XV of 1852, section 12 provides that Her Majesty's Courts and Judges and all officers, Commissioners, Arbitrators etc., authorised to receive evidence with respect to proceedings, in such Courts may administer oaths to witnesses. The Evidence Act repeals this section and puts nothing in its place. (1872) or any power those C mers to examine 12"

12th August 1872

REPORT OF THE SELECT COMMITTEE

"The Hon'ble Mr Hobhouse also presented the Report of the Select Committee on the Bill to amend the Indian Evidence Act, 1872. He said that in considering the Bill the committee had proceeded on the principle that under the circumstances it was no part of their duty to alter any part of the Act on the score of principle but only to effect such alterations as they believed the draftsman would have made if his attention had been called to them. The principal reason for passing the present Bill into law before the 1st September was this —

Act I of 1872 repealed in toto a prior Act, XV of 1852, and one of the sections of that Act was as follows —

XII All Her Majesty's Courts within the British territories under the Government of the East India Company, and every Judge and Justice of such Courts and every officer, Commissioner, Arbitrator or other person now or hereafter having by law or by consent of parties, authority to hear receive and examine evidence, with respect to or concerning any suit action, or other proceeding in any of such Courts, is hereby empowered to administer an oath to all such witnesses as are legally called before them respectively

Now, that was a positive enactment in the clearest possible terms, purporting to confer upon certain tribunals and officers power to administer oaths. *Prima facie* if that power were removed from the Statute Book, and nothing put in its place, it would cease to exist. The question then was whether the power could be derived from any other quarter. For the purpose of determining this question it had been necessary to read the Acts of Parliament and ten charters, and to read some of these documents very carefully, since they were framed on the most perplexing of all principles, the principle of declaring void all previous inconsistent provisions. So that you had to read through the whole document to see what was and what was not inconsistent. The result was that the power of administering an oath would remain with the High Courts, but would not remain therein mentioned. It was, therefore, in clear and extensive an authority as simplest way of doing that in the present emergency was by continuing the existence of that section. When the time came for dealing with the matter finally, the proper place for it would be found in an Act relating to the subject of oaths and affirmations, rather than in one relating to the general subject of evidence.

Previously to this year, the incapacity to administer an oath would have vitiated many legal proceedings. But in the present year, an Act (No VI of 1872) was passed, which had two objects—one was to respect and bind the conscience of witnesses, and the other, to prevent the entire vitiation of legal proceedings by omissions and irregularities in the administration of oaths. The first object had nothing to do with the present question. An oath was an oath, whatever might be the form of it, and the person who administered it must be duly qualified. The misadministration of an oath by a person upon being sworn to do so, would deal with the case. Certainly, many a Commission made by a person have, by reason of perjury to the giving of false testimony under such circumstances. On this point Sections 178 and 179 of the Penal Code showed the importance attached to the legal administration of oaths. For the foregoing reasons, the continuation of the section, which was the subject of the judicial proceedings, on which day Act I of 1872 was to come into force, whereas no person would be done by continuing the section in question the only suggestion against it.

As they would not be remarked upon in themselves and were intended to cover obvious printing or of drafting. We had now received several criticisms on Act I of 1872, and there was little doubt that, after it had been tested in actual practice it would, like most laws of great magnitude and difficulty and especially those passed on subjects new to legislation, require amendment in several particulars.

29th August 1872

Act III of 1887

OBJECTS AND REASONS.

'The object of this Bill is to prevent officers of any department concerned with any branch of the public revenue from being compelled to say whence or of any offence. In England

information as to frauds on the revenue (See *Russel on Crimes*, 5th Ed Vol III, p 553)

The law on the subject is further stated in Bell's *Laws of Excise* as follows — It is a rule of evidence applicable to criminal cases and the same rule has always been held to apply to penal informations at the suit of the Revenue, that a witness is not permitted to disclose privileged communications brought to his knowledge for the use of the witness, but may be put on a principle of public policy

272) Hence those questions which tend to the discovery of the truth which the disclosure was made to the officers of justice are not permitted to be asked (*Rez v Hardy* 24 How St Tr 753—per *Eyre C J*) If the name of the informer were to be disclosed would be defeated (*Ibid* p 81

v Bryant it was held that a witness could not give the information? (15 M & W 169) It cannot be ascertained from the records why the English law was not incorporated in the Indian Evidence Act The omission has caused much inconvenience'

11th August 1886

REPORT OF THE SELECT COMMITTEE

'We the undersigned members of the Select Committee to which the Bill to amend the Indian Evidence Act 1872 was referred have considered the Bill and have the honour to submit this our Report

'We have so altered the section which it was proposed to substitute for section 125 as to follow the plan an *Explanation* to

11th January 1886

Act III of 1891

OBJECTS AND REASONS

"The principal object of this Bill is to amend section 54 of the Indian Evidence Act 1872 so as to render the previous conviction of an accused person irrelevant when it is sought to prove the conviction with the object merely of showing that the accused is a man of bad character and is therefore more

fact that the accused person has been previously convicted of any offence is relevant The result of this amendment of the law will be that the rule as to the relevancy of a previous conviction will be contained in section 43 of the Act The existence of the judgment convicting the accused will be relevant only if the fact of the conviction is a fact in issue or is relevant under some provision of the Act

It is also necessary to amend the Act so as to show first that in criminal cases the fact of a previous conviction is relevant only if it is relevant to the knowledge of the jury and secondly that in civil cases the fact of a previous conviction is relevant only if it is relevant to the knowledge of the jury and thirdly that in criminal cases the fact of a previous conviction is relevant only if it is relevant to the knowledge of the jury and fourthly that in civil cases the fact of a previous conviction is relevant only if it is relevant to the knowledge of the jury

In English law for the purpose of proving guilty and in other acts of a nature similar to that charged may be given in cases of uttering false coins or disposing of forged bank notes (1 *Russel*, 233) On the whole

evidence of this nature has been confined to cases of coinage and forgery, but there is one case, *Reg. v. Francis*, (13 L. J. M. C. 47) in which evidence was admitted on a charge of obtaining money on false pretences. In that case Lord Coleridge C. J. said "It seems clear upon principle that when the fact that the prisoner has done the thing charged is proved, and the only remaining question is, whether at the time he did it he had guilty knowledge of the quality of his act, or acted under a mistake, evidence of the class received must be admissible." This case probably goes further than any other case, and the amendment which has been proposed of section 13 seems to provide sufficiently for the class of cases in which the peculiar nature of the offence makes this question the crucial test.

"As regards the admission of evidence of other similar acts to prove guilty knowledge, it is thought that such evidence might be admitted in cases in which an accused person is charged with a long series of offences. *Pro. Code*, with and tried that is to say it is proposed the three offences to be

as the act
an opportu-
not raised

"Briefly stated the amendments proposed to be made by the Bill are as follows—

(1) the provision allowing a previous conviction to be proved in all cases will be repealed;

(2) a previous conviction will be relevant under section 43 when it is a fact in the Act;

it relevant as evidence or bad character

(3) a previous conviction will be relevant to prove guilty knowledge or intention,

(5) the fact that an act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, will be relevant to prove guilty knowledge or intention."

4th July 1890

REPORT OF THE SELECT COMMITTEE.

"We the Committee have the honor to report to the House of Commons which the Bill was referred, and to submit this our report with

We generally approve the Bill and consider that the object can be attained by adding to section 14 an Explanation suggested by the High Court

We consider it desirable to indicate more particularly the classes of persons exercising magisterial functions who are not to be held to be magistrates for the purpose of section 26

We have added a clause to remove a difficulty which has been experienced in the construction of the words 'for the same offence' in section 30 of the same Act"

6th February, 1891.

Act V of 1899

OBJECTS AND REASONS

"It has been found that in the case of Queen Empress v. ... that the ... v. op un me de th ob

'The opportunity has been taken to suggest the amendment of two other sections. Section 37 fails to render relevant statements as to the facts of a public nature made in the Acts of certain legislatures. Cl 2 will remove what is now an obvious lacuna. The remaining amendment is of a purely formal character.'

8th October, 1898

REPORT OF THE SELECT COMMITTEE

'We, the undersigned members of the Select Committee to which the Bill to further amend the Indian Evidence Act, 1872 was referred, have considered the Bill and have now the honour to submit this our Report with the Bill as amended by us annexed hereto.

We have added a sub section making a consequential amendment in section 73 of the Act.'

1st February, 1899

APPENDIX F.

THE BANKERS' BOOKS EVIDENCE ACT

Act XVIII of 1891

Received the assent of the Governor-General on the 1st October, 1891

An Act further to amend the Law of Evidence with respect to
Bankers' Books

Whereas it is expedient to amend the Law of Evidence with respect to Bankers' Books, It is hereby enacted as follows —

Title extent and commencement 1. (1) This Act may be called the Bankers' Books Evidence Act, 1891

(2) It extends to be whole of British India

(3) [*Repealed by Act X of 1914 Schedule II*]

Notes This Act is primarily intended for the convenience of bankers and to facilitate proof of their transaction—*R v Dono*, 29 T L R 635, *Arnott v Hayes*, 86 Ch D 731, *Kissan v Lank*, (1896) 1 Q B 574, *Pollock v Earle* (1898) 1 Ch 1

2 In this Act, unless there is something repugnant in
Definitions the subject or context,—

(1) 'Company' means a company registered under any of the enactments relating to companies for the time being in force in the United Kingdom or in any of the Colonies or Dependencies thereof or in British India or incorporated by an Act of Parliament or of the Governor-General in Council, or by Royal Charter or Letters Patent.

(2) 'bank' and 'banker' mean—

(a) any company carrying on the business of bankers

(b) any partnership or individual to whose books the provisions of this Act shall have been extended as hereinafter provided.

(c) any post office savings bank or money order office,

(3) "bankers' books" include ledgers day-books, cash-books, account-books, and all other books used in the ordinary business of a bank,

(4) "legal proceeding" means any proceeding or inquiry in which evidence is, or may be given and includes an arbitration

(5) "The Court" means the person or persons before whom legal proceeding is held or taken,

(6) "Judge" means a Judge of a High Court,

(7) "trial" means any hearing before the Court at which evidence is taken, and

(8) "certified copy" means a copy of any entry in the books of a bank together with a certificate written at the foot of such copy that it is a true copy of such entry, that such entry is contained in one of the ordinary books of the bank, and was made in the usual and ordinary course of business; and that such book is still in the custody of the bank, such certificate being dated and subscribed by the principal accountant or manager of the bank with his name and official title

Origin This Act is based on the English Bankers' Books Evidence Act, 1879, (43 & 44 Vict C 11)

Certified copy of a document which does not come within section (1), though it is not admissible in evidence. *Patrick, 4 C W N*

Banker means a person who is a banker and banker' mean on the business of bankers of Inland Revenue and Banking to Savings Banks and Banks' connotes the business of banking money received for purposes of promissory notes. It is a mere fact that a Government Treasury receives money from a District Board and respects orders issued to it for payment does not constitute the Treasury a Bank. *Rangaswami v Sankaralingam, 43 M 816-39 M L J 327-58 Ind Cas 893, Tolsey v Hill, 2 H L C 28, (43) per Lord Brougham*

Banker In *Halifax Union v Wheelright* 10 Ex 183-44 L J Ex 121, Baron Cleasby said "First, it is said that taking that statute together with several other statutes the word banker' was not to be restricted to any person or to the person upon whom the money is received, but who in the ordinary course of his business receives money from and for whom he receives money" *Hart's Law of Banking*

3. The Local Government may, from time to time, by notification in the official Gazette, extend the provisions of this Act to the books of any partnership or individual carrying on the business of bankers within the territories under its administration, and keeping a set of

not less than three ordinary account-books, namely, a cash book, a day book, a journal, and a ledger, and may in like manner rescind any such notification

4 Subject to the provisions of this Act, a certified copy of any entry in a banker's book shall, in all legal proceedings, be received as *prima facie* evidence of the existence of such entry, and shall be admitted as evidence of the matters, transactions, and accounts therein recorded in every case where, and to the same extent as, the original entry itself is now by law admissible, but not further or otherwise

Origin This section is based on section 3 of the English Bankers' Books Evidence Act, 1879, which runs as follows "Subject to the provisions of this Act, a copy of any entry in a banker's book shall in all legal proceedings be received as *prima facie* evidence of such entry, and of the matters, transactions, and accounts therein recorded"

Principle "Then if they are not removable, on the ground of public inconvenience, that is upon the same footing in point of principle as in the case of that which is not removable by the physical nature of the thing itself. . . The necessity of the case in the one instance, and in the other case the general public inconvenience which would follow from the books being removed, supplies the reason of the rule" *Per Alderson B in Mortimer v McCallan*, 6 M & W 58, 67

Scope and object of the section "The Act was passed mainly for the relief of bankers to avoid the serious inconvenience occasioned to them by their having to produce books which were in constant use in their business" *Parnell v Wood*, (1892) P 187 "Banks are subject to the performance of duties to the public which might be seriously interfered with if they were compelled to carry the books needed in their business into every Court or tribunal where testimony is to be introduced concerning them. Books belonging in public offices cannot be removed from their legal custody without some strong necessity for their production. While bank-books are not public to the same extent, yet the business which the corporations are required to transact cannot be done unless the books are usually preserved where they belong" *Per Campbell C J in People v Hurst*, 41 Mich 328 (Am) This Act makes copies of such entries evidence against any one thus the entries in a defendant's banker's books are made evidence against the plaintiff *Harding v Williams*, 14 Ch D 197, see also *London & W Bank v Bolton*, 51 Sol Jo 466 The Act applies to all books kept by the bank, even although not in daily use, and applies to the successors of a bank by whom the entries were made *Asylum for Idiots v Handysides*, (1906) 22 T L R 573 The main object of this Act is to enable evidence to be procured and given *Arnott v Hayes*, (1887) 36 Ch D at 737, *Emmott v Star News paper Co*, 62 L J Q B 77, *R v Bona and Another*, (1912) 99 T R 223 and to enable a party to the proceedings to attend and to be examined on them, to obtain an order for leave to inspect and take copies of them *Re Marshfield*, 32 Ch D 499

5. No officer of a bank shall in any legal proceeding to which the bank is not a party be compellable to produce any bankers' book, the contents of which can be proved under this Act, or to appear as a witness to

Case in which officer of bank not compellable to produce books

prove the matters, transactions, and accounts therein recorded unless by order of the Court or a Judge made for a special cause

Scope This section corresponds to section 6 of the English Bankers' Books Evidence Act, 1879 (42 & 43 Vict 11) By this section a banker is exonerated from personal attendance in Court See also *Emmott v Star News Paper Co* 62 L J K B 77.

6. (1) On the application of any party to a legal proceeding, the Court or Judge may order by order of Court or Judge that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceeding, or may order the bank to prepare and produce, within a time to be specified in the order, certified copies of all such entries, accompanied by a further certificate that no other entries are to be found in the books of the bank relevant to the matters in issue in such proceedings and such further certificate shall be dated and subscribed in manner hereinbefore directed in reference to certified copies.

(2) An order under this or the preceding section may be made either with or without summoning the bank, and shall be served on the bank three clear days (exclusive of bank holidays) before the same is to be obeyed, unless the Court or Judge shall otherwise direct.

(3) The bank may, at any time before the time limited for obedience to any such order as aforesaid, either offer to produce their books at the trial, or give notice of their intention to show cause against such orders and thereupon the same shall not be enforced without further order.

Scope This section corresponds to section 7 of the English Act A magistrate before whom criminal proceedings are pending is a Court within the meaning of it. It is so made an order under this section R.

but the Judge ought to be satisfied that the application is necessary, but the Judge must be satisfied that the application is admissible in evidence in the action, and if required *Arnott v Hayes*, 36 Ch D 731, *Poultney v Hayes*, 36 Ch D 131, *London & Lancashire Insurance Co v London & Lancashire Insurance Co*, 29 T L R 675, or alter the principles of law or the practice with regard to discovery (*Pollock v Larle*, 1898, 1 Ch 4) or take away any previously existing ground of privilege [*South Staffordshire Tramways Co v Lbbs Smith*, (1895) 2 Q B 669 C A; *Parnell v Wood*, (1893) P 139] An order under this section should be made on sufficient ground only *Perry v Phosphor Bronze Co*, (1894) 71 L T. 854. Where a defendant applied for inspection to assist

him to justify a libel imputing pecuniary embarrassment inspection was refused *Emmot v Star Newspaper Co* 62 L J Q B 77 Similarly in *Pollock v Earle*, (1893) 1 Ch 1 the C A refused to make an order in the case of third persons who were neither actual nor constructive parties to the case, e g, as to the bank its directors for inducing as to such balance. *Phip* he Court should take care n" The order should only

be made where the entries of which inspection is sought will be admissible in evidence at the trial *Houard v Tall* 23 Q B D at p 2

It seems that the Court has jurisdiction to order inspection of the accounts of third parties *Houard v Tall* 23 Q B D 1, *South Staffordshire v Dibbsmith*, (1895) 2 Q B 669, *M'Gorman v Aheras* 35 Ir L T R 84, *Agra Bank v Kashi Ram*, P L R 1900, p 237 But this power should not be exercised ordinarily *Pollock v Earle* (1893) 1 Ch 1 But when order for inspecting the accounts of third parties is sought a notice should be given to him *South Staffo*

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an order to inspect the banker's book, and in a fit case an order will be made *Perry v Phosphor Co*, (1894) 71 L T 854, *Yearly Practice*, (1921) 459 The qualifications of the cor and customer are (a) there is a duty to th

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7 (1) The costs of any application to the Court or a Judge, under or for the purposes of this

Costs

Act, and the costs of anything done or to be done under an order of the Court or a Judge made under or for the purposes of this Act, shall be in the discretion of the Court or Judge, who may further order such costs or any part thereof to be paid to any party by the bank if they have been incurred in consequence of any fault or improper delay on the part of the bank.

(2). Any order made under this section for the payment of costs to or by a bank may be enforced as if the bank were a party to the proceeding.

(3) Any order under this section awarding costs may, on application to any Court of Civil Jurisdiction designated in the order, be executed by such Court as if the order were a decree for money passed by itself

Provided that nothing in this sub section shall be construed to derogate from any power which Court or Judge making the order may possess for the enforcement of its or his discretions with respect to the payment of costs.

APPENDIX G.

THE INDIAN OATHS ACT.

ACT X OF 1873

Received the assent of the Governor General on the 8th April, 1873

An Act to consolidate the law relating to Judicial oaths, and for other purposes.

Whereas it is expedient to consolidate the law relating to judicial oaths, affirmations and declarations and to repeal the law relating to official oaths, affirmations and declarations; It is hereby enacted as follows:—

1 PRELIMINARY

Short title 1. This Act may be called "The Indian Oaths Act 1873".

It extends to the whole of British India, and so far as regards subjects of Her Majesty, to the territories of Native Princes and States in alliance with Her Majesty ;

[Commencement]—*Repealed by the Repealing Act, 1873*
(II of 1873).

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if they testify falsely *Gobind Ram v Empress*, 18 P R 1893 Cr The procedure of the arbitrator is not governed by the Oaths Act *Bhagrat v Ram Ghulam*, 4 A 283-A W N 1882, 31 A Magistrate is not competent to administer oath in the course of a non-judicial inquiry *Allahwaray v Crown*, 17 Cr L J 368-35 Ind Cas 672

III PERSON BY WHOM OATHS OR AFFIRMATIONS MUST BE MADE

Oaths or affirmations to be made by— 5 Oaths or affirmations shall be made by the following persons:—

(a) All witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give evidence by or before any Court or person having by law or consent of parties authority to examine such persons or to receive evidence;

Interpreters (b) interpreters of questions put to, and evidence given by witnesses;

Jurors. (c) jurors.

Nothing herein contained shall render it lawful to administer in a criminal proceeding, an oath or affirmation to accused person, or necessary to administer to the official interpreter of any Court, after he has entered on the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those duties.

Noting that the said provisions of the Act are not applicable to the said persons.

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Persons subjected to the oath this section requires that oaths or affirmations shall be made by the three following classes of persons, namely (1)

witnesses (2) interpreters, and (3) jurors. So oath or affirmation is requisite in all testimonial statements made in Court. An interpreter is a kind of witness and must be sworn. *Wigmore* § 1824, *R v Douglas*, 13 Q B D 42, 59, 66, 72. A juror should also be sworn. *Queen v. Ramsodoy*, 20 W. R Cr 19.

Accused person. "Originally an accused person was allowed to produce no witnesses; later, he might produce them, but they testified without oath, and finally he was allowed to be sworn." *Wigmore* § 1824. This section as well as section (4) lays down that no oath shall be administered in sub section (4) that no oath shall be administered in reference only to the statement made by him.

It has no power to make an oath under also *Reg v. Emperor*, 22 Q, All India Emperor v. King Emperor, 23 B 213, *Nga Nque v. K E*, 20 Cr L J. 312, *Q E v. Tribuni*, 20 *Durani*, 23 B 213, *Nga Nque v. K E*, 20 Cr L J. 265; *K E v. Annya*, 3 Bom L R 437 A 426; *Joseph v. Emperor*, 3 Bur L J 265; *K E v. Annya*, 3 Bom L R 437. The term "accused" means a person under trial. *Hinanda v. Emperor*, 2 C L J 149, see also *Emperor v. Govind*, 18 Corporation of Calcutta, 31 C. W. N 306 = no power to administer an oath or affirm records under s 164 Cr Pro Code. *Lalu* 10 C P L R Cr 16.

Scope of the section. The direction in s 164 Cr Pro Code that the statement at all be recorded in one of the manners prescribed for recording procedure. The statement itself is one which is made before the Court by a witness, and is therefore part of the Evidence Act. The person making it is not a witness. *Queen Empress v. Alagu*, 16 M L J 161 = 22 Ind 18 Act is imperative, some person is not a witness. Whether a person is examined as a witness or not is a question of fact regarding the case. In any option, it is evidence, but to the case may be *Queen Empress v. Alagu*, 16 M L J 161 = 22 Ind 18 Act is imperative,

some person is not a witness. Whether a person is examined as a witness or not is a question of fact regarding the case. In any option, it is evidence, but to the case may be *Queen Empress v. Alagu*, 16 M L J 161 = 22 Ind 18 Act is imperative,

an interpreter under the prosecution to *Al v. King Emperor*, 20 W. R Cr 19. prove that the interpretation was made accurately, 9 C L J 690 = 13 C W. N 942.

An enquiry on an application under s 100 Cr Pro Code, 1898, in issue of a search warrant is judicial inquiry and proceedings preliminary to the issue of a search warrant under s 100 are judicial proceedings. In the course of such proceedings to examine persons 5 of the Oaths *Abdul Aziz* v. *Abdul Aziz*.

6. Where the witness, interpreter or juror is a Hindu or Muhammadan, or has objection to making an oath, he shall, instead of making an oath, make an affirmation.

Affirmation by natives or by persons objecting to oaths

In every other case, the witness, interpreter, or juror shall make an oath

Hindu and Mahomedan law on the subject. 'If we turn to India even prior to the introduction of English rule, we find that the Laws of *Menu* had their oath too, and in point of form, that prescribed by *Menu* is not very different from the English one.—The imprecatory part too of the oath of *Menu*, if not framed exactly in conformity with the varying Code of the religious belief of the swearer, was nevertheless in a form adopted to the peculiarities of the influence by which each individual might be presumed to be most affected. Let the Judge cause a Priest to swear by elephant and his weapons, a Merchant by or servile man imprecating on his own crimes. The meaning is he shall adjure: falsely your truth will be destroyed, a *Cashetree* by saying your horse or elephant and weapon become useless, a *Vaisya* 'your cattle, seeds and gold will be unproductive.' A *Sudra* he shall adjure by saying, 'if you speak falsely all sins will be imprecations punishment have been swearing sanctioned.

19 C 355.

IV FORM OF OATHS AND AFFIRMATIONS

7. All oaths and affirmations made under section 5 shall be administered according to such forms as the High Court may from time to time prescribe.

And until any such forms are prescribed by the High Court, such oaths and affirmations shall be administered according to the forms now in use

Explanation—Repealed by the Lower Burma Courts Act (VI of 1900) s. 48. Schedule II.

swear according to his own notion of the oath in the same case *L. C. sud.* "The next thing is the form of the oath It is laid down by all

clerk of arraigns or of the peace to desire the witness to take the book in his hand and, that done to say to him 'The evidence you shall give between prisoner at the bar shall be the truth, the truth; So help you God', upon which the usual form of words in civil cases differred shall give to the Court and Jury, touching the oath, the whole truth, and nothing but the truth

So help you God 18
the administration of the oath is immaterial, provided that it bringing to bear of this apprehension of oaths or ceremonies are used in imposing as binding by his belief Indar Prasad Ind Cas 314

beginnings of capacity for various purposes Pl Cr I, 302, 634 Buller, Nisi Frius, 293, Young v Slaughter 22 Pl Cr 228, R v Trauers 1 Stra 700 But this view was finally repudiated in R v Drasier, East Pleas of the 'Crown, 1, 443 After much deliberation, where the Court said 'An infant, though under the age of seven years may be sworn in a criminal prosecution, provided such infant appears on strict examination by the Court, but is the evidence cannot be received' See also R v Perkins 2 Moo Cr, C 139; Braddon's Trial 9 How St Tr 1127, R v Holmes 2 F & F 788, Wignmore § 1821, Nafar v Emperor, 18 C W N 147-41 C 406, Iatu v Emperor, 6 Pat L J 147-61 Ind Cas 705 Evidence of child witnesses can be admitted without oath or affirmations In re Chinarenaladu, 33 M 550, Hussain v Emperor, 76 Ind Cas 1037, Hari Ramji v Emperor, 20 Bom L R 365-45 Ind Cas 497 In the case of a child witness the Judge is bound first to ascertain by questioning the child whether it is by tender years prevented from understanding the questions or from giving rational answers to those questions Then if the Judge intend so doing, on the ground solemn affirmation under child will be admissible

Emperor v Kusha, 5 Bom L R 551

8 If any party to, or witness in, any judicial proceeding offers to give evidence on oath or solemn affirmation in any form common amongst or held binding by, persons of the race or persuasion to which he belongs, and not repugnant to justice or decency and not purporting to affect any third person, the Court may, if it thinks fit, notwithstanding anything hereinbefore contained, tender such oath or affirmation to him.

Scope of the parties C L J 77-78 any judicial proceedings in this section does not mean the complainant in a

criminal proceeding nor the accused. Sections 811 of the Oaths Act do not apply to criminal proceedings. *Queen Empress v. Murari* 13 B 359, *Imperator v. Hyt Ali*, 5 S L R 129-13 Ind Cas 215-13 Cr L J 23, 1 Weir 822, *Emperor v. Chitman* 22 Bom L R 898-58 Ind Cas 147. Under the provisions of this Act, an oath proposed in a form which could affect a third party can not under . . . *Ram Narain v. Babu Singh*, 18 A 4 . . . 1916-7 Ind L J 513 . . . as 448, 23 A

1873 *Irsu Meah v Aalaram*, 2 C L R 176, *Ulagappa v Peria*, 15 Ind Cas 195. But where defendant also refuses no presumption arises *Sukdeo v Ganesh*, 10 Ind Cas 472=7 N L R. 50

Where in a suit, the parties put in a joint application evidencing an agreement to abide by the statement on oath of a certain person, but one of the parties led them to withdraw from the reference on the ground that the statement was not correct, and the other party with the other party and no collusion was allowed to do so. *Chuddu v. Kuar Sen*, 1914, 10 C.L.J. 100.

An agreement to a case decided on the evidence of a third person given on oath, in Code, and would join in it. The such a case. *Law*

Neither an invocation nor an oath or affirmation in the technical sense of the words is in any way an essential part of the special oath or solemn affirmation provided for in section 8 of the Indian Oaths Act of 1873. The

the first from its very nature, and must be in the form held deponent belongs. The special is a complete substitute for the o supplemented by it or any pr used in respect of the special procedure provided for in section 8 are merely descriptive of the nature and suggestive of the consequences of the ritual—linking it up with ordinary oaths and affirmations—but are in no way connected with what its form should be. *Indar Prasad v Jogmohan Das*, 31 C W. N 1053=54 I A 301=2 Luck 316=46 C L J 13=39 M L. T. 618=53 M L J. 1 (P C)=54 I A 301.

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guardian although given without the leave of the Court, provided there is no fraud or gross negligence on the part of the guardian *Muhammad v. Behary Lal*, A I R 1930 Cal 463.

9. If any party to any judicial proceeding offers to be bound by any such oath or solemn affirmation as is mentioned in section 8, if such oath or affirmation is made by the other party to, or by any witness in, such proceeding, the Court may, if it thinks fit, ask such party or witness, or cause him to be asked, whether or not he will make such oath or affirmation.

Court may ask party or witness whether he will make oath proposed by opposite party.

witness, or cause him to be asked, whether or not he will make the oath or affirmation

G. Provided that no party or witness shall be compelled to attend personally in Court solely for the purpose of answering such question.

Scope Under §§ 8 and 9 of the Act, it is not necessary that the form of oath should be specified before it can be held binding on the parties agreeing to be bound by it. It is sufficient if the oath is common among, and held binding by the class to which the parties belong. *Ahmad Ali v Hanuman*, 29 P R 1887. If in the course of a suit, the plaintiff offers to bind himself by the oath of a witness and the witness, after consenting to the offer, refused afterwards to take oath, the Court cannot decree the suit in the plaintiff's favour, even though the defendant had agreed to it in case the witness refused to take the oath. Such an act on the part of the Court is not sanctioned by the Oaths Act. *Bawa Suchat v Ratna*, 31 P R 18. to record evidence in a case cannot

tion between Court and P
s not include persons authorised to

Puran Chand v Chabar, 69 P R,

1909. Pleader has no power to bind

client by oath. *Perag v Ram*, 75 P R 1900. Ordinarily, it is the party himself that can make an offer contemplated under this section. If, however, a party specially authorises his pleader, or an agent, to make an offer to be bound by a particular oath, he might be estopped from retracting the step he had taken if his offer were acted on. *Sadasiv v Maruti*, 14 B 455. A offer by

or
absence of the Court's sanction to the agreement under s 4b2, the minor defendant is barred by the consent of his guardian, if there is no fraud or

defendant offered
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If the party who has agreed to be bound prevents the oath being taken, the other party is entitled to a decree
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Where the defendant takes oath proposed by the plaintiff, the oath is
J 244=31 A. 315=2 Ind

bound by the oath of the other party and to have the case decided in accordance

therewith. *Wasir zaman v Fata Dib*, 11 A L J 39=38 A 131=32 Ind Cas 318

Where the agreement proves abortive, a suit can be decided on evidence taken *Seshagiri v Sankany Setti*, 1 L W 258=1917 M W N 101=36 Ind Cas 1001 Where an offer is made by plaintiff to be bound by oath the Court has full discretion to call upon the defendant to accept or refuse the offer, and, subject to the exercise of that discretion, the offer once made stands, and if the defendant eventually accepts it, the plaintiff is bound by the result *Ahaway Din v M. Nur* 6 Ind Cas 701 See also *S. S. v. S. S.* 1926 Loh 240

Ordinarily a party cannot resile from his offer, but he can do so with the permission of the Court *Ram Bhai v Dhuni* 92 Ind Cas 813; *Narayan v Srilantha* 4 Mys L J 217, *Sahib v Wali*, 49 A 388=25 A L J 297=A. I R. 1927 All 590 If a party after agreeing to abide by an oath satisfies the Court that there is good ground for retracting, the Court would exercise a wise discretion in refusing to administer the oath and it is only when a party puts forward frivolous reasons for retracting that the Court would be justified in administering the oath notwithstanding the retraction *Ramdeo v Naipal*, A. I. R. 1933 All 184

Where in certain divorce proceedings among Mahomedans the plea for the wife applied that both parties should be put on special oath and the Court granted the application directing the application to be put on special oath prescribed 'or Tann' under Mahon that the other party agreed to abide by not be conclusive because of secti *Umar Saheb*, 52 B 295=110 Ind Cas 151=30 Bom L R 441=A. I. R. 1928 B 268

The word "party" in this section includes a duly authorised representative such as a pleader and that he can make the offer contemplated by the section *Amir v Mohammad* 5 O W N 10, see also *Hata v Samai* 187 Ind Cas 810=33 P L R 470=A I R 1932 Lah 414

A party cannot add new condition to his original offer and the other party can take the oath in accordance with the original offer. *Kinhi v Kunnath*, 1928 M W N 113=A I R 1928 Mad 488=109 Ind Cas 758

10 If such party or witness agrees to make such oath or affirmation, the Court may proceed to ad-

Administration of oath if accepted minister it or, if it is of such a nature that it may be more conveniently made out of Court, the Court may issue a commission to any person to administer it, and authorize him to take the evidence of the person to be sworn or affirmed and return it to the Court.

the oath itself, must issue a Commission to some person to administer it and to be sworn and return it to the Court, see also *Dir Bux v. Dir Meah*,

as Evidence conclusive against person offering to be bound

Scope of the section
provisions of the Act is
proceedings. *Keshava*
examined under the usual form of oath
of
the

person who offered to do so and by stated *Maddhogir v Gopal Bhasin*, 7 C P L R 122, *Su in v* 100, 1898, *Hamid v Naqvi* 84 Ind Crs 729, *Gramathul v Sidlayya*, 90 Ind Crs 577 (2) - 49 M L J 379. A statement by a witness that a party is in possession is in point of law admissible evidence of the fact that such party was in possession under section 11 of the Oaths Act, it is conclusive proof of the matters stated. The expression "conclusive proof" in s 11 is to be understood in the sense in which it is defined by s 4 of the Indian Evidence Act 1872. *Vithu v Pampy* 8 Bom L R 19-1 M L J 63.

The parties to a suit agreed to be bound by the deposition of a referee in the manner contemplated by the decree. The referee died afterwards and did not fully cover the questions to be usual procedure. *Mahe*

usual procedure *Mah*
There is nothing in the Indian Oaths Act constraining a Court to follow a decision in favour of a particular party. If a party to a suit says that he would be bound by the oath of a particular person under the provisions of section 11 of the Act, it means no more than this that *pro tanto* he will be bound, that is to say, in so far as the matter of that evidence is concerned, and that evidence will be conclusive as to its truth, and the truth of such evidence will be conclusive as against him throughout the whole of the litigation. But it does not, in any way, compel the Court to accept that evidence as conclusive. *Muhammad Zahu*

An attorney empowered

to be decided accordingly
P R 1903; see also *Gharib v*

Under this section the oath is not conclusive to the suit but is so only
na v Bala Shela, 3 M L T 163

might be made by the plaintiff upon oath as prescribed by law. The plaintiff accordingly was examined on oath administered in the usual manner. *Held*, that though the statement then made by the plaintiff might not be binding, nevertheless, 1873, the decision of the Muhammad, A

ed under the provisions of sections 8 11 of
subsequent proceeding *Badiuddin v Niram*
31

It confirms the decree of the first Court on

the strength of the claim of a party to the suit on a question of fact, the decree of the Court is none the less a final adjudication. *Ahmed v. Mohidin*, 24 M 441.

Where the plaintiff originally agreed to be bound by the oath of the defendant, if taken in a particular form and subsequently varied the agreement by attaching further conditions as to the way in which the oath should be made,

opportunity must be given to the defendant to take the oath in the manner originally agreed upon between the parties. If the defendant does so, the evidence so given will be the defendant refuses to take the oath on the merits *Thulku*.

An adjudication by a Court on an oath made by one of the parties to the suit would make the matter or issue covered by the adjudication *res judicata* in a subsequent litigation between the same parties, though the subject matter of the suit is different *Sanyal v Artu Suaro*, 13 M L T 261=24 M L J 331=36 M 257=18 Ind Cas 835.

An oath is under s 11 of the Oaths Act conclusive only as against the person against one who never joined in the oath. Right of appeal against the decision =50 P W R 1918=45 Ind.

C 230

Where the agreement was to take the oath on a particular day, but the oath was taken on a later day the burden lies on the person who relies on the oath to show that the oath was taken on the day specified in the contract *Athermantuth v Chandroth*, 1.

When a defendant takes an oath by the defendant, the Court is bound to decide in favour of plaintiff *Jamna v Nanda*, 118 P. R 1919=57 P L R 1919=49 Ind Cas 1005.

An oath taken by a minor defendant to the effect that he is the son of the minor defendant is bound to be taken on the specified oath *Porbhu v Jamil*.

When a statement is made by the defendant in the presence of the witness, the statement being made on oath was conclusive proof of the facts set forth in it. *Dilsukh v Bawa Bama*, 1, R 5 A 147.

When a statement is made by the defendant in the presence of the witness, the statement being made on oath was conclusive proof of the facts set forth in it. *Dilsukh v Bawa Bama*, 1, R 5 A 147.

When a statement is made by the defendant in the presence of the witness, the statement being made on oath was conclusive proof of the facts set forth in it. *Dilsukh v Bawa Bama*, 1, R 5 A 147.

There is nothing in the Oaths Act which requires that the reference to the referee comes to an end as soon as the referee has once been examined. The referee can be re-examined if all the points which would be necessary to be examined are not examined. *Shen v Kashi Nath*, 48 A 276=A I R 1927 A 11 676.

When a statement is made by the defendant in the presence of the witness, the statement being made on oath was conclusive proof of the facts set forth in it. *Dilsukh v Bawa Bama*, 1, R 5 A 147.

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When a statement is made by the defendant in the presence of the witness, the statement being made on oath was conclusive proof of the facts set forth in it. *Dilsukh v Bawa Bama*, 1, R 5 A 147.

12 If the party or witness refuses to make the oath or solemn affirmation referred to in section 8, he shall not be compelled to make it, but the Court shall record, as part of the proceedings, the nature of the oath or affirmation proposed, the facts

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him to justify a libel imputing pecuniary embarrassment, inspection was refused *Emmot v Star Newspaper Co* 62 L J Q B 77 Similarly in *Pollock v Earle*, (1898) 1 Ch 1 the C A refused to make an order in the case of third persons who were neither actual nor constructive parties to the case, *e g*, as to the bank inst one of its directors for inducing representation as to such balance *Phip R* said "The Court should take care of oppression" The order should only be made where the entries of which inspection is sought will be admissible in evidence at the trial *Howard v Peall* 23 Q B D at p 2

It seems that the Court has jurisdiction to order inspection of the accounts of third parties *Howard v Peall* 23 Q B D 1, *South Staffordshire v Ebbsmith*, (1895) 2 Q B 669, *M'Gorman v Kierans*, 35 Ir L T R 84, *Agia Bank v Kashi Rim*, P L R 1900, p 237 But this power should not be exercised ordinarily *Pollock v Earle*, (1898) 1 Ch 1 But when order for inspecting the accounts of third parties is sought, a notice should be given to him *South* B 669

kept by the bank, even when they are successors of the bank by whom the entries

doubtful whether the meaning of the Bankers' 284=8 Q W N 125 his affidavit of documents

But it is thin the b, 31 C book in getting

fit case an order will be made *Yearly Practice*, (1921) 450 The implied in the relation of banker

and customer are (a) where disclosure is under compulsion by law, (b) where there is a duty to the public to disclose, (c) where the interest of the bank required disclosure, and (d) where the disclosure is made by the express or implied consent of the customer *Tournier v National Provincial Banks*, (1924) 1 K B 461=93 L J K B 449 Where a party desires an order under section 6 of the Bankers' Books Evidence Act, 1891 on his own behalf, the Court ought to grant it *ex parte*, but where he applies against the other party the Court ought not to make the order without notice to the other party *Tricunlai v Lakshmi chand*, 5 Bom L R 865

7. (1) The costs of any application to the Court or a

Costs

Judge, under or for the purposes of this Act, and the costs of anything done or to be done under an order of the Court or a Judge made under or for the purposes of this Act, shall be in the discretion of the Court or Judge, who may further order such costs or any part thereof to be paid to any party by the bank if they have been incurred in consequence of any fault or improper delay on the part of the bank.

(2). Any order made under this section for the payment of costs to or by a bank may be enforced as if the bank were a party to the proceeding.

(3) Any order under this section awarding costs may, on application to any Court of Civil Judicature designated in the order, be executed by such Court as if the order were a decree for money passed by itself:

Provided that nothing in this sub-section shall be construed to derogate from any power which Court or Judge making the order may possess for the enforcement of its or his discretions with respect to the payment of costs.

APPENDIX G.

A1

THE INDIAN OATHS ACT.

ACT X OF 1873

Received the assent of the Governor General on the 8th April, 1873

An Act to consolidate the law relating to Judicial oaths, and for other purposes.

Whereas it is expedient to consolidate the law relating to judicial oaths, affirmations and declarations and to repeal the law relating to official oaths, affirmations and declarations; It is hereby enacted as follows :—

1. PRELIMINARY

Short title 1. This Act may be called "The Indian Oaths Act 1873".

Local extent. It extends to the whole of British India, and so far as regards subjects of Her Majesty, to the territories of Native Princes and States in alliance with Her Majesty ;

[Commencement]—*Repealed by the Repealing Act, 1873 (II of 1873).*

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 (1898) 1 Ch 1, the C A refused to make an order in the case of third persons
 who were neither actual nor constructive parties to the case, e.g., as to the bank
 balance of a company, in an action against one of its directors for inducing
 a purchase of its shares by " " " " " " " " which balance *Phy*
Ev 352 In the above cases " " " " " " " " should take care
 that this section is not : e order should only
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 evidence at the trial *Houard v Iell* 23 Q B D at p 2

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 and customer are (a) Where disclosure is under compulsion by law, (b) where
 there is a duty to the public to disclose, (c) where the interest of the bank
 required disclosure, and (d) where the disclosure is made by the express or
 Banks, (1924)
 under section 6
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 v Lakhmi

7. (1) The costs of any application to the Court or a Judge, under or for the purposes of this Act, and the costs of anything done or to be done under an order of the Court or a Judge made under or for the purposes of this Act, shall be in the discretion of the Court or Judge, who may further order such costs or any part thereof to be paid to any party by the bank if they have been incurred in consequence of any fault or improper delay on the part of the bank.

(2). Any order made under this section for the payment of costs to or by a bank may be enforced as if the bank were a party to the proceeding.

(3) Any order under this section awarding costs may, on application to any Court of Civil Judicature designated in the order, be executed by such Court as if the order were a decree for money passed by itself :

Provided that nothing in this sub-section shall be construed to derogate from any power which Court or Judge making the order may possess for the enforcement of its or his discretions with respect to the payment of costs.

APPENDIX G.

App.

THE INDIAN OATHS ACT.

ACT X OF 1873.

Received the assent of the Governor General on the 6th April, 1873

An Act to consolidate the law relating to Judicial oaths, and for other purposes.

Whereas it is expedient to consolidate the law relating to judicial oaths, affirmations and declarations and to repeal the law relating to official oaths, affirmations and declarations, It is hereby enacted as follows:—

1. PRELIMINARY

1. This Act may be called "the Indian Oaths Act 1873".

Short title.

It extends to the whole of British India, and so far as regards subjects of Her Majesty, to the territories of Native Princes and States in alliance with Her Majesty ;

Local extent.

[Commencement]—*Repealed by the Repealing Act, 1873 (II of 1873).*

History. 'The employment of oaths' says Prof. Wigmore "takes our — back to the origins of Germanic law and custom, whereas in all primi

- I. **Applicability** The provisions of the Indian Oaths Act are not intended to be utilized in such a manner as would abrogate the provisions of the Evidence Act, but if what is deposited to is not the Evidence Act the fact of a special oath will *Jamu v Muhammad*, 90 Ind Cas 378 = A I R

2. [Repeal of Enactment] *Repealed by Act XII of 1873*

3 Nothing herein contained applies to proceedings before Saving of certain Courts Martial or to oaths, affirmations or declarations prescribed "by or under any instructions under the Royal Sign Manual of His Majesty or" by any law which, under the provisions of the Indian Councils Act, 1861, the Governor General in Council has no power to repeal.

II AUTHORITY TO ADMINISTER OATHS AND AFFIRMATIONS

4 The following Courts and persons are authorized to Authority to administer oaths and affirmations administer, by themselves, or by an officer empowered by them, in this behalf, oaths and affirmations in discharge of the duties or in exercise of the powers imposed or conferred upon them respectively by law —

- (a) all Courts and persons having by law or consent of parties authority to receive evidence,
- (b) the commanding officer of any military station occupied by troops in the service of Her Majesty

Provided .

(1) that the oath or affirmation be administered within the limits of the station, and

(2) that the oath or affirmation be such as a Justice of the Peace is competent to administer in British India.

Scope A Magistrate holding an enquiry as to the fitness of a surety has power to record evidence on oath in the exercise of the power and duty conferred upon him *Emperor v Ghulam*, 26 A 371 = A W N 1904 52 There is no provision of law which requires a Court examining a witness to record the fact that an oath was administered *Syed Ahmed v King Emperor* 11 A L J 933 = 35 A 575 Under the rules framed under the Steam Vessels Act, a *Meah*, 4 of the Indian evidence duties are null

or in exercise of the powers imposed or conferred on them by law *King Emperor v Pakist* 2 L B R 272 A Sub magistrate acting under ch XIV of the Criminal Procedure Code is a Court acting in the discharge of a duty imposed on him by law and is therefore authorized to administer oath under this section *Tevan v Emperor* 29 M 59 = 3 Cr L J 370 Witnesses examined before a Commissioner appointed under Act XXXVII of 1800 to hold an enquiry into the behaviour of a certain Judicial officer are bound to state the truth and render themselves liable to be punished under s 193 I P C

If they testify falsely *Gobind Ram v Empress*, 18 P R 1893 Cr The procedure of the arbitrator is not governed by the Oaths Act *Bhagirath v Ram Ghulam*, 4 A 283=A W N 1882, 31 A Magistrate is not competent to administer oath in the course of a non-judicial inquiry *Allahu arayo v Crown*, 17 Cr L J 368=35 Ind Cas 672

III PERSON BY WHOM OATHS OR AFFIRMATIONS MUST BE MADE

Oaths or affirmations to be made by— 5 Oaths or affirmations shall be made by the following persons—

(a) All witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give evidence by or before any Court or person having by law or consent of parties authority to examine such persons or to receive evidence,

(b) interpreters of questions put to, and evidence given by, witnesses;

(c) jurors

Nothing herein contained shall render it lawful to administer in a criminal proceeding, an oath or affirmation to accused person, or necessary to administer to the official interpreter of any Court, after he has entered on the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those duties.

Nature of the —
universally establish
it is sufficient, for
L O J in *Omichand*
said "Nothing but
according to our dea
L O added "All that is necessary to an oath is an appeal to the Supreme
Being, as thinking him the rewarder of
Miller v Salomons, 7 Exch 535, *M*
Omichand v Barker), was that the es
Supreme Being in whose existence
whom he also believed to be a rewarder of truth and an avenger of falsehood"
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Supreme Being as thinking him the rewarder of truth and the avenger of falsehood *Indar v Jog Mohan* 1924 Oudh 412

Persons subjected to the oath. This section lays down that oaths or affirmations shall be made by the three following classes of persons, namely (1)

G witnesses (2) interpreters and (3) jurors. So oath or affirmation is requisite in all testimonial statements made in Court. An interpreter is a kind of witness and must be sworn. *Hignore* § 1824, *R v Douglas* 13 Q B D 49 59 66 72. A juror should also be sworn. *Queen v Ramsdoy* 20 W R Cr 19.

Accused person. Originally an accused person was allowed to produce no witnesses, later he might produce them but they testified without oath and finally they were allowed to be sworn. *Hignore* § 1824. This section as well as section 342 (4) of the Cr Pro Code lays down that no oath shall be administered to the accused. The provision in sub-section (4) that no oath shall be administered to the accused has reference only to the statement made by him in answers to questions put to him by the Court under this section. It has no reference to any other act of the accused, and therefore the accused can make an affidavit on oath in support of the case under section 526. *Ghulam v King Emperor* 9 P R 399, see also *Peg v Hanmantha*, 1B 610, *Emp C W N 740*, *Alshoy v K E* 45 C 720, *Q F v Dalgna*, 10 B 190, *Allada v King Emperor* 9 P R 1906, *Bannu v Emperor*, 33 C 1353, *Emperor v Durant* 23 B 213, *Nga Ngue v K E* 20 Cr L J 319, *Q E v Tribuni* 20 A 426, *Joseph v Emperor* 3 Bur L J 260, *K E v Annya*, 3 Bom L R 437. The term accused means a person under trial. *Hinanda v Emperor* 2 C L J 149 see also *Emperor v Govind* 18 Bom L R 266, *Krishna Deoal v Corporation of Calcutta* 31 C V N 506-28 Cr L J 407. A magistrate has no power to administer an oath or affirmation to a person whose statements he records under s 164 Cr Pro Code. *Lalu v Empress*, 2 P R 1893 Cr, see also 10 C P L R Cr 16.

Scope of the section. The direction in s 164 Cr Pro Code that the — shall be recorded in one of the manners prescribed for recording procedure re the Court of the Evid is Act Qu

of obtaining information upon not before the Court he can witness. *Hari Charan v Queen* child understands the nature

for the sake son of a era 13 A 10 C v Sheorath 10 C 1000 giving regard to the has any option as evidence but to the case may be *Queen Empress v 161-22 Ind imperative*

refer under prosecution to *Kathai v King Emperor*

100 Cr Pro Code, 1893, to issue binds preliminary to the issue of proceedings. In the course of such empowered to examine persons take oath under s 164 of the Oaths Act and under s 14 of the Indian Evidence Act to state the truth. *Abdul A v Crown*, 34 P R 1916 Cr 17 Cr L J 491-36 Ind Cas 171.

6 Where the witness, interpreter or juror is a Hindu or Muhammadan, Affirmation by him or by persons objecting to oaths or has objection to making an oath, he shall, instead of making an oath, make an affirmation.

In every other case, the witness, interpreter, or juror shall Ap
make an oath.

Hindu and Mahomedan law on the subject "If we turn to India even prior to the introduction of English rule, we find that the Laws of *Menu* had their oath too, and in point of form, that prescribed by *Menu* is not very different from the English one —The imprecatory part too of the oath of *Menu*, if not framed exactly in conformity with the varying Code of the religious belief of the swearer, was nevertheless in a form adopted to the peculiarities of the influences by which each individual might be presumed to be most affected 'Let the Judge cause a Priest to swear by his veracity, a Soldier by his horse or elephant or servil
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and weapon become useless, a *Yaisya* 'your cattle, seeds and gold will be unproductive.' A *Sudra* he shall adjure by saying, 'if you speak falsely all sins will be on your head (*Macnaughten's Hindu Law* Vol I, 248) A course of imprecation though, by the way, which seems to address itself rather to the punishment of a present life, than a future one This however appears not to have been the only cause of swearing According to *Mr Beaufort*, the form of swearing by the water of the *Ganges*, and by copper and *toolsy* is virtually sanctioned by many *shastras*, but other prescribed forms are of equal validity; and all oaths, made by laying the hand on any symbol or image of the *Diety*
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IV FORM OF OATHS AND AFFIRMATIONS

7. All oaths and affirmations made under section 5 shall be administered according to such forms as the High Court may from time to time prescribe.

Forms of oaths and affirmations

And until any such forms are prescribed by the High Court, such oaths and affirmations shall be administered according to the forms now in use

Explanation—Repealed by the Lower Burma Courts Act (VI of 1900) s. 48. Schedule II.

Forms of oath In *Omichund v Barker* 1 Atk 45 Wills L C J. said.
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V. *Solomons*, 7 I

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1 Teach Cr L 4th Ed 412, Walker's Case
N Pleas 23, *W v Extrehan*, C & M 219,
the usual form of oath in criminal cases
at common law was as follows. The form at the assizes or sessions is, for the
clerk of arraigns or of the peace to desire the witness to take the book in his
hand, and, that done to say to him 'The evidence you shall give between
our sovereign lord the king and the prisoner at the bar shall be the truth, the
whole truth, and nothing but the truth; So help you God', upon which the
witness kisses the book' The usual form of words in civil cases differed
slightly 'The evidence that you shall give to the Court and Jury, touching the
matters in question, shall be the truth, the whole truth, and nothing but the truth'
11 *Hamore* § 1818 provided that it

† Lala Jogmohan, 11 U L J 400-02 114 0

Capacity to take oath—Children It was formerly thought that for children there was an age below which the incapacity to take the oath was beyond doubt and was to be regarded as always wanting. This notion was probably due to the unwarranted transfer into the law of Evidence of some principles of substantive law, by which certain ages, specially seven years, were thought to mark the beginnings of capacity for various purposes. Vide Co Litt 6 b, 2476, Hale Pl Cr 1, 302, 634 Buller, Nisi Prius, 293, Young v Slaughterford 11 Mod 228, R v Travers 1 Stra 700. But this view was finally repudiated in R v Drasier, East Pleas of the Crown, 1, 443. After much deliberation where the Court said 'An infant, though under the age of seven years may be sworn in a criminal prosecution, provided such infant appears on strict examination by the Court to possess a sufficient knowledge of the nature and consequences of an oath. For there is no precise or fixed rule as to the time within which infants are excluded from giving evidence, but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the Court, but if they are found incompetent to take an oath, their testimony cannot be received. See also R v Perkins 2 Moo Cr, C 189, Braddon's Trial 9 How St Tr 1127, R v Holmes 2 F & F 788, Wigmore § 1821, Nasar v Emperor, 18 C W N 147-41 C 406, Fatu v Emperor, 6 Pat L J 147-61 Ind Cas 705. Evidence of child witnesses can be admitted without oath or affirmations. In re Chinatal adu, 38 M 550, Hussain v Emperor, 70 Ind Cas 1037, Hari Rany v Emperor, 20 Bom L R 365-45 Ind Cas 497. In the case of a child witness the Judge is bound first to ascertain by questioning the child whether it is by tender years prevented from understanding the questions put or from giving rational answers to those questions. Then if the Judge intend not to do so, he should proceed to administer so doing, on the ground solemn affirmation under child will be admissible.

section 13 of the Oaths Act the deposition of
Emperor v Kusha, 5 Bom L R 551

8 If any party to, or witness in, any judicial proceeding offers to give evidence on oath or solemn affirmation in any form common amongst, or held binding by, persons of the race or persuasion to which he belongs, and not repugnant to justice or decency and not purporting to affect any third person, the Court may, if it thinks fit, notwithstanding anything hereinbefore contained, tender such oath or affirmation to him.

Scope of the section Under the parties and not from the Court C L J 77-36 C W N 786-A. I any judicial proceedings in this

-- should come from
Cas 836-66
'party' to
dominant in a

criminal proceeding nor the accused Sections 8 11 of the Oaths Act do not apply to criminal proceedings *Queen Empress v Murari* 13 B 389, *Imperial v. Haj Ali*, 5 S L R 129=13 Ind Cas 215=13 Cr L J 23, 1 Weir 822, *Emperor v Chaman*, 22 Bom L R 898=58 Ind Cas 147 Under the provisions of this Act, an oath proposed in a form which could affect a third party can not under any circumstances be lawfully administered *Ram Narain v Babu Singh*, 18 A 46, *Nabi Balsh v Ram Janaya*, 66 P R 1916=7 Ind Cas 479=114 P L R 1910, *Tulsi Ram v Dayaram*, 88 Ind Cas 448 23 A L J 513 Where the lower appellate Court at the instance of the defendant, called a witness, the witness was found to be false, the Court was justified in setting aside the verdict of the trial Court, and in ordering a new trial. *1871* 195. But where defendant also refuses no presumption arises *Sukdeo v Ganesh*, 10 Ind Cas 472=7 N L R 50

Where in a suit, the parties put in a joint application evidencing an agreement to abide by the statement on oath of a certain person, but one of the parties thereto subsequently, asked them to withdraw from the reference on the ground of collusion of that person with the other party and no collusion was proved *Held*, he could not be allowed to do so *Chuddu v Kuar Sen*, 2 A L J 654=29 A 49

on evidence of a third person given
Cod
join
such a case *Lakshraj Singh v Dulhama*, 21 A 100

Neither an invocation nor an oath or affirmation in the technical sense of the words is in any way an essential part of the special oath or solemn affirmation provided for in section 8 of the Indian Oaths Act of 1873 The words "oath" and "affirmation" in section 8 of the Act is descriptive of the nature and suggestive of the consequences of the ritual—
the High Court prescribes,

and must be in the form held
deponent belongs The special
is a complete substitute for the o
supplemented by it or any part of it The words "oath" and "affirmation"
used in respect of the special procedure provided for in section 8 are merely
descriptive of the nature and suggestive of the consequences of the ritual—
way connected
as, 31 C W N
618=53 M L

The offer of the guardian of a minor defendant on behalf of the minor to abide by the deposition to be given by a plaintiff on a special oath stands on a footing equal to that of the offer of the plaintiff to be examined on oath contemplated by C P. Code, section 251, and the consent of his guardian is not required provided there is no fraud or collusion. *ammad v. Behary*

9. If any party to any judicial proceeding offers to be bound by any such oath or solemn affirmation as is mentioned in section 8, if such oath or affirmation is made by the other party to, or by any witness in, such proceeding, the Court may, if it thinks fit, ask such party or witness, or cause him to be asked, whether or not he will make the oath or affirmation.

Court may ask party or witness whether he will make oath proposed by opposite party.

i. Provided that no party or witness shall be compelled to attend personally in Court solely for the purpose of answering such question.

Scope. Under ss 8 and 9 of the Act, it is not necessary that the form of oath should be specified before it can be held binding on the parties agreeing to be bound by it. It is sufficient if the oath is common among, and held binding by the class to which the parties belong. *Ahmad Ali v Hanuman*, 29 P R. 1837. If in the course of a suit, the plaintiff offers to bind himself by the oath of a witness and the witness, after consenting to the offer, refused afterwards to take oath, the Court cannot decree the suit in the plaintiff's favour, even though the defendant had agreed to it in case the witness refused to take the oath. Such an act on the part of the Court is not sanctioned by the Oaths Act. *Bawa Suchat v Ratna*, 31 P R 1838. A local commissioner appointed to record evidence in a case cannot administer an oath to one of the parties, under the provisions of ss 8, 9 and 10 of the Oaths Act. As the distinction between "Court" and persons is not include persons authorised to administer oaths. *Puran Chand v Chabar*, 89 P R.

client by oath. *Perag v R*
himself that can make an offer
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absence of the Court's sanction to the agreement under s 462, the minor defendant is barred by the consent of his guardian, if there is no fraud or negligence on the part of the latter. *Shoo Narain v. Sukh Lal*, 27 C 229-4 C W N 327, *Chengal Reddi v Venkata*, 12 M 483.

A person, who under s 9 of the Oaths Act, agrees to be bound by an oath cannot retract. The agreement to be bound by an oath is in effect, an agreement to treat the evidence given under the oath as the evidence in the case, and to dispense with other evidence. If the party who has agreed to be bound prevents the oath being taken, the other party is entitled to a decree. *M L J. 99*, *Thoy: Ammal v*

Subbaraya, 22 M. 231

Where the defendant takes oath proposed by the plaintiff, the oath is conclusive. *Chhed: Lal v Jauala Prasad*, 6 A L J 241-31 A. 315-2 Ind C.A. 111. *to be*
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by

matter stated in the agreement is sufficient as the ground of a decision, a judgment may be passed, for then it would be conclusive evidence [under the Oaths Act. *Vasudeva v. Naraina*, 2 M 356. A duly authorized agent holding a special power-of-attorney from a party to a suit enabling him to conduct it in a manner he may deem fit can make an offer under s 9 of the Oaths Act, to be bound by the oath of the other party and to have the case decided in accordance

therewith. *Wasir-zaman v. Farza Bibi*, 11 A L J 33-39 A. 131-32 App
Ind Cas 348

Where the agreement proves abortive, a suit can be decided on evidence taken *Seshagiri v. Sankaraj Setti*, 1 L W 258-1917 M W N 104-36 Ind Cas 1001. Where an offer is made by plaintiff to be bound by oath the Court

it seems that under
to refuse to refer
A 65; but see *Mith*
596-74 Ind Cas
1926 Lab 240

Ordinarily a party cannot renege from his offer, but he can do so with the permission of the Court *Ram Bhaj v. Dhun* 92 Ind Cas 813, *Narayan v. Sriantha*, 4 Mys L J 217, *Salik v. Wali*, 49 A 388-25 A L J 297-A I R. 1927 All 590 If a party after agreeing to abide by an oath satisfies the Court would exercise a wise is only when a party puts the Court would be justified in administering the oath notwithstanding the retraction *Ramdeo v. Naipal*, A I. R 1933 All 184

Where in certain divorce proceedings among Mahomedans the pleader

not be conclusive because of section 11 of the Oaths Act *Ahalya Bibi v. Umar Sahib*, 52 B 295-110 Ind. Cas. 131-30 Bom L R 447-A I, R 1928 B 268

The word "party" in this section includes a duly authorised representative such as a pleader and that he can make the offer contemplated by the section *Amir v. Mohammad*, 5 O. W N 10, see also *Hala v. Samail* 137 Ind Cas 810-33 P L R 470-A I R 1932 Lab 414

- offer and the other party
Kunnath, 1928

10 If such party or witness agrees to make such oath or affirmation, the Court may proceed to administer it or, if it is of such a nature that it may be more conveniently made out of Court, the Court may issue a commission to any person to administer it, and authorize him to take the evidence of the person to be sworn or affirmed and return it to the Court.

Administration of
oath if accepted

Court, the Court may issue a commission to any person to administer it, and authorize him to take the evidence of the person to be sworn or affirmed and return it to the Court.

to be sworn or affirmed and return it to the Court.
to be adminis-
in any form
he requirements
J. 618 The
is only when
10 of the Act, to
iminary to the
administer the oath proposed the *Krishna Rao v. Srinivasa Rao*, 7 M L T. agreement must be adopted *Krishna Rao v. Srinivasa Rao*, 7 M L T. Under this section, the Court if it does not administer a commission to some person to administer it and the person to be sworn and return it to the Court. L N 122, see also *Dar But v. Dar Meah*,

11. The evidence so given shall, as against the person

{ Evidence conclusive who offered to be bound as aforesaid,
as against person be conclusive proof of the matter
offering to be bound stated.

Scope of the section. The decision of an issue arrived at, under the provisions of the Act is not an adjudication operating as an estoppel in any future proceedings. *Akshara v Rulram*, 5 M 259. This section does not apply to the evidence of a defendant who has been examined under the usual form of oath and not under any oath or form of affirmation under s 8. *Ram Jaladar v Ram Kishen*, 23 W R 397, see also *Kashiram v Bhulu* A W N 188, 188.

Under section 11, it is "the evidence so given" which shall, as against the person who offered to be bound, be conclusive proof of the matter stated. *Maddhogir v Gopal*, 45 P R 1598, *Hamid v Nazim* 84 Ind Cas 577 (2)=49 M L J 379 A.

It is in point of law admissible evidence of the fact that such party was in possession under section 11 of the Oaths Act, it is conclusive proof of the matters stated. The expression 'conclusive proof' in s 11 is to be understood in the sense in which it is defined by s 4 of the Indian Evidence Act 1872. *Vithu v Ramji* 8 Bom L R 19=1 M L T 63.

The parties to a suit agreed to be bound by the deposition of a referee in the manner contemplated by ss 10 and 11 of the Oaths Act, and a decree was passed in favour of one of the parties on the strength of that deposition. The referee died afterwards. The deposition did not fully cover the quest was, therefore, to be in usual procedure. *Maha*.

There is nothing in the Indian Oaths Act constraining a Court to pass a decision in favour of a particular party. If a party to a suit says that he would be bound by the oath of a particular person under the provisions of section 11 of the Act, it means no more than this that *pro tanto* he will be bound, that is to say in so far as the matter of that evidence is concerned and that evidence will be conclusive as to its truth, and the truth of such evidence will be conclusive in litigation. But it does not accept that evidence as a whole. A W N 1892, 3. The case and specifically to the client may bind him by offering the opposite party to take oath and the suit to be decided accordingly. *Ganga Dissen v Matna*, 143 P L R 1903=85 P R 1903; see also *Gharib v Karim* 72 P R 1874.

Under this section the oath is not conclusive to the suit, but is so only as to the facts deposed to in the oath. *Jaitama v Bala Sheka*, 3 M L T 163. *Abdul Nussein v Badruddin*, 1 Bom L R 531.

A defendant to a civil suit agreed to be bound by whatever statement might be made by the plaintiff upon oath as prescribed by law. The plaintiff accordingly was examined on oath administered in the usual manner. *Held*, that though the statement then made by the plaintiff might not be binding.

in 21 1893, 200

The oath taken in one proceeding under the provisions of sections 8 11 of the Act is not binding in any subsequent proceeding. *Badiuddin v Nizamuddin*, 33 C 386=10 C W N 501.

Where an appellate Court confirms the decree of the first Court on the strength of the oath of a party to the suit on a question of fact the decree of the Court is none the less a final adjudication. *Ahmed v Mordin*, 21 M 444.

Where the plaintiff originally agreed to be bound by the oath of the defendant, if taken in a particular form and subsequently varied the agreement by attaching further conditions as to the way in which the oath should be made,

opportunity must be given to the defendant to take the oath in the manner originally agreed upon between the parties. If the defendant does so, the evidence so given will be conclusive evidence of the facts to which it relates. If the o

suit
a subsequent litigation between the same parties though the subject matter of the suit is different *Sanjari v Artu Suaro*, 13 M L T 261=24 M L J 321=36 M 237=18 Ind Cas 83.

only as against the one who never joined if appeal against the W R 1918=45 Ind

Cas 230

Where the agreement was to take the oath on a particular day but the oath was taken on a later day the burden lies on the person who relies on the oath t the contract *Athermankuthi v*

by the defendant, the Court is bound to decide in favour of plaintiff *Jamna v Nanda*, 118 P R 1919=57 P L R 1919=49 Ind Cas 1005

Where an offer is made by the guardian of the minor defendant to the plaintiff as regards the truth of a certain fact the minor defendant is bound by the statement of the plaintiff made under specified oath *Porbhu v Jamil*, 19 A L J 911

acc
anc
being made on oath was conclusive proof of the facts set forth in it *Dusun v Raja Rama*, L R. 5 A 147

This section does not provide that the evidence given on oath shall be

There is nothing in the Oaths Act which says that the reference to the referee comes to an end as The referee can be re examined if to be established are not put to him I R 1926 All 266=24 A L J 241

For the application of section 11 of the Oaths Act it is necessary that the "evidence" of the fact in contro- *reidca*, 103 Ind Cas 349=A I R.

de by the oath taken by a parti afterwards say that id Cas 864=A

though the other parties do not agree to it. bound and the case must be tried only as against the others *Bim Lalani v Hamill*, 27 A L J 1095=118 Ind Cas 183=A I R 1929 A 759

12 If the party or witness refuses to make the oath or solemn affirmation referred to in section 8,

Procedure in case of refusal to make oath he shall not be compelled to make it, but the Court shall record, as part of the proceedings, the nature of the oath or affi- nropo ed, the facts

that he was asked whether he would make it, and that he refused it, together with any reason which he may assign for his refusal

Scope of the section Under section 12 of the Act, it is only when a party refuses to make the oath proposed that the Court is bound to record that he was asked if he would make it and that he refused to do so *Madhogir v Gopal*, 7 C P L R 122 This section directs the Court to record as part of the proceedings the nature of the oath proposed, the fact that the party was asked to make the oath and refused, together with any reason assigned for the refusal. The section seems to contemplate that the Court shall give such weight as it may think fit, to the fact that a party has offered to make an oath, and has afterwards refused to make it, whilst it negatives the view that the refusal to make the oath is in itself a ground for dismissing the suit or giving the plaintiff a decree as the case may be *Mryan v Pathu Kuli*, 17 M L J 515 = 31 M 1, per *White C J* It may be doubted whether this section was intended to

the defendant as to his indebtedness in the plaintiff's book the failure on the part of the plaintiff to produce the account book was equivalent to failure to take an oath, or refusal to be bound by an oath *Amirchand v Govind Sahai* 5 P R 1003 = 37 P L R 1903

A Court is not entitled to presume because a party refuses to take a special oath that his case is false In the absence of anything on the record to show the reasons for the refusal, no inference can be drawn *Amantulla v Chhattoo*, 93 Ind Cas 830
oath in conduct
in the case by
positive evidence
1933 Nag 52

Where the plaintiff after agreeing to abide by the oath of a third person subsequently declined to abide by it, the Court has no power to dismiss the case on the ground that the plaintiff has failed to take a special oath but must allow the case to go to the jury with an inference that the plaintiff's case is true *Lah 78*

V MISCELLANEOUS

13 No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place or shall affect the obligation of a witness to state the truth.

Scope The evidence of a boy aged 10, to whom no oath or affirmation was advisedly administered, was held admissible *Budha v Lmpress*, 31 P R 1889 Cr
limited to
R Cr 16,
Chinna v
omission and is not
v *Sanbhai* 11 C P L
per *Parker J*, *Golla*
Queen v Sheo Bhogla,

23 W II Cr 12; *Emperor v Kasha* 5 Bom L R 351, *Queen Empress v Shari*, 16 B 359; *Queen v Ananta*, 22 W II Cr 1, *Q v Perumal*, 1 Weir 827 (1 B); *Queen v Itarya*, 22 W. R Cr 11; *Bulchand v Tarak Nath*, 18 C W. N. 1523; *Nasir v Emperor*, 18 C W N 147-41 C 406, *Dhanu v Emperor*, 13 A L J 1072, *Emperor v Hari*, 20 Bom L R 365, *Emperor v Sashi*, 24 C W N 767, *Pulu v Emperor*, 6 Pat L J 147, *Hussain v Emperor*, 1913 Lah 332, but see *Queen Empress v ...* *ollins*
C J; Queen v Masu, 10 A 207-A *King*
Emperor, 2 L R 322; *Daya v King*, 11 *468*
 If the jury in a Sessions trial are not sworn *could*
 be covered by this section *Queen v This*
 section has no application to the evidence of a witness taken on commission in a foreign territory *Kadambini v Kumudini*, 30 C 931-7 C W N 806
 This section applies to deposition taken by Registrar of the Presidency Court of Small Causes at Calcutta *Bulchand v Tarak Nath*, 18 C W N. 1323.

Asking whether a person would take oath and not recording the fact and not actually offering the oath are irregularities vitiating the trial *Afsar Kahan v Shahu*, 1922 Cal 148

14. Every person giving evidence on any subject before any Court or person hereby authorised to administer oaths and affirmations shall be bound to state the truth on such subject.

Scope Section 132 of the Evidence Act, read with s 14 of the Oaths Act compels a witness to answer criminating questions, and he is protected by the proviso to s 132 from a criminal prosecution for any offence for which he eliminates himself directly or indirectly by his answer except a prosecution for giving false evidence by such answer *Queen Empress v Ganu Singh*, 12 B 440

15. The Indian penal Code, sections 178 and 181 shall be construed as if, after the word "oath" the words "or affirmation" were inserted

Amendment of Penal Code ss 178 and 181

16. Subject to the provisions of sections 3 and 5, no person appointed to any office shall, before entering on execution of the duties of his office, be required to take any oath, or to make or subscribe to any affirmation or declaration whatever.

Official oaths abolished.

G. that he was asked whether he would make it, and that he refused it, together with any reason which he may assign for his refusal.

Scope of the section Under section 12 of the Act, it is only when a party refuses to make the oath proposed that the Court is bound to record that he was asked if he would make it and that he refused to do so. *Madhogir v Gopal*, 7 C P L R 122. This section directs the Court to record, as part of the proceedings, the nature of the oath proposed, the fact that the party was asked to make the oath and refused, together with any reason assigned for the refusal that the Court shall give such weight, as it may think fit, to the fact that the party has offered to make an oath, and has not refused to do so. This does not negatives the view that the refusal to make the oath is, in itself a ground for dismissing the suit or giving the plaintiff a decree, as the case may be. *Miyar v Pathu Kuli*, 17 M L J 545 = 31 M 1, per *White C J*. It may be doubted whether this section was intended to apply to a case, in which the parties have arrived at an agreement that one of them shall take an oath. *Ibid* per *Miller J*. By an agreement between the parties to a suit, the plaintiff agreed that he should take an oath, and that, on

Patthakuli, 17 M L J 545 = 31 M L T 91 = 31 M 1.

Where the plaintiff offered to be bound by any statement recorded by the defendant as to his indebtedness in the plaintiff's book the failure on the part of the plaintiff to produce the account-book was equivalent to failure to take an oath, or refusal to be bound by an oath. *Amurchand v. Govind Sahai*, 5 P R 1003 = 37 P. L R 1903.

A Court is not entitled to presume because a party refuses to take a special oath that he is guilty of the offence charged. *See* *Amurchand v. Govind Sahai*, 5 P R 1003 = 37 P. L R 1903.

positive evidence which has been adduced. *Rameshorday v. Gopy*, A 1 R 1933 Nag 52.

Where the plaintiff after agreeing to abide by the oath of a third person subsequently declined to abide by it, the Court has no power to dismiss the case in accordance with the oath drawing such inference as may be drawn from the facts of the case. *See* *Amurchand v. Govind Sahai*, 5 P R 1003 = 37 P. L R 1903.

Lah 78

V. MISCELLANEOUS

13. No omission to take any oath or make any affirmation,

no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place or shall affect the obligation of a witness to state the truth.

Scope The evidence of a boy aged 10, to whom no oath or affirmation was advisedly administered, was held admissible. *Budha v Empress*, 31 P. R. 1889 Cr 71. The section does not include any omission and is not limited to. *Empress v Sanbhai*, 11 C P. L. M 105, per *Parker J*, *Golla* Cas 737; *Queen v. Sheo Bhogta*, 11 C P. L. M 105, per *Parker J*, *Golla* Cas 737.

23 W R Cr 12, *Emperor v. Kasha* 2 Bom L R 11, *Queen Empress v. Shari* 16 B 309, *Queen v. Ananta* 22 W R Cr 1, *O v. Perumal*, 1 Weir
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 20 Bom L R 305 *Emperor v*
 1 Pat L 1 147, *Husain v. Emperor*,
Perumal 16 M 105 per *Chinn*
 W N 1888 86 *Pan Ngun v. King*

Emperor, 1 L R R 322; *Daya v. King*, 9 Bur L 1 133-36 Ind C 18 408
 If the jury in a Sessions trial are not sworn the omission is one which could
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 section has no application to the evidence of a witness taken on commission in
 a foreign territory *Kalamani v. Kumulini*, 30 C 134-7 C W N 806
 This section applies to deposition taken by Registrar of the Presidency
 Court of Small Causes at Calcutta *Bulchand v. Tarak Nath*, 18 C W N
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Asking whether a person would take oath and not recording the fact and
 not actually offering the oath are irregularities vitiating the trial *1/ai Ar* 11
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